Criminal Justice Issues

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVII, Issue 5-6, 2018.
ISSN 1512-5505

EDITORIAL

Almir MALJEVIĆ

Dear readers,

The 18th Annual Conference of the European Society of Criminology took place from August 29th to September 1st 2018 in Sarajevo, Bosnia and Herzegovina, under the title Crimes against Humans and Crimes against Humanity: Challenges for Modern Criminology. Total of 1203 registered participants, plus additional 100 volunteers, contributed to the organization of one of the best ESC conferences to date. A total of 300+ sessions had been organized, at 30 different locations, covering a range of topics related to crimes against humans and crimes against humanity. It is worth noting that, looking at the number of active participants, this event was bigger than the Winter Olympic Games held in Sarajevo in 1984. Therefore, at the opening ceremony, I have described the conference as the Olympic Games for Criminologists.

With the organization of this conference, the second of a kind in the world, the University of Sarajevo and the Faculty of Criminalistics, Criminology and Security Studies, are officially placed on the criminological map of the world. And whereas the conference itself belongs to the history, the research and ideas presented, the discussions and conversations held, will have its impact on the future. New projects will be developed, new collaborations will be established, and new solutions to the societal problems will be found.

In order to preserve some of the ideas, and thereby contribute to the future of criminology in Bosnia and Herzegovina, Europe and the world, the Faculty of Criminalistics, Criminology and Security Studies has decided to invite presenters to submit their work for potential publication in the Criminal Justice Issues – the Journal of Criminalistics, Criminology and Security Studies, which publishes papers in English once a year. A number of papers have been submitted for consideration, and those that have satisfied rigorous, double blind peer reviewing process are being published in this issue, together with other papers that have not been presented at the conference.

The paper that deserves particular attention is MEETING THE DEMANDS OF JUSTICE WHILST COPING WITH CRUSHING CASELOADS? HOW SYKES AND MATZA HELP US UNDERSTAND PROSECUTORS ACROSS EUROPE, written by Marianne L. Wade. This paper, which was presented at one of the main plenary sessions, examines the procedural paths taken by criminal justice systems in dealing with crimes against humans. It highlights the dearth of knowledge in relation to prosecutors work within them despite this being key to understanding how criminal justice systems work "producing justice" as a whole. It draws together what information is available to highlight how far systems across Europe have moved towards more negotiated forms of justice for a vast majority of cases, despite the professed abhorrence at US style plea bargaining

Criminal Justice Issues
Journal of Criminal Justice and Security
YEAR XVII, ISSUE 5-6, 2018.
ISSN 1512-5505

most jurisdictions profess. Utilising Sykes and Matza's seminal "techniques of neutralisation" as a tool, it highlights how far the proliferation of such modern criminal justice practices has gone to warp the kind of justice produced in the vast majority of cases. It highlights the efforts of prosecutors as largely principled and reasoned in nature but producing a "justice" likely not to resonate with the broader public. It therefore highlights the need for honest reflection upon what is needed from criminal justice systems and the necessity of reform in light of this to ensure our systems remain legitimate. This honest reflection is emphasised as particularly necessary as domestic systems serve as models (and the source of personnel) for transnational and international(ised) criminal justice systems.

In addition to this paper, this issue contains articles covering a range of topics. Some papers are focusing on prevention, other on sanctions. Some papers are written from a national perspective (Hungary, Mexico, Bosnia and Herzegovina, Poland, Australia, etc.), others utilise a comparative approach. Some authors are focusing on a particular type of criminal behaviours (environmental crime, homicide, corruption, or terrorism), others on particular offenders (individuals, groups, or states). As expected, in this issue you will find papers that deal with crimes against humans, but also crimes against humanity. Unsurprisingly, some authors have opted for analysing different participants within a criminal justice system (a victim, or a prosecutor), whereas others have decided to assess the work of the whole criminal justice system.

Regardless of what your topic of interest, you will find something interesting in this issue. With the exception of the first paper, which is the paper from the plenary session, all other papers are listed alphabetically, by the family name of the first author.

In the end, after the ESC Sarajevo 2018 Conference, it has to be asked - what can be expected in the future? What will the future (Bosnia and Herzegovina) bring to criminology? And what will criminology bring to the future (Bosnia and Herzegovina)? It is common place to observe that post-war Bosnia and Herzegovina is facing various challenges: cybercrime, ecological crime, migration flows, crimes against children, trafficking in human beings, terrorism, organized crime, corruption, are only the first once that come to mind. If these are to be addressed properly, they will have to be well researched and understood. It is hoped that this ESC Conference will lead governments in Bosnia and Herzegovina to recognize a direct link between criminological research, as a process of fact finding, on one side and effective criminal justice and other security policies, on the other. This, it is hoped, would lead to a dedication of budgetary funds for criminological research, which would provide a fertile ground for further development of criminology in the country and, later on, contribute to introduction of evidence based policies.

Almir Maljević

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 1-35
ISSN 1512-5505

MEETING THE DEMANDS OF JUSTICE WHILST COPING WITH CRUSHING CASELOADS? HOW SYKES AND MATZA HELP US UNDERSTAND PROSECUTORS ACROSS EUROPE

Marianne L. WADE*

Abstract

This paper examines the procedural paths taken by our criminal justice systems in dealing with crimes against humans. It highlights our dearth of knowledge in relation to prosecutors work within them despite this being key to understanding how our criminal justice systems work "producing justice" as a whole. It draws together what information is available to highlight how far systems across Europe have moved towards more negotiated forms of justice for a vast majority of cases, despite the professed abhorrence at US style plea bargaining most jurisdictions profess. Utilising Sykes and Matza's seminal "techniques of neutralisation" as a tool, it highlights how far the proliferation of such modern criminal justice practices has gone to warp the kind of justice produced in the vast majority of cases. It highlights the efforts of prosecutors as largely principled and reasoned in nature but producing a "justice" likely not to resonate with the broader public. It therefore highlights the need for honest reflection upon what is needed from criminal justice systems and the necessity of reform in light of this to ensure our systems remain legitimate. This honest reflection is emphasised as particularly necessary as domestic systems serve as models (and the source of personnel) for transnational and international(ised) criminal justice systems.

1. INTRODUCTION

If one wishes to understand the bulk processing of cases within criminal justice systems, plenty of scholarship highlights the understanding of prosecutorial work as key.[1] In the USA, this line of study is well established.[2] Across Europe this is less true though studies in more recent

* Many thanks are due to Richard Young and the two anonymous reviewers for their comments on previous versions of paper

1 Tonry, M. (2012), p. 1; for how strongly prosecutorial structures and priorities influence outcomes see also Johnson, Boerner, Wright and Miller and Caplinger (all 2012).

2 see e.g. the work of Ronald Wright, Maximo Langer, and e.g. Tonry (2014).

years highlight the central influence of prosecutorial efforts there too.[3] Many European jurisdictions feature a traditional abhorrence of plea-bargaining (and its functional equivalents).[4] Prosecutors have therefore been regarded as administrators of criminal justice in the bureaucratic sense simply following the letter of the law. Academic study of them was regarded as unnecessary.[5] Indeed offence was often taken at the suggestion research could reflect anything but prosecutors adhering to the procedural ideals of the system.[6] Any notion of this group of steady professionals negotiating cases out of the system; i.e. away from trial, was considered untoward. Nevertheless, regardless of their varied principled foundations, criminal justice systems across the Old Continent have adopted functional equivalents to plea-bargaining. This paper discusses the impact of such practices and their implications for justice. In so doing it also aims to highlight the danger of our very considerable knowledge lacuna and the need for comprehensive research.[7]

In undertaking this task, this paper revisits the results of a study completed in 2008 at the University of Goettingen.[8] It does so because efforts to replicate the study have proved impossible. It remains difficult to gain broad statistical understanding of prosecutorial work - and therefore the endings designated for swathes of cases being processed in criminal justice systems - across Europe. It should be highlighted that the original study was born as an investigation to elucidate the statistical patterns found in submissions to the European Sourcebook of Crime and Criminal Justice Statistics[9] around the turn of the century. Despite the provision of full information about the legal paths open to prosecutors, the statistics recorded remained incomprehensible for many countries. They simply could not be explained by what rapporteurs explained as legally possible. The data clearly testified to huge case movement at the prosecutorial level within a large number of the criminal justice systems being examined. The law, however, provided little information as to what could be happening. The law in the books was either entirely ignorant of prosecutors filtering cases out of the system or it spoke of such tools as exceptional measures; a characterization not borne out statistically. The numbers showed prosecutors designating only small proportions of cases for the trial envisaged as the norm by the respective criminal procedure. In a large number of countries, actual practice was strongly marked by practitioners - above all prosecutors – finding ways to allow overloaded criminal justice systems to cope with crushing caseloads.

---

3 see. e.g. Jehle/Wade 2006, Fionda (2008), More recently King/Lord 2018, Rodgers (2017).

4 Thaman (2010), p. xvii and xxii. Damaska (2010) 86-90. For an explanation of the conceptual conflict involved, see Brants (2010), 181-184. See also e.g. Spain which traditionally avoided prosecutorial measures of the nature dealt with by this study see Aebi/Balcells (2008) p. 317 but note the dominant role now played by the conformidad (in newer, controversial form) - see Thaman (2010 Typology) 371 et seq, Vadell (2015) 20 and Bachmaier (2015) 97-101. For a summary of the principles affected see Altenhain (2010) 161 et seq.

5 On the shocking discovery of the reality see Thaman (2010 Typology) 387 and Deal (1982).

6 Albrecht, H.J. (2007); see also Boyne (2007), 255

7 Tonry (2012), 4 and 26 categorises the lack of research as "remarkable." For Italy see Vicoli (2015) 143.

8 Thanks are due to Lorena Bachmaier, Jackie Hodgson, Chris Lewis, Erika Roth, Paul Smit and Piotr Sobota for their kind assistance in updating the study's findings to the extent possible.

9 Council of Europe, 1999, 93 et seq. ; WODC 2003, 87 et seq., WODC 2006, 87 et seq., 2010, et seq., Heuni, 2014, 111 et seq., HEUNI 2017, 111 et seq.

Seeking not only to revisit earlier study - but to contemporarily answer the question set by the scientific committee of the European Society of Criminology: how our systems deal with crimes against humans-, this article draws upon what literature is available examining prosecutorial work across Europe. The 11 jurisdictions covered by the Goettingen study formed the basis of this endeavour but other jurisdictions are included where illuminating information is available. As will be seen, the unwitting transformation of justice the Goettingen project demonstrated prosecutorial practice as driving, has only been exacerbated in the past decade. Nevertheless there is good reason to believe that prosecutors across Europe work in strong professional cultures[10] and would vigorously deny any suggestion that they do anything but advance the interests of justice. How this (self-)perception can be squared with the rather stark reality of our systems the statistics reflect is examined utilising Sykes and Matza's seminal Techniques of Neutralization. Whilst recognising that utilising a theory of delinquency to analyse agents of the law is distinctly unusual, this paper regards so doing as instructive a) to demonstrating just how far our systems as a whole have become distanced from the ideals of justice in the majority of cases processed; as well as b) to understanding how prosecutors can espouse those very ideals when their practice suggests something radically different.

2. WHAT PROSECUTORS DO

2.i. Prosecutorial Action Categorised

The Goettingen study classified prosecutorial action into 6 categories: The simple drop, public interest drop, conditional disposal, penal order, trial by "special procedure" and cases brought before court.[11] Many but not all jurisdictions studied[12] feature all options and there may be more than one procedural variation of any given category.[13] The categorization nonetheless facilitates a functional comparison of prosecutorial work across Europe.[14]

The **simple drop** encompasses a formal prosecutorial decision to drop a case with no further consequences. This category often encompasses a large number of cases. It is, however, very much dependent upon the extent of police powers a system features.[15] Where police have

---

10 Which do, indeed, appear to be key in ensuring that the excesses associated with criminal justice in the USA do not become established in European jurisdictions. See Luna/Wade (2010).

11 For a comparative typology of many of these case-ending categories, see Thaman (2010 Typology), 331-371.

12 Croatia, England and Wales, France, Germany, Hungary, the Netherlands, Poland, Spain, Sweden, Switzerland (Basel) and Turkey.

13 see Elsner et al (2008).

14 Graphical depictions and more detailed explanation of its findings can be found in Wade (2006) and Jehle et al (2008). Detailed explanations for each country, explaining all categories as applied, can be found in: See Aubusson de Cavarlay (2006), 191 et seq.; Lewis (2006), Elsner and Peters (2006), Blom and Smit (2006); Bulenda, Gruszczynska, Kremplewski and Sobota (2006); Zila (2006), Turkovic (2008), Roth (2008), Aebi and Balcells (2008), Gilleron and Killias (2008), p. 340 et ses. and Hakeri (2008). Similar for Scotland see Leverik (2010), 138 et seq., Denmark, Wandall (2010), 231-232, 236-238.

15 Note for instance the effect of reforms in Spain coming into force in 2015 which allowed police to close cases in which no perpetrator has been identified and there is insufficient evidence to provide real prospects of a case being built. A 51% drop in the number of criminal cases reported - see Memoria de la Fiscalía General del Estado 2017. In Denmark, police initiate VOM - Wandall (2010), 239-240. Leverik (2010), 131 provides a statistical overview of case-endings in Scotland, including the police impact.

powers to filter out cases (as e.g. in the Netherlands[16]) or issue regulatory fines (as in Sweden[17]), prosecutorial activity will be limited. However, in many European systems, like the German[18] one in which the prosecution service serves as "mistress of the investigative stage,"[19] this category will include everything from cases in which perpetrators are not known, to those covered by amnesty, featuring insufficient evidence, etc. In many cases, these decisions will be made on technical grounds.[20] Naturally cases in which prosecutors have decided not to seek further evidence, or order further steps to attempt to identify a perpetrator, will also swell the numbers of this category. Ideally the study would have liked to highlight such latter cases as instances of prosecutorial discretion (the ever important, omnipresent, if extra-legal, power to look away) but this proved impossible on a quantitative basis.

The over-whelming dominance of the police in the British criminal justice system, means that much of the power ascribed to prosecutors across Europe sits with the police or in the alternative prosecutorial agencies (such as the Serious Fraud Office) there. The ever closer co-operation between police and Crown Prosecution Service, alongside the latter's formal acquisition of charging powers in 2010, however, means its role is far from irrelevant.[21] It is important to note, nevertheless, that statistically police cautions achieve some of what is discussed in this paper, whilst prosecutorial power is exercised via the less well researched mechanism of plea-bargaining there.[22] Community resolutions and suspended prosecutions are categorised as policing measures in the UK whilst continental European jurisdictions would view these as key prosecutorial options.[23] Despite political rhetoric that such measures in the UK should led to tougher responses to crime, indications are that use is very much in line with prosecutorial patterns in continental Europe as criminal justice systems struggle to cope with their caseload.[24]

The **public interest drop** covers cases in which a prosecutor decides there is a case to answer under the criminal law but concludes that pursuit of an identified perpetrator can be halted as e.g. the interests of justice do not demand a prosecution in that particular case.[25] Such decisions are associated with an internal record (in police and prosecution case management systems) that the suspect is presumed guilty. There is, however, no direct tangible or public effect

16 Blom and Smit (2006), 247.

17 Asp (2012), 148.

18 Elsner and Peters (2006), 224.

19 French police are subservient - see See Aubusson de Cavarlay (2006), 198; as are the Polish see Bulenda, Gruszczynska, Kremplewski and Sobota (2006), 273 but note also the special procedural form for petty offences p. 274. Croatian and Turkish police have no case-closing role see Turkovic (2008), 278 and Hakeri (2008), 364.

20 See e.g. Zila (2006), 294; such determinations may be made by the police in Hungary, see Roth (2008), 303.

21 See Lewis (2012).

22 Notable exceptions include King and Lord (2016)

23 See Ministry of Justice (2014);

24 BBC (2013 Community Resolutions); Bowcottt (2014)

25 Note also that the diving line between simple and public interest drops is not always clearly drawn. Thus e.g. the criteria for drops mentioned for Basel Stadt (Switzerland) are mostly technical and thus simple drops but consideration that the accused "is so strikes by the immediate consequences of the offence that an additional punishment would be inadequate" - all covered in the same procedural norm, clearly falls within the public interest criteria. Statistically these are, however, inseparable. See Gilleron and Killias (2008) p. 344.

of this decision. No formal finding of guilt,[26] i.e. conviction, results. The suspect dealt with in this manner usually has no means by which to insist upon their innocence.

This is the position also resulting from **conditional disposals**; this category covers cases in which, similarly, a prosecutor decides there is a case to answer by an identified suspect. Again, however, the assessment is that the case need not be brought to trial. However, the public interest/interests of justice (or whatever procedural measure is used[27]) is viewed as demanding some action against the suspect to counter-act the wrong perpetrated. This is the kind of flexible reaction which allows prosecutors to facilitate victim perpetrator mediation, or to refer addicted offenders to treatment,[28] etc. Often procedural exceptions are introduced into law after discussion of such socially progressive solutions[29]; the intimation being this is the main driver of such reform. Statistically, however, the use of this category across European jurisdictions of all legal families was overwhelmingly to require the suspect to pay a fine.[30] Only rarely was this money reportedly directed anywhere other than into general public coffers.[31]

An affected individual can refuse to fulfil the condition imposed via such measures and the case will then proceed to trial. Conviction is routinely associated with a harsher punishment as well as a public record of guilt (a criminal record[32]) alongside the public nature of any such proceeding. Just as those refusing plea-bargains in the US experience this "trial tax," withstanding prosecutorial power ups the stakes for defendants across Europe.[33]

The **penal order** category refers to a paper based route via which a formal conviction is achieved. It involves a prosecutor filling out a standard form applying[34] for a punishment - in the vast majority of cases a pecuniary fine or, in a few cases, a suspended term of imprisonment - which will almost always be approved by the relevant court after cursory viewing. Notification of the conviction is then posted to the assumed criminal with details of their appeal rights. Procedures vary amongst jurisdictions but allow persons thus convicted between 8 and

---

26 On this point see Thaman (2010 typology), 334).

27 See Aubusson de Cavarlay (2006), 190; Elsner and Peters (2006), 221; the procedures described in Bulenda, Gruszczynska, Kremplewski and Sobota (2006), 267 have now been reformed and expanded upon see art. 335 of the Polish Code of Criminal Procedure; Turkovic (2008), 277 and 286; Roth (2008), 299 but note that the new Hungarian Code of Criminal Procedure (in force since the 1st July 2018) expands upon the potential use of conditional disposals. See also Hakeri (2008), 361 et seq. and 367.

28 Note also recent proposals to crate such options across the UK as a diversionary measure - Rawlinson (2017) and Lammy (2017), 28 et seq.

29 See Aubusson de Cavarlay (2006), 194-195; Roth (2008), 301. Note also that systems refusing to introduce this kind of option, such as Spain, end up with less possibilities for victims as plea-bargaining becomes dominant - see Aebi and Balcells (2008), 326. For explanation of how they stand in contrast to inquisitorial philosophy see Rogacka-Rzewnicka (2010), 288-291.

30 Elsner and Peters (2006), 223; Bulenda, Gruszczynska, Kremplewski and Sobota (2006), 263. See also Leverik (2010), 143. Note also the stifling affect upon use when the victim's consent is required for a conditional dismissal (Krapac 2010, 266).

31 See Aubusson de Cavarlay (2006), 191-195; note that in Hungary payments to the victim or for a specific purpose are required, Roth (2008), 300. King and Lord (2018), 61-63.

32 Note that a prosecutorial waiver leads to a criminal record in Sweden (Asp, 2012, 156/7).

33 See Aprile (2014), 30, Luna and Wade (2010), 8; Luna (2005), 703; Langer (2006) 223, 225-26, Wright and Miller (2003), 1409 & 10; and Wright and Miller (2003 Screening), 30-36

34 Not in Norway where it is an entirely independent prosecutorial procedure - Strandbakken (2010), 252-253.

30 days to contest their conviction. Thereafter the decision becomes final. A criminal record and enforcement of punishment ensues in the normal manner.

Trial by special procedure refers to non-paper based paths to conviction, which, however, still entail far less substantial court oversight of cases. Consequently the resulting conviction should be ascribed far more strongly to prosecutorial judgment of a case rather than to the "classic" finding of guilt by a court. A section of a normal trial may be omitted or an alternative path to procedural efficiency pursued. The challenges of quantitative research rear their head in this category also. It proved impossible to ensure that guilty plea proceedings be ascribed to this category. Because those remain a formal court decision, not usually marked as involving a special procedure, they frequently remain hidden within normal trial statistics. For this reason, prosecutorial adjudication remains unseen to a significant extent, even in the statistics. This category encompasses only more exotic forms such as the Polish prosecutor-initiated "waiver of trial" or indeed the defence-requested "voluntary submission to punishment."

The **cases brought before the court** category reflects the cases in which prosecutors have decided that the "ideal," public process foreseen by criminal procedure should be pursued in order to achieve the conviction and punishment of an identified suspect. As mentioned above, this category will, however, contain the cases regardless of whether this was achieved in a more efficient manner via a guilty plea[35] or whether a full trial ensued. It is illuminating that the countries featuring a greater proportion of cases in this category are either known to rely heavily upon guilty pleas (England and Wales)[36] or to feature procedures which in other European jurisdictions would count as abbreviated (such as the Netherlands with its very swift trials, strongly reliant upon the prosecutorial file).[37]

2.ii. Prosecutorial Action Evaluated

Greatly simplified, the core conclusions of the eleven country Goettingen study were that criminal justice systems across Europe, from all legal families and even if relatively well resourced, are overloaded. Practitioners working within them had been left seeking ways to cope. The "classic" criminal justice process - the one which permeates public consciousness of how a conviction is reached - is exceptional in most jurisdictions. The reality of criminal justice in Europe demonstrates clear parallels with the US system.[38] Whilst it may not be plea-bargaining *strictu sensu* taking the place of the "classic" trial, diversionary measures or abbreviated court proceedings are the pre-dominant path chosen to secure a criminal justice response to suspected offending. Sometimes this is associated with a presumption, rather than a formal finding, of guilt so a suspected perpetrator avoids the full stigma of conviction. To a very significant degree, however, either diversionary measures or abbreviated court proceedings are used and the latter even impose a full conviction albeit without the drama (and potential publicity) of a full trial. This shift

---

35 For an overview of plea bargaining law and practices in 30 Council of Europe Member States see paras. 62 et seq of the Natsvlishvili and Togonidze v Georgia judgement of the European Court of Human Rights (Appl. No. 9043/05) of 29th April 2014.

36 With prosecutors now key to such scenarios - Lewis (2012) III.D and E

37 For details see: Wade (2006) and (2008a) - as well as sources cited in footnote 16. See also Leverik (2010) 147 for (plea-dominated) Scotland.

38 Stuntz 2004 and 2001; Langer 2006; Miller 2004

is directly associated with very significantly increased prosecutorial power. Prosecutors determine diversionary measures (sometimes flanked by similar police powers for less serious crime[39]) whilst they factually "lead the judicial hand" in abbreviated proceedings. Even where such procedures are formally a court decision, this almost exclusively constitutes a rubber stamping of prosecutorial decision-making.[40] In this way, again a parallel to US American discussions is warranted. It has become appropriate, also across Europe, to speak of prosecutorial adjudication.[41]

More rarely this development creates a greater role for the defendant (or defence counsel) in such proceedings meaning their influence upon a criminal justice response is increased.[42] This is true in negotiated proceedings (often proportionate to the strength of representation a defendant can afford[43]) but also more significant in unusual procedural forms such as e.g. the Polish "voluntary submission to punishment."[44] Serious concerns are raised about equality before the law, the legitimacy of criminal justice, coercive pressures upon innocent suspects to acquiesce and the more banal likelihood of mistakes as punitive decisions are taken by individuals, under time-pressure behind closed doors.[45]

The Goettingen study demonstrated that criminal justice systems across Europe are only straightforward chains of procedural steps leading from arrest to trial for a small proportion of cases. Far more frequently, they comprise a series of disposal funnels as shown clearly by the following depiction of the German system:

---

39 Dutch police can e.g. impose penal orders of up to 225 Euros - Brants (2010) 209.

40 See Luna Wade 2010 and 2014; for detailed analysis of an example of judicial distaste for this see King and Lord (2018), 53 et seq. on the Innospec case.

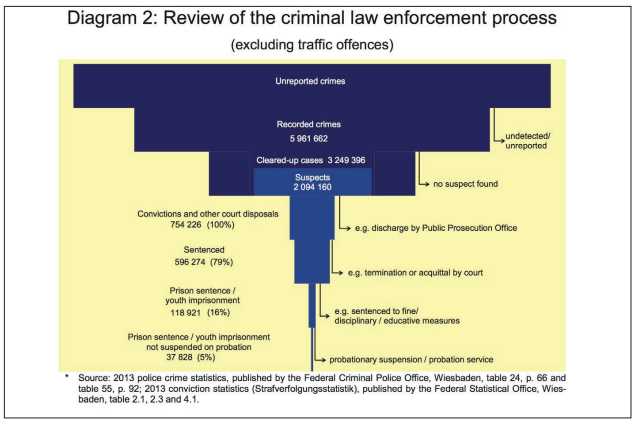
41 See Langer (2006).

42 On this general perception of plea bargaining see Alge (2013) section 3. For an example of potential forum shopping, see King and Lord (2018), 48. Note the UK's explicit referral to companies seeking to engage with US authorities who could offer deferred prosecution arrangements (rather than dealing with UL law enforcement) as a reason for introducing these in Britain - p. 69. On the dampening effect this can have on law enforcement activity see Sittlington and Harvey (2018), 438.

43 For judicial discomfort at unduly lenient sentences resulting from serious fraud cases involving powerful defendants see Alge (2013) section 5.

44 See Bulenda et al., 264. This form was particularly unusual because it involved defence counsel presenting to court not only the legal classification of the defendant's behaviour (i.e. the charge) but also the suggested punishment. During the period in which the Goettingen study took place, it was statistically very much in the ascendent. This demonstrated the Polish system bucking a trend and apparently assigning more power to defence counsel than to prosecutors. On the one hand, the politically desired effect was apparently to retain power within the courts rather than its transfer to prosecutors whilst the pressure of overcrowded prisons led defendants wishing to know their punishment and "get on with it" to choose this procedural form on the other. Interestingly, although this procedure has also become more broadly available (now for punishments of up to 15 years imprisonment, as opposed to 8 as it was pre-2010), a further reform of criminal procedure 2010 saw the prosecutorial application for punishment without trial (a form of prosecutorial adjudication) expanded to include guilty pleas for misdemeanours. Therewith a fall into line with broader European trends occurred with the transfer of wide-ranging powers - for less serious crimes - into prosecutorial hands. See also Rogacka-Rzewnicka (2010) 283 et seq. and Jasinski (2015). Note also, however, that defendant-driven procedural options seem to be utilised only where they provide tangible benefit for the defendant. In Croatia, e.g., procedural provision of this type offers no such advantage. As a result this measure is not used there (Krapac (2010), 275-276).

45 See Wade (2006) 111 et seq.



Source: Jehle (2015)

This picture astonishes for a number of reasons. On the one hand, the German system features great clarity in delineating procedural forms mostly because prosecutorial discretion, adjudication, abbreviated court proceedings and full "classic" court proceedings can be differentiated cleanly in the statistics.[46] The funnel is thus more visible than it would be in many systems in which much would be subsumed by the "cases before a court" category. On the other hand this picture surprises because German law still clings firmly to a fiction of prosecutorial discretion as a procedural exception.[47] Famously for legal comparators it is also the jurisdiction regarded as sticking to its principle of mandatory prosecution.[48]

In this filtering process established as the norm across Europe by the Goettingen study, prosecutors play the key practitioner role in determining what treatment cases receive.[49] In other words it is prosecutors who normally decide which action individuals experience by the state as a response to criminal acts they are suspected of having committed. No procedural code leads us to expect such dominance and popular expectations of criminal justice - as discussed below - are very different.

There is ample evidence that the tendencies the Goettingen study identified as coping mechanisms[50] have only intensified and that the trend toward prosecutorial power has, if anything, accelerated across Europe. Indeed the law has frequently followed practice and even systems traditionally adverse to any incorporation of "plea-bargaining" have capitulated to encompass

46 cf e.g. with England and Wales and the Netherlands.

47 see the language of the criminal procedure code, available in translation at. Paras 153 et seq are particularly relevant – I won't keep editing these notes because it's obvious they are still under construction.

48 see the classic debate between Langbein and Weinreb (1978) and Goldstein and Marcus (1977) as well as German works pointing to the reality challenging the then widely accepted legal fiction e.g. Kausch (1980).

49 Jehle et al (2008).

50 Note that in the Netherlands the transition to a prosecutor dominated system was more strongly deliberated - see van de Bunt and van Gelder (2012), p. 119; see clear response to strain Bachmaier (2015) 103-105. For another example of coping see Westmarland et al (2018) 3,7, 10-12 detailing use of restorative justice label processes to deal with domestic violence possibly also to increase case-closure statistics. Note the need even where the system expressly steers against such Caianiello (2012) 255.

procedures one would struggle to defend against the label. Spain saw prosecutors deciding in 67% of all criminal cases registered to present charges to court in 2017. In 77% of those cases, however, a plea agreement was entered meaning that the *conformidad* proceedings is factually the primary form of case-ending used in the majority of cases.[51] Germany too features a formal plea-bargaining procedure (Absprache)[52] though prosecutorial drops and disposals still see far more frequent use than that path.

Poland[53] has continued on its path to greater efficiency and the voluntary submission to punishment proceedings (by which a defendant's lawyer not only qualifies the nature of his or her acts but also suggests the appropriate punishment - of up to 15 years imprisonment - in its application to court)[54] have gained greater scope since 2015. In practice, however, the use of these proceedings has decreased significantly in proportion to the prosecutor-led application for conviction without trial[55] which has become a penal order type procedure. Hungary saw even more recent law reform to increase the efficiency of criminal proceedings. Prosecutors already had a full palate of options available. Since 1st July 2018 these have, however, become further streamlined and a true guilty plea procedure (which allows the ending of a case at the preliminary court hearing) was introduced.[56]

2.iii. Reflecting on Prosecutorial Action

The central aim of this paper is to highlight what prosecutorial practices may mean on the meta-level. Persistent practice of this nature - particularly in the convergent trend across Europe - leaves its mark upon prosecutorial working culture and the understanding of what it means to be a prosecutor. Long-term practice has rendered the exceptional coping mechanisms the norm for professionals working within our criminal justice systems.

Each criminal justice system is, however, also a sum of its parts meaning the intended exception now constitutes the system and therewith the usual reaction to crime. The Goettingen study identified prosecutors as ranking cases and selecting criminal justice system responses in order to achieve the best approximation of justice they could (as they, or indeed guidelines of Ministries overseeing their work, see it[57]), in the largest number of cases, making the most of the limited resources available to them. It is evident that prosecutors - and those overseeing their work (in the administrative rather than legal sense) - feel they must respond to breaches of the criminal law in some formal manner. The mode of response is, however, determined by pragmatism borne of the situation as a whole.

How criminal justice responses are achieved has become a matter of routine to criminal justice practitioners[58] to the extent that trends are visible as to what the appropriate reaction should

---

51 Memoria de la Fiscalía General del Estado 2017 - with thanks to Lorena Bachmeier-Winter

52 See Peters, J. (2008) Die Normierung der Absprachen im Strafverfahren

53 With thanks to Piotr Sobota for the provision of updated information

54 Article 387 Code of Criminal Procedure

55 Article 355 Code of Criminal Procedure

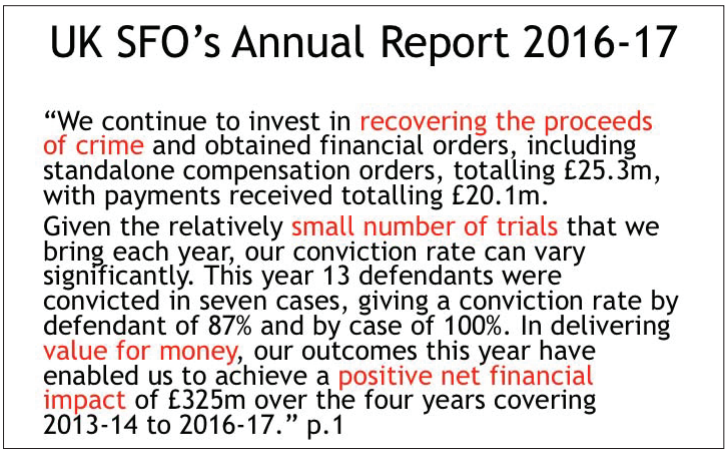
56 With thanks to Erika Roth.

57 See e.g. Wade (2009), Elsner and Peters (2006) p. 222.

58 For a description of this analysed in the US American context see Rosset and Cressy (1976, p. 90).

be. There is a clear sense of what constitutes "the going rate"[59] for certain types of offending and offender. This can also be observed in a European trend.[60] During the Goettingen study, we as an international, inter-disciplinary research team were surprised about how much our systems factually had in common; how unified the vision of what kinds of offences and offender require what reaction by prosecutors has actually become.[61] Whilst it is important to record the study recognising prosecutors as generally motivated to achieve positive social impact with the resources accessible to them,[62] the predominant lesson of our research remains that a striving for efficiency is the core and dominant driver of system change. The tailored, individualised justice procedural codes and popular depiction lead us to expect have become exceptional. The decisive decision determining the state response to crime is usually taken by a prosecutor after a cursory look at key case characteristics.

Within this culture charge reduction and achieving "justice of sorts" has become a part of prosecutorial life and therewith criminal justice's default setting. The UK provides an instructive example. It features a specialist agency to deal with the investigation and prosecution of the most serious frauds. This extract from its most recent annual report demonstrates the expectations it feels it has to meet:



Source: Serious Fraud Office (2017 - *emphasis added*)

[59] For specific crime contexts see e.g. Sanders et al 2010, p. ; Wade (2009); note that office culture can counter-act such consensus even where legislated for, Krajewski (2012) p. 108 but also that the value attached to individual prosecutor independence in Italy may also stand against this, Ruggiero (2015) 80; on the difficulty of balancing with judicial power and constitutional principle there see Vicoli (2015) 147-151.

[60] Tonry (2012),19 observes that many European systems have "well-established and frequently used diversion programmes" attentive to equal application and available even for even "moderately serious cases"(20).

[61] See how strongly the various case-ending forms can be associated with various offences and types of offender, shown below in figure XXX. Note also the disquiet apparent in England and Wales at disposals being used differently e.g. to dispose of repeat offenders cases without imposing conditions, demonstrating agreement on this point - House of Commons Home Affairs Committee (2015) p. 5.

[62] And indeed very significant individual efforts to e.g. increase the significance of procedures such as victim-offender mediation as a criminal justice response (see e.g. Brants (2010) 212-213) and some e.g., make specific efforts also to ensure that fines extracted from suspected perpetrators benefit organisations who support their victims (such as safe houses).

It is interesting to note that the Director of the Serious Fraud Office (SFO) also used press exposure to emphasise the expectation that those investigated must cooperate with his agency in order to benefit from the leniency of conditional disposals now available to it.[63] This is rational within the system setting of the SFO. However, it must be noted this is the very office charged with the criminal investigation and prosecution of the institutions responsible for the 2008 financial crisis and all the social harm it caused.[64] That their processes and public relations are steeped in the language of compliance and compromise is telling. Imagine what responses (political and in the media) equivalent language by police or a prosecution office dealing with any other category of serious criminal would attract.[65]

This extreme example starkly highlights one central characteristic - and problem - of our justice systems as prosecutorial decision-making has become central. The over-whelming pressure to achieve efficiency and cost-effectiveness dictate that where criminal justice practitioners meet resistance, they compromise. Prosecutors, police officers and indeed even legislators will most likely meet resistance when investigating powerful suspects. Such pressure makes "low-hanging fruit" all the more attractive.[66] Our systems have effectively become primed to ensure full investigation and prosecution of the conduct of the powerful are very significantly hampered by our dedication to efficiency.

3. WHAT PROSECUTORS REGARD THEMSELVES AS DOING

In spite of this portrayal of the sum of what prosecutors do, there is every reason to believe they would - across Europe - take great umbrage to any suggestion they are undermining criminal justice in any way. Prosecutors are more likely to insist that they take decisions as outlined above with the express intention to preserve their criminal justice systems and the constitutional principles they operationalise. Given the reality they find themselves facing, their chosen path is the only route to preventing the collapse of this system. In interviews with prosecutors,[67] researchers repeatedly establish that prosecutorial decision-making and actions are principled in nature. When pushed as to why specific decisions are made, I have experienced prosecutors frequently looking baffled and - after some pause for thought - asserting very fundamental, constitutional principles as guiding their work. Although this point is far from empirically established, it chimes with (results from studies including participant observation alongside interviews) Boyne's conclusion that "The soul of the German prosecution service resides in the ongoing commitment of individual prosecutors to the Rechtsstaat"[68] and Hodgson's[69] finding that "the conventional 'ideals' retain a continuous force and relevance for procureurs, who describe their work (both as they understand it to be and as they would wish it to be) in these terms and whose crime control orientation is shielded by redefining it in terms of "representing the public interest.'"

---

63 Ruddick 2017 Serious Fraud Office boss warns big names to play ball - or else

64 Note also the apparent political recognition that the current situation is inadequate - see (Travis 2017).

65 See Alge (2013) section 6.2. for such extrapolation of the logic of the BAE systems settlement.

66 See e.g. Hallsworth (2006).

67 Documented in e.g. Albers et al (2013), Wade (2008) and (2011).

68 P. 271. this Rechtsstaat is, of course, associated with the principle of mandatory prosecution.

69 2002 p. 228 (fn 4). Note also Hodgson's surprise at this as a finding which emerged after interviews rather than an expected structural feature.

Despite the persuasiveness of such principled thinking, one need not look far to find evidence of prosecutors thinking very pragmatically on such points. Some chief prosecutors declare their systems as unable to cope[70] and when questioned about specific practices, prosecutors do also defend as necessary the decisions causing the patterns of case-endings described above. Arguments one would associate with Paker's crime control model[71] are also easily found.

Nevertheless, abhorrence at US style plea-bargaining is pervasive across Europe. Practice there is regarded as coercive, taking unconscionable risks of convicting innocents and imposing hideously disproportionate punishment.[72] The distinct prosecutorial cultures to be found across Europe highlight professional dedication to not doing this. Ultimately the use of the "classic" full trial so consistently across Europe also suggest that prosecutors do subscribe to the ideals of justice and make very considerable efforts to ensure that serious offenders - as defined by the current norms of the system - face justice in the terms described as ideal by that system. The most serious punishment - deprivation of liberty - is consistently achieved across Europe via full trial (clearly distinguishing criminal justice systems there from US American models).

Explaining human attitudes and behaviour in a one-dimensional manner would be a counter-scientific undertaking. It would be odd to expect any kind of purist professional culture particularly when forged - as are prosecutorial ones across Europe - under considerable practical pressures. As indicated above, however, there is not a sufficient basis of evidence upon which to draw conclusions about what motivates prosecutors across Europe. Indeed, if for example one accepts Packer's models of criminal process, given the dominance of crime control rhetorics, it would be odd to find prosecutors not also espousing such values. Nevertheless the due process model, encapsulating constitutional ideals, also embodies powerful arguments likely to be attractive to lawyers sworn to uphold their constitutions. And those studies available documenting prosecutorial behaviour do indeed indicate these as important. Why else do prosecutors assign those they are convinced have committed the most heinous crimes to procedures most strongly protecting their human rights? It seems plausible therefore to assume that prosecutors do also subscribe to the core or ideal values our criminal justice systems espouse. The dedication they express in interviews to constitutional values is genuine.

Given the results produced in the majority of cases by the criminal justice systems those prosecutors populate, however, the question is raised how prosecutors can demonstrate such devotion to values they must be regarded as effectively undermining with a majority of their actions? Prosecutors can thus be added to the groups of criminal justice professionals clinging to a belief in their role apparently contradicted by the reality of everyday practice.[73]

How prosecutors see themselves is, furthermore, not only important for its own sake. Its influence reaches well beyond national criminal justice systems. The most obvious example is provided by the establishment of a European Public Prosecutor's Office (EPPO) within the

---

70 - reference to "public would understand if we were able to explain"; law and policy article (reviewed)

71 Packer (1964).

72 Bachmeier (2010).

73 See Newman (2013) on legal aid defence lawyers in the UK and Shiner (2010) on police officers believing their own "colour blindness"

framework of the European Union.[74] That amounts to the creation of a supra-national criminal justice agency at the European level. This revolutionary step is being undertaken in recognition of the failure of national systems to deal with crimes compromising the financial interests of the European Union.[75] It is justified by the serious nature of the organised crime being undertaken. Given the traditions prevalent in many EU member states, one might reasonably expect the EPPO to operate based upon a principle of mandatory prosecution. Indeed this would be consistent with the mechanisms the Goettingen study demonstrates systems resorting to in order to ensure court time can be devoted to such serious crime.

Legislative negotiations were, however, steeped in the understanding that prosecutors dealing with financial crime negotiate and do deals with those they suspect of wrong-doing.[76] Interestingly records of negotiation within the Council demonstrate that the power to facilitate a negotiated case-ending (the so-called "transaction") was the subject of intense debate. A few member states questioned whether such a power should be granted but others insisted this power must be far greater.[77] The clear majority viewed such powers as important. The solution reached and passed into law as article 40 of the EPPO Regulation could not see EU law predetermined by domestic law any more strongly. The EPPO can now end cases in accordance with the criminal procedural options available in the member state in which a case is being dealt with.[78] The domestic norm will determine supra-national prosecutorial practice. This revolutionary office is not expected to tackle the crimes falling within its remit in a revolutionary manner. The supra-national level is learning directly from the domestic. This despite the EPPO's very raison d'être being that the criminals it should be countering are well-resourced, organised and operating across transnational boundaries. Again it seems the crimes of the powerful benefit most clearly from systemic learned dedication to efficiency, especially when achieved via bargaining.[79]

The central point is clear. Negotiated case endings and informal case-disposition have become so integral to criminal justice responses to crime that any idea of not giving prosecutors negotiating and discretionary powers is generally viewed as ridiculous. The dominant prosecutorial culture established across Europe overshadows our practical concept of justice to such an extent that even new systems - intended to deal with entirely different or only a very limited proportion of criminal phenomena - automatically become marked by it. Individual prosecutors too learn their trade in domestic settings, grow to understand what it is to be a prosecutor in their first role and carry those lessons with them throughout their careers.[80] This may act as a useful check on the exercise of powers, preventing extremes seen

---

74 See Proposal for a COUNCIL REGULATION on the establishment of the European Public Prosecutor's Office COM/2013/0534 final - 2013/0255 (APP) resulting in Regulation (EU) 2017/1939.

75 See European Commission (2013a).

76 Such logic can also be found within national systems: see Mazzacuva (2014), King and Lord (2018).

77 Justice and Home Affairs Council, 2016, 5. and annex 1.

78 Regulation 2017/1939. See Raffaraci and Belfiore (2019).

79 For an analysis of different defendants ability to "play the system" see Alge (2013) section 5, see also Brants (2010) 184, 205-206 for bargaining occurring due to the power of the adversary. Note also the nexus between increased discretion and degradation of equality before the law - Asp (2012) 155.

80 Boyne (2007), Roth (2013), Thomas III (2008) and e.g. A.B.A 1992 and Sullivan et al (2007).

elsewhere;[81] nevertheless they are pervasive and will also transcend the national sphere, when career trajectories do.

The volte face of international criminal justice might also be explained (at least partially) in this way. When plea-bargaining was first discussed in that context in the mid-1990s, Cassesse's abhorrence to it marked the system.[82] Less than 10 years later, as the system began dealing with an overwhelming case-load, the practice became prevalent.[83] Prosecutors faced with an all too familiar problem, reverted to their routine tools to solve it.

Such developments should highlight the urgency of understanding prosecutorial work. Not only is transparency concerning how criminal justice systems deal with the bulk of cases desirable. The frameworks practitioners and politicians take for granted in the "production" of criminal justice deeply mark our national criminal justice systems as well as any extensions of punitive reach. Deeper knowledge facilitating reflection upon these practices and their effects is surely all the more important, therefore, as transnational criminal justice grows in import.

4. RECONCILING PROSECUTORIAL BELIEFS AND ACTIONS

In order to illuminate how the study findings can be reconciled with continuing prosecutorial belief in traditional justice "values", this paper applies a framework developed by Gresham Sykes and David Matza. The Techniques of Neutralization[84] is a seminal criminological paper published in 1957 and will doubtlessly surprise when raised in a paper of this kind. It is, after all, sub-headed "A Theory of Delinquency" and addresses juvenile delinquency specifically.

The purpose of this paper is not to suggest that prosecutors across Europe are engaging in delinquent conduct. Rather, Sykes and Matza's framework demonstrates how behaviour seemingly challenging overarching norms can be undertaken even though the validity of those norms is, in fact, recognised and valued by the individual undertaking that action. It is a theory demonstrating how the language of exceptionalism can facilitate the undermining of a norm, without the overriding belief in the correctness of that norm ever being called into question. This paper thus conducts an examination perhaps best described as inspired by this seminal framework.

This exploration is not seeking to imply that prosecutors, in the main, are engaging in these practices for any other reason than to maximise the positive effects of their work, given the resources at their disposal. There is no intimation of individual wrong-doing. The suggestion is far more, that our systems, as a sum of all of these individual, seemingly rational and justifiable decisions, are mutating into something very different than what we as societies - including prosecutors - intend and presumably would want. Alongside explaining how prosecutors can do one thing and genuinely believe another, Sykes and Matza's scheme also highlights starkly the impact prosecutorial practices are having. As a tool, the techniques of neutralisation demonstrate how, as the exception has become the norm, the way in which the majority of

---

81 as suggested by Damaška (1975) see also Luna/Wade (2010), Part III.

82 See Morris/Scharf (1995), 652.

83 See Damaška (2010), 101 et seq. Though on the issues involved see Amory-Combs (2012).

84 Sykes and Matza (1957).

cases are dealt with by criminal justice systems has altered the very nature of what these systems as a whole achieve.[85].

4.i. Sykes and Matza's "The Techniques of Neutralization"[86] and Prosecutorial Practice Analysed

Sykes and Matza fundamentally challenged the idea that all rule-breaking is grounded in an idea that the rule lacks validity for those breaking it. They challenge the notion that subcultural theory and theories of anomie - and thus rejection of the dominant social norm by groups encompassing individuals who undertake criminal behaviour - explains offending. They cite their observation of juvenile boys being questioned about delinquent behaviour very much understanding a difference between good and bad, acceptable and unacceptable behaviour. Indeed they demonstrate the boys as not only acquiescing to but agreeing with the overriding social norms they find themselves accused of breaching. Sykes and Matza highlight that these boys, however, proffer reasons why their behaviour is justified or excusable summarised in 5 "techniques of neutralization."

These are as follows:

- denial of responsibility,
- denial of injury,
- denial of victims,
- appeal to higher loyalties, and
- condemnation of condemners

These techniques allow the boys to engage in ""bending" the dominant normative system-if not "breaking" it" explaining how deviance can be coupled with values aligned with dominant morality protected by laws. Sykes and Matza state: "one of the most fascinating problems about human behavior is why men violate the laws in which they believe"[87] They explain the techniques they identify as providing "*justifications for deviance*."

This paper utilises this theory to analyse prosecutorial behaviour in European jurisdictions and generate a clear understanding of how the impacts identified by the Goettingen study and beyond are produced, despite the professionals involved making very significant efforts to uphold the dominant normative system. The deviance or breach under discussion here is not of law; but of the idealised notion of criminal justice; the 'procedural norm' framed as central by our criminal procedures (and popular depictions thereof). This idea includes, public open trials allowing for a full presentation of evidence by both sides, marked clearly by a presumption of innocence operationalised e.g. through the right to be heard. The result of any such trial is individualised justice. Condemnation occurs after a prosecutor convinces more than one person (not infrequently several lay persons or professional magistrates or a combination of the two) of the correctness of the view - and legal evaluation - she has formed of an event. Justice is then served by a response tailored specifically to the defendant and possibly responsive also to the victim.

---

85 See also Ashworth and Zedner (2008) and (2015).

86 Sykes and Matza (1957),

87 p. 666

This paper invites the reader to step away from a strict application of Sykes and Matza's theory and consider this framework applied to prosecutors undertaking their jobs in adherence to the law. Some of the prosecutorial practices developed across Europe - and indeed now enshrined in law - demonstrate some equivalency to the factors discussed by Sykes and Matza. In striving for efficiency, prosecutors can be seen deviating from the norms there is evidence to suggest they hold dear.

4.i.a. Denial of Responsibility

Sykes and Matza identify a denial of responsibility as occurring when individuals explain their behaviour as dictated by "forces outside of the individual and beyond his control;" responsibility for delinquent acts is ascribed by the suspect e.g. to the bad neighbourhood lived in.[88] Our criminal justice systems do frequently refuse to deal with criminality and deny their responsibility to so do in many ways. Although the headline purpose of criminal justice systems is to ensure all crimes against humans are dealt with, the factual ability of criminal justice systems to cope is predicated on their denying responsibility for significant numbers of crimes.

The important point to stress here is that prosecutors work in settings always primed to deny responsibility for many crimes against humans. The material scope of criminal justice systems is established by the parameters of the criminal law. Ironically this is expanding rather than contracting across Europe, just as our systems struggle to cope.[89] A traditional way of denying responsibility is via jurisdictional rules. More recently, this is being recognised as problematic and exceptions are made to ensure e.g. that citizens who deliberately travel to less well-regulated jurisdictions can be held accountable for crimes of child abuse they perpetrate there.[90] Nevertheless a western European citizen accusing a fellow citizen e.g. of selling a counterfeit life vest to a refugee on a Turkish beach - even if that vests turns into a millstone which precipitates the death of a child wearing it when a vessel capsizes - will likely be told by the criminal justice system she might naturally turn to, that this is purely a matter for Turkish authorities. *Locus regit actum (the place governs the act)*, no matter how morally abhorrent actions may be.

This well-established and fundamental principle geared to deny responsibility poses problems for the pursuit of transnational crimes as prosecutors are fundamentally predisposed to looking mainly to criminality occurring within their borders and to limiting their professional interest to such.[91] This context demonstrates all too clearly how resourceful and organised offenders can use such presumptions to ensure their crimes go undetected or at least not fully pursued and comprehensively punished.[92] The impotence of criminal justice systems faced with schemes defrauding victims via telephone or internet scams stemming from abroad[93] highlight groups of victims criminal justice systems fail to secure justice for in this way. This will become a greater

---

88 p. 667.

89 see e.g. Morris (2008).

90 See e.g. s. 72 of the British Sexual Offences Act 2003. The exceptions made to the UK's strict jurisdictional regime are summarised in Archbold (2019) 2-35-2-88 and CPS guidance available at: https://www.cps.gov.uk/legal-guidance/jurisdiction

91 See e.g. Wade (2009).

92 See e.g. European Commission 2013a.

93 highlighted in Roth (2013).

challenge for our criminal justice systems as victimisation via such paths increases. It is, however, the traditional base-line of our systems.

European criminal justice systems do, however, also feature newer mechanisms by which this technique is engaged. Addressing socially harmful behaviour is increasingly a task not ascribed to criminal justice systems.[94] Where this forms part of a principled effort to decriminalise less serious behaviour, the arguments of this paper provide strong reason to support this.[95] Where, however, this is done in relation to behaviour entailing serious social harm it is problematic; threatening to undermine the very essence of criminal justice.[96] At a systematic level, criminal justice responsibility is denied via the creation of alternative systems meaning that some socially harmful behaviour is not subject to the same social stigmatisation nor faces as potentially effective and stringent regulation and punishment. The most obvious example of this is the compliance based response to the 2008 financial crisis.[97] It is telling that it was the finance ministers of EU countries who met in Brussels to discuss further regulation and not those concerned with criminal law enforcement.[98] Such a response better accommodates the crimes of the powerful particularly as circumstances change and they are able to undertake more sophisticated forms of criminality.[99] It seems reasonable to expect prosecutors to mirror such approaches, defining out crime where the fit to the traditional boundaries of their tasks is not obviously met. "*I am a prosecutor of country A, an act in country B even if perpetrated by or against one of my citizens, is not my responsibility"* - is a thought pattern to be expected. Adaptive interpretation of criminal norms in order to pave the path to prosecute behaviour which could be defined as criminal as times and modes of perpetration change is not to be expected simply because it adds to an already excessive workload.[100] The "neighbourhood" prosecutors work in will not allow such dynamic adaptation.

---

94 Ashworth and Zedner (2008), Hunt (2014), Lacoeur (2018)

95 Note also that despite broad efforts to "westernise" after the fall of the iron curtain, many formerly communist European countries have retained the group of less serious offences - including theft below a certain value - to be dealt with by social or community courts rather than the criminal justice system. See Bulenda et al. 259, Thaman (2010), 333.

96 Ashworth and Zedner (2008); Hunt (2014); Wade (2009). Note also the British Government's suggestion that it will accept an EU Framework Decision on Defence Rights in Criminal Proceedings if terrorist suspects are excluded from the presumption of innocence (Discussed at EU Presidency Conference (2007)).

97 Though note that one European jurisdiction (Belgium) long associated with resistance to prosecutorial discretion on a principled basis, did attempt to respond by criminal prosecution – only to find its efforts frustrated by a deal already reached with Dutch prosecutors. See Reuters 2013 and 2013a, Toussaint (2014). This resulted in a Belgian prosecution being barred under the ne bis in idem rules resulting from art. 54 of the Convention Implementing the Schengen Accord (for detail see Tchorbadjiyska (2004)). This is the logic of the EU approach to ne bis in idem, see Ruggiero (2015) 61. Davis (2016), 100 assesses US refusal to limit prosecution after case-disposal measures in other jurisdictions as having a chilling effect on the development of such measures.

98 Council of the European Union (2009), 8. Note also the case of a multi-national too big to prosecute King and Lord (2018), 78 et seq.

99 Again see the arguments behind the creation of an EPPO demonstrating the dangers of leaving an enforcement lacuna, making certain crimes attractive to highly-resourceful defendants European Commission (2013), 2.

100 Consider e.g. calls for misogyny to be treated as a hate crime - Quinn (2018) - and the Grenfell fire to be viewed as murder, Norrie (2018). Of course, expansive interpretation of norms is not desirable from a rule of law point of view and is not what is being advocated here. The point is that the boundaries delineating prosecutorial responsibility can leave lacuna as social norms and factors like, e.g. mobility, change.

It is important to stress that such denial of responsibility cannot be explained only by overloading and a consequential search for efficiency. On the one hand, alternative systems are developed to avoid the procedural protections of criminal justice viewed as overly onerous by some e.g. in the counter-terrorist context.[101] On the other hand, the failure to incorporate responsibility of very socially harmful behaviour can be viewed as accompanying the informal development of coping mechanisms as traced above. If legislative reform occurs only post-facto to establish as lawful practices developed by frontline practitioners,[102] it is not outlandish to suggest that the law is developing without regard to higher principle, nor indeed with the desired oversight of the system as a whole.[103]

The prosecutorial practices now dominating how cases are dealt with by criminal justice systems are stop-gap measures. Yet principled reform is what would be required for coherent action to tackle crimes against humans, particularly if regulation of the powerful is expected. Any frontline practitioner struggling to cope with their workload is likely to dismiss as absurd any (un-resourced) attempt to broaden their remit, let alone require them to become familiar with complex new substantive areas or to work increasingly combatively against well-resourced defendants.[104] Since legislators take reforming impetus from this group of professionals, their main concern - workload reduction - will be the transferred primary concern. Furthermore if this groups is more likely to resist being allocated such work, socially harmful behaviour perpetrated by more powerful individuals is even less likely to feature on a reform agenda to be tackled by the criminal justice system.[105] As the financial crisis shows, those with the political and social capital to push for criminal justice reform are unlikely to do so for white collar crime. Systems struggling to cope - whose professionals might lend any calls for reform credibility - are unlikely to be responsive to any push for an increased remit.[106]

Our overloaded criminal justice systems and those working within them are practically forced to say that they cannot take on responsibility for matters it might well be desirable for them to. The creation of systems parallel to the criminal justice system invite stretched prosecutors to deny their responsibility for behaviour which could be covered by alternatives. Criminal justice practitioners indeed truthfully parallel the youths in Sykes and Matza's study asserting that preventing the social harm in question is a matter beyond their control.

---

101 Secretary of State for the Home Department (1998) 7.11-16.

102 As evidenced above, see also Altenhain (2010) 159.

103 For an insight into how the pressures of practice lead the law see also Alge's (2013) account of how the plea agreement powers given to the UK SFO were not intended to facilitate plea-bargaining and how the latter received official standing within 3 years.

104 See the response of prosecutors on detection of trafficking human beings reported in the EuroNEEDs study analysed in Wade (2011), 168-169.

105 This is, for example the logic of negotiating case-ending powers for the EPPO.

106 See e.g. a recent declaration by the Metropolitan Police that it is unable to consider treating misogyny as a hate crime - Quinn (2018); Also Thornberry, 2013.

4.i.b. Denial of Injury

The second technique highlighted is the denial of injury described by Sykes and Matza as offenders questioning "whether or not anyone has clearly been hurt by his deviance" or asserting that "behavior does not really cause any great harm despite the fact that it runs counter to law."[107]

Our criminal justice systems in parallel seem to converge strongly around an idea that whilst behaviour encompassed by them is all criminal, not all of it is sufficiently harmful or unjust to justify the consumption of sparse and valuable resources on a reaction. Across Europe prosecutorial practice is led by guidelines on use of diversionary powers and practice. As demonstrated by the Goettingen study results, there is clear evidence of European values in this regard.[108]

The following diagram demonstrates the use made of the various case-ending possibilities in study countries:

Use of Case-ending Options

Option	Used
Simple drop (insufficient evidence, technical reasons)	
Drop (public interest)	1st time offenders Petty theft, cannabis possession, less serious violent offences, minor property offences
Drop for procedural economy/efficiency reasons	Where other more weighty charges brought/heavier sanctions expected
Conditional disposal	Usually 1st time offenders, Petty theft, cannabis possession, less serious violent, traffic and minor property offences Condition attached: fine, mediation, community service
Penal order	Recidivists Less serious violent, traffic and minor property offences To achieve: fines
Other simplified/accelerated proceedings	

Source: Wade (2006)

Where decriminalisation and discouraging punitivism drive the agenda, the coherence of prosecutorial behaviour across Europe appears rational and indeed laudable. Criminal justice systems do, however, currently claim to form a system to punish all of these crimes. As the debate surrounding proportionality of use of the European Arrest Warrant has also shown, the effect of relatively minor crimes varies according to who is victimised.[109] Whilst a theft of 50 Euros may not matter to some, to others it may constitute a significant loss. Furthermore, where repeat victimisation comes into play, each individual case may reasonably be disposed of, in accordance to the pattern shown above, but the overall damage done may be considerably greater.[110] Any individual (or indeed business) so affected may feel aggrieved and let down by the criminal jus-

[107] Sykes and Matza (1957), p. 667.

[108] See also the parallels with Norway, Strandbakken (2010), 246-248, 250-251, for Denmark see Wandall (2010), 223, 236-238, Croatia - Krapac (2010), 259.

[109] Haggenmueller (2013) 100.

[110] Chakroborti, N. and Garland, J. (2015), 6.

tice and the state in turn. Particularly where expectations have been raised by victim-inclusive rhetoric, this sense of disappointment may erode the legitimacy of criminal justice systems.[111]

Even when cases are taken forward, evidence points to prosecutors systematically reducing charges to fit them into categories allowing for less resource-intensive treatment.[112] Not pursuing evidence of racial motivation for instance can mean an assault qualifies for a prosecutorial drop or that a case which would require referral to a higher court, can be dealt with more quickly in a lower one. The treatment of cases recorded by the statistics is the treatment of cases as categorised as prosecutors. They may see ordinal proportionality in their designation of files and regard their professional duty as done by achieving justice of sorts. Victims may feel the justice done in their name is anything but, particularly if significant features of of their injury are ignored and therewith, effectively denied. Parallel to Sykes and Matza's findings, prosecutors are signalling that they regard (at least) certain (aspects of) injury as not really causing harm sufficient to be acknowledged by criminal justice processes. The ideal of individualised, tailored justice is thus normally abandoned.

4.i.c. Denial of the Victim

The next technique does not deny the factual harm caused by a delinquent act but relativises its significance, declaring in Sykes and Matza's words that "the injury is not wrong in light of the circumstances." They explain "Insofar as the victim is physically absent, unknown, or a vague abstraction (as is often the case in delinquent acts committed against property), the awareness of the victim's existence is weakened."[113]

Legislation formulating prosecutors' options to utilise drops and disposals speak of these as appropriate for cases in which e.g. the defendant's guilt is minor.[114] One of the factors impacting upon this includes a victim's behaviour.[115] Given how prosecutors construct cases with regard to their options (as shown in 4.i.b.), it would be surprising if such construction did not sometimes also extend to denial of victimhood, e.g. by qualifying the victim as equally blameworthy and thus opening the door to the use of drops and disposals for instance.

For the purposes of this paper, this technique can be evidenced more strongly as a denial of the *"relevance"* of the victim. Many of the procedural options available to prosecutors - when driven by a need for efficiency - necessitate a sidelining of the factual experience of the victim. The very logic of plea bargaining or any negotiated/in any way consensual case-ending[116] is

---

111 Or prosecutors as responsible for such trends see e.g. Brants (2010) 217. Note also that such disappointment can manifest in more concrete problems for the criminal justice systems, such as victims' refusal to participate as witnesses in the future and to advise friends and family against so doing. See e.g. CPS Victim and Witness Satisfaction Survey September 2015 - Wood et al, 34 et seq.

112 See e.g. Thaman (2010) xxix et seq.

113 Sykes and Matza (1957), 668.

114 See e.g. 153a of the German Code of Criminal Procedure available in English at https://www.gesetze-im-internet.de/englisch_stpo/.

115 See guidelines, e.g. BOS-Polaris - van den Bunt/van Gelder 2012, 124 and 129; Code for Crown Prosecutors (2018), 4.14.c

116 Which is what the discussed mechanisms are, defendants forego their right to a trial and to appeal - on the importance of this aspect, see Bachmaier (2018) 257.

that both sides will cede something. The prosecution side usually incentivises a defendant by a reduction in charges or punishment.

Charge bargaining or charge reduction[117] in order to elicit a guilty plea ensures that the legal qualification of an act is lesser than it might be viewed at court. Either not all crimes are considered[118], or aggravating factors are ignored, harms qualified etc. The person suffering such harms is unlikely to agree with such reductions. As outlines above, they may well be disappointed by their experience becoming side-lined and relativised as the routine of the system takes hold. Victim empowering measures provide clear indication of this; they allow victims to tell the entirety of their story and the impact of a crime, including factors not considered relevant by the law.[119] The narrowed consideration of even those latter factors during prosecutorial decision-making contributes to a reduction of the legitimacy with which criminal justice systems are viewed.[120]

Diversion proceedings (though doubtlessly positive from a victimological point of view where e.g. victim-offender mediation becomes an option) fundamentally deny the relevance of victimhood for criminal justice purposes. They intimate that the experience of victimhood by an offence is less important than other factors. Where that factor is the victim's desire to participate in mediation, or indeed to receive compensation, or see that the perpetrator seeks treatment, this should not be viewed as problematic. Given, however, that the majority of diversionary measures are used to serve the efficiency of the system, to save it money (or indeed serve to raise funds for the state), this is a very different matter.

A prosecutor's decision that e.g. the interests of justice do not demand any further action or anything beyond a fine, is a decision which sidelines and relativises the harm done to the victim in comparison to broader societal goals.[121] It has nothing to do with the individualised justice usually promised in principle by criminal justice systems.

It is central to recognise that charge reduction results from rationalisation inherent to practitioners treating the content of criminal justice processes as a routine matter. Overload has primed the system to ignore individual features of crimes, victims and indeed perpetrators. Charge-bargaining is e.g. often engaged in to facilitate avoidance of courts incorporating lay participants.[122] This demonstrates that such decisions are driven by resource considerations as procedures before such fora require greater amounts of time and indeed carry a greater risk of less controllable outcomes.[123] Motivation of this kind side steps victim-related issues demonstrating criminal justice systems' denial of the relevance of the victim to the desired

---

117 On the distinct difference, see Hodgson (2012) II.A.

118 And note the need for such an option to be specifically legislated for in European criminal justice systems traditionally adhering to a stringent interpretation of the principle of legality, e.g. Poland see Rogacka-Rzewnicka (2010), 283.

119 For a description of victim participation measures, see Braun (2019), 1 et seq.

120 On this concept in relation to corporate crime and negotiated justice, as well as the myriad of relevant perspectives see King and Lord (2018), 23-30.

121 Note the acknowledgement of this inherent in requiring prosecutors to explain such decisions to specific groups of victims in a few jurisdictions (e.g. rape victims in Britain) – Ministry of Justice (2015).

122 Thaman (2010), xxix et seq.

123 Thaman (2010), xxx.

case outcome. The structure of options developed by prosecutors to allow them to cope with overload provide ideal categories for them to engage in the technique described by Sykes and Matza "awareness of the victim's existence is [indeed] weakened."

4.i.d. Condemnation of the Condemners

Sykes and Matza describe a fourth technique by which juvenile delinquents respond with hostility to an accusation of wrong-doing; those suspects emphasising that, in fact, it is the system which sees fault in them which is flawed. In this way, Sykes and Matza explain the juvenile "has changed the subject of the conversation in the dialogue between his own deviant impulses and the reactions of others; and by attacking others, the wrong-fulness of his own behavior is more easily repressed or lost to view."[124]

Raising this technique is perhaps somewhat jarring in this context. A parallel can, however, be identified if we consider a suspect, offered a conditional disposal or facing a prosecutorial drop, who wishes to insist upon his or her innocence. Despite not featuring the extremes of the United States system, European criminal justice processes increasingly demonstrate features which exert pressure to comply upon individuals made the subject of such proceedings. Even conviction by penal orders can only be appealed against for between 8 and 30 days. Surely justice would be better served by suspects being given more time to understand the letter they receive and to e.g. seek legal advice? Why is there evidence of prosecutors using public interest drops to end cases which might more obviously be qualified as simple drops? Could this be because e.g. victims can appeal against a technical decision, not however against a discretionary one?[125] The dynamics of systems reflected by such features are of efficiency. Mechanisms making it difficult and risky to withstand this, confirm this but also demonstrate clearly the disregard the system has for such individuals.

Overall as such individual decisions make up a system, what happens to those who try to insist upon classic criminal proceedings and full rights or comprehensive prosecution? As seen in the context of negotiations for the EPPO,[126] they are usually viewed as unrealistic. They are perhaps not condemned, but also not taken seriously.

Furthermore, the debate surrounding criminal justice - in turn influencing prosecutors as well as influenced by them - does demonstrate activity more fitting to the condemnation of the condemners technique. The fate of those who insist upon full procedural rights for suspected terrorists or even potential European arrest warrant detainees is to be labelled "friends of criminals."[127] Try to imagine insisting upon recourse to normal criminal proceedings as the norm in any of our systems without being laughed out of the room as an idealist waster of resources.[128]

---

124 Sykes and Matza (1957), 668.

125 Weigend (2004).

126 See below around footnote 138.

127 See e.g. Higgins (2018); Johnston (2005 and e.g. Downey et al (2012), 246

128 Again, proponents of an EPPO without negotiating powers were treated as having no understanding of prosecutorial reality (even though, of course, no EU level prosecutorial reality of this kind exists yet).

In relation to the crimes of the powerful, condemnation of the condemners is also more apparent. To date the financial capital of Europe is the City of London. Although strongly under fire for their role in triggering the financial crisis of 2008, companies there are central in pushing for the "anti-regulation" stance adopted by the UK Government[129] since 2015. Those who condemn as criminal the actions of banks or property managers are labelled the enemies of business, even in the city of banks caught falsifying interest rates and in which 72 people burned to death in their homes in the horrific 2017 Grenfell tower fire.[130]

At the EU level, budgetary constraints are mobilised to shut-down discussion on rights provision. Even the most liberal EU Parliamentarians capitulated in the consideration of the Commission's Access to a Lawyer Legislation.[131] This provided for access to legal counsel for defendants at a level currently not available in many member states which met fierce resistance over the question of who would pay for such provision.[132] The hard line of budgetary concern trumps and is, however, an acceptable vehicle to condemn those who insist criminal justice systems should feature meaningful procedural rights. Interestingly the member states seemingly command no such deference when it comes to funding punitive measures at the EU level. The funding of joint investigation teams through Eurojust and Europol,[133] for example, has never encountered any parallel resistance.

Condemnation of those who object to mechanisms developed under the guise of efficiency is cased in neutral, often financial (actuarial) terms but it is a perceivable feature of our criminal justice systems and debates surrounding them.[134] Citing the reality of their daily lives to objectors, provides prosecutors with the ability to engage this technique.

4.i.e. Appeal to Higher Loyalties

Of the techniques offered by Sykes and Matza's framework, the appeal to higher loyalties resonates most easily with this paper's subject matter.

As Sykes and Matza[135] put it:

> "the delinquent may see himself as caught up in a dilemma that must be resolved, unfortunately, at the cost of violating the law"

"deviation from certain norms may occur not because the norms are rejected but because other norms, held to be more pressing or involving a higher loyalty, are accorded precedence"

Where prosecutors recognise that some of their work[136] does not sit comfortably with the procedural ideals their system espouses and they attach value to, they will doubtlessly - and indeed reasonably - point to practice not as designed to undermine such principle but to

---

129 See OECD (2016), UK Government Red Tape Challenge and e.g. Rigby (2015)

130 See Bennett (2018), Wheeler (2011), for US BBC News (2017).

131 European Commission (2011).

132 See e.g. Ludford (2013).

133 See e.g. http://www.eurojust.europa.eu/doclibrary/JITs/jits-funding/Pages/ARCHIVE/jits-funding.aspx

134 Strongly echoing a technique highlighted by Simon (2008) 25-26 as used to "govern through crime."

135 (1957), 669.

136 e.g. Sun-Beale (2015) 38, 50-52.

preserve the functionality of the system as a whole. Procedural ideals are anchored within higher, more theoretical levels of the law (often constitutional) and be reflected e.g. in prosecutors' oaths of office. That the nitty gritty of everyday practice does not always live up to such ideals, is hardly surprising. Nor can it always be deemed inappropriate. The ranking of cases and matching to the various procedural options available across Europe - as found by the Goettingen study - clearly demonstrates prosecutors as protective of criminal justice resources. This is particularly true of court time. They undertake such efforts not for their own sake but clearly in order to reserve such resources for the full "ideal" treatment of cases of particularly serious crime and where the liberty of the suspected offender is at stake. This is a profound difference to US American practices.[137]

Criminal justice contexts are deeply marked by a higher loyalty to efficiency and cost-effectiveness than to the procedural principles laid down in codes. Only in exceptional cases are the latter regarded as factually necessary. Prosecutors and those administering their work have acted rationally as case-loads rise and resources become scare. Within the parameters of the system, who could fault their decision-making?

The Goettingen study highlighted patterns consistent with prosecutors across Europe doing the best they can, with what they have.[138] There are clear patterns of principle from the prosecutorial vantage point. They demonstrate - in a pragmatic manner - professionals committed to the normative system and preserving it as best they can. The key point is that they are not in a position to do so in the vast majority of cases.

4.ii. Interim Conclusion

In 1957 Sykes and Matza[139] wrote "delinquent behavior, like most social behavior, is learned and … is learned in the process of social interaction."

""bending" the dominant normative system-if not "breaking" it-cuts across our cruder social categories and is to be traced primarily to patterns of social interaction"

In this consideration of prosecutorial work across Europe, applying this line of thought appropriately to these professionals is illuminating. Prosecutors are clearly not breaking the law[140] but this paper questions whether they cannot indeed be regarded, collectively, as '"bending" the dominant normative system' of our criminal justice systems?[141] They do so to preserve their image of themselves and their work as serving an understanding of justice fundamentally forged by constitutional principles. In this way they can preserve their sense of doing highly meaningful, socially-useful work, even as the realities impacting the majority of their work chip away at its character and warp it in the manners described above. Seemingly in denial of

---

137 See Luna/Wade (2010) 1496 et seq.

138 Note expectations of more, not less such practice - e.g. Bachmaier (2018), 238. tracking this trend: Fair Trials International (2016).

139 on pp. 664 and 669.

140 Of course, it is to be acknowledged that some amongst this group will be. Where the powers highlighted above are utilised, e.g. in line with a discriminatory point of view or in accordance with corrupt practices, this is - of course - in breach of the law.

141 Alge (2013) section 7 e.g. views the SFO as "subverting the adversarial system"

the realities of their lived experiences, prosecutors nevertheless defend the ideals of criminal justice. Very much like Newman's use of Freud when examining defence lawyers whose daily reality contradicted the principles they honestly claimed to work for, this paper demonstrates the utility of Sykes and Matza's seminal lens for a new purpose. The perspective it lends enables us to understand the stark contrast between exasperated prosecutors and the horrified public reacting to headlines of criminal justice deals made with celebrities.[142]

Readers may legitimately question whether the techniques described above are truly relevant to lawyers. Amongst such a huge group, it is certainly unlikely one explanation will prove sufficient. There is doubtlessly, furthermore, a difference between a German *Einstellung* and the Spanish *conformidad*. Nevertheless it remains plausible that highly trained, very skilled lawyers operating in these distinct professional cultures remain fundamentally committed to constitutional values. Utilised as above, Sykes and Matza provide insight into how observable practice is rendered compatible with such self-comprehension.

Even if denying the applicability of such techniques to prosecutors, readers might use them to reflect upon what our societies demand of prosecutors and other criminal justice professionals. After all, in debates surrounding criminal justice, even the most fiscally conservative - politicians, media, and public - tend to espouse strong justice values. Discourse is often marked by crime control in relation to offenders but the debate surrounding victims, treatment of the innocent, etc. bears hallmarks of cultural expectations framed by the ideal of the full trial.[143] Sykes and Matza's scheme provides illuminating insight when analysing our responses to crimes against humans as societies. Prosecutors, even if not engaging the techniques of neutralisation themselves, are at least the agents who do so on our behalf. It is elected governments which set the true parameters of criminal justice in the resources allocated to it. Public and media reaction to deals when made public, clearly signals to criminal justice professionals that we expect them to allow ourselves still to feel that we live in principled societies, with functioning justice systems worthy of the name.

5. THE INCREASING IMPORTANCE OF PROSECUTORIAL WORK AND KNOWLEDGE THEREOF

A key concern is that we do not know enough to truly enter into the debate this paper highlights we require. It remains important to emphasise the evidence of prosecutorial practice being significantly shaped by constitutional principle, the rule of law and values of admirable, public office.[144] Nevertheless, clear trends of considerable social impact going well beyond the efficiency gains desired are observable.[145]

The rise of prosecutorial power across Europe has been an organic process to allow criminal justice systems to cope. They have faced a steady trend of increasing caseload (beginning to reverse in the last three years) twined with resource shortage accentuated by austerity.

---

142 E.g. cases against Ronaldo, BAE Systems, Rolls Royce (see Pratley 2017 and King and Lord (2018), 101 et seq), Helmut Kohl, Steffi Graf and Boris Becker.

143 See e.g. Commissioner for Victims and Witnesses. (2010) and Victims' Commissioner (2015).

144 See e.g. Boyne (2007) and Wade (2011).

145 Jehle/Wade (2006), Jehle (2008) and Wade (2008).

Even prior to that response to the 2008 financial crisis, resource allocation was fundamentally marked by taxpayer's unwillingness to increase the funds available to state mechanisms. Given that the most obvious solution - decriminalisation - is politically unpalatable (and indeed more, not less, reliance upon police action and criminal justice systems across Europe seemingly desired[146]), practitioner and particularly prosecutorial responses managing these systems seem reasonable. Indeed if legislators are forever extending the net of criminalisation[147], should we not be grateful to prosecutors on the other hand for ensuring procedural decriminalisation in practice?

Perhaps we should. Possibly European scholarship does not concern itself with the actions of prosecutors because the professionals who undertake these jobs work within office cultures which ensure such discretionary decisions are made in a reasonable manner.[148] The advent of these powers has, after all, not seen the ratcheting up of sentences and the coercive practices US American scholars concern themselves with.[149] There may indeed be some comfort to be taken from the apparent absence of over-charging[150] and lesser sentencing length.[151] However, anyone familiar with critical criminological studies[152] must surely balk at the idea that just use of power can be associated with increased, systemic discretion. There is little criminological basis to argue anything other than that discretion particularly when not properly held to account, facilitates discrimination and uneven application of the law.[153] Extensive discussion of unconscious and conscious bias for example would seem justified at this point.

The Goettingen study and what has followed here maps European jurisdictions as marching, one way or another, towards a mass production of guilty pleas with a number of dangers of increased injustice highlighted. Mechanisms marked, in all but exceptional cases, by the hallmarks of extreme actuarial justice[154] are the result. Systems become warped with prosecutors becoming "Erledigungsmachinen" (literally disposal machines) identifying cases primarily as belonging to categories to be treated in a certain way.[155] Full attention and individualised justice as foreseen by traditional criminal procedure is lent only to the rarest, most serious cases. Everything else, all other crime and its victims, all other suspected criminals become objects of routine treatment. There is, of course, evidence that all criminal justice practitioners - even defence lawyers - become sucked into the logic of this system and what those who become entangled in it "de-

146 Bauman, (1998).

147 See.e.g. the expansive nature of EU legislation on terrorism requiring the criminalisation of incitement and glorification offences; a significant extension into the preparatory realm - e.g. Derencinovic (2010) and Korosec (2010) and Decoeur, 2018; for the trend towards "endangerment" offences more broadly, see Sieber (2018).

148 See Langbein and Weinreb (1978), Boyne (2007) and Luna and Wade (2010). On the dangerous influences of sustained culture in Poland see Krajewski (2012), 85-89, 91, 94, 108-9.

149 See Langer (2006).

150 See Tonry (2012), 21.

151 On the contribution of over-charging and sentence length to making negotiated justice coercive see Bachmaier (2018), 251 et seq.

152 And disciplines well beyond it: see in administrative law e.g. Forsyth and Hare (1997)

153 See e.g. work on stop and search in the UK, particularly when the "restraint" of reasonable suspicion disappears – Bowling and Marks (2016),15.

154 Feeley and Simon (1994); on managerialism Leverik (2010), 154.

155 Roth (2013), in the Netherlands (with computer-based support) van de Bunt and van Gelder (2012), 125-130.

serve.[156]" As such criminal justice cultures transcend national boundaries, the urgency of comprehensively identifying and understanding these developments becomes all the more apparent.

Deeper examination is, however, also required because the perspective of criminal justice practitioners is not the only one of relevance. Criminal justice systems hold political worth because their work is considered important by many in our societies.[157] How else is the failure to resort to decriminalisation in the circumstances outlined to be explained? Political rhetoric has furthermore specifically engaged victims,[158] underlining their importance and emphasising their participatory rights.[159] How our systems, altered as outlined, affect such promises is thus surely a further question worthy of study? It is hoped that the future will see a broader group of academics dedicated to revealing how shifts in prosecutorial practice and culture change criminal justice across Europe.

6. CONCLUSION

The point of this paper is decisively not to shame prosecutors seeking to cope in a principled manner under the circumstances in which they find themselves. It is an attempt to understand what they do and what it takes for them to currently do it.The fundamental point and challenge highlighted, is the clear tension between what "justice" should be - and systems (alongside media and dramatic representations) still communicate to the general public that it is -, and what it actually is, in the vast majority of cases. The findings examined here indicate strongly that there is clear divergence between the expectations of criminal justice practitioners and their „service users" as to what they can reasonably achieve. The justice prosecutors expect to deliver will mostly be very different from what a victim or indeed a perpetrator might expect. The public outcries at negotiated case settlements involving celebrities are an illustration of a rejection - at the societal level - of any notion that such proceedings constitute a criminal justice norm. They highlight very clearly the differences in perception of criminal justice held by criminal justice professionals (posited to be utilizing techniques of neutralisation) and the public they serve. This dichotomy is important and dangerous because it indicates that closer examination will cause the public and therewith sections of it who come into contact with the criminal justice system - whether as victim or perpetrator[160] - to often not recognise the "justice" melted out to them as legitimate or indeed justice of any sort.[161]

---

156 Summarised in e.g. Burton, Sanders and Young (2010), 243-245.

157 See e.g. Baumann (1998) and Simon (2006).

158 The extent of this does vary, however, note e.g. how distanced the Dutch prosecutor traditionally was from the victim as a feature of her role not being adversarial - van de Bunt and van Gelder (2012), 124 (see also Brants (2010), 194) and how much difference provision in the criminal procedure code itself makes - Asp (2012), 152.

159 The importance of this development is perhaps best evidenced by the passing of supra-national legislation to give effect to victims' rights via the EU - see Council of the European Union (2001) now replaced with European Parliament (2012).

160 On the notion of voluntariness of agreement see Bachmaier (2018) as well as Thaman (2010), 327 et seq. For an example of the pressures to plead guilty, see e.g. Hales (2018), 60.

161 For professional recognition of the evolution taking place see e.g. Lord Goldsmith (2011), on the imprecations for justice, Bachmaier (2018), 259. On how regulatory treatment downgrades the societal perception that crime has taken place, see Leverik (2010), 153, King and Lord (2018), 9, 36 and undermines legitimacy (quoting OECD and Transparency Int) 64,

The deviance of prosecutorial practice matters because justice is a concept of importance to society more broadly. The norms perceived to permeate criminal justice systems are meaningful because they are what constitutes justice as socially defined.[162] It is surely unfair to ask criminal justice professionals, working at capacity, to disappoint and undermine social cohesion and peace?[163] Furthermore, if criminal justice systems' resources are being funnelled to exacerbate the differences in treatment of the more and less powerful, this cannot continue to be their designated purpose? Understanding of criminal justice systems at a meta level, facilitated by understanding of prosecutorial work and its impact would provide important reform impetus.

Ultimately the aim of this paper is thus to call for more honesty surrounding criminal justice systems.[164] Contrasting political declarations to be tough on crime as well as victim-oriented with the reality of what criminal justice professionals are facilitated (and encouraged[165]) to deliver would appear a pathway designed, ultimately, to cause loss of faith in the criminal justice system by those who need it most. Honest discussion of what works when imposed by the criminal justice system is equally urgently required.[166] Systems fundamentally marked and altered by pragmatic adaptation (the status quo in which European systems find themselves) require critical examination at the political and societal level. This can only be prompted by better knowledge of them. Police officers and prosecutors should not be left to explain to the public that they cannot pursue swathes of activity formally falling under the criminal law. The public should be expected to understand that an unwillingness to devote resources to a system limits its scope of action.[167] It is not suggested that massive reinforcement of criminal justice systems is the right way forward but that if we live with factual decriminalisation, this should actually ensue.[168] In that way discrimination is made more difficult and a sense of individual disappointment on the part of victims[169] feeling "let down by the system" can be avoided.

Finally the manner in which states allocate scarce resources should surely be subject to debate befitting democracy? It should not be the coincidental product of how even the most dedicated professionals have chosen to act behind closed doors, no matter how noble their intentions. A system marked only by barely coping, the resulting pragmatism and driven by a need to become more efficient is surely not appropriate to dictate use of the "ultima ratio" of state power; particularly as times change? Criminal justice systems working thus are inflexible and

---

162 For an examination of the problems inherent where legal meaning diverges strongly from social meaning see Norrie (2018).

163 Boyne (2007), 8, for instance, analyses the divergence between ideal and practice in Germany as "threaten[ing] to undercut public confidence in the law and the state itself." Note also similar fears over cautions used for serious crime in the UK - Travis (2015) and House of Commons Home Affairs Committee (2015), 5.

164 On the need for openness to ensure "buy-in" to avoid delegitimising a system see King and Lord (2018), 30.

165 Note, for example, that when victim offender mediation was introduced in Germany, the effort of such work was not reflected in internal, performance management systems. Thus a penal order is worth more than a VOM process in the points allocated to a case disposition for career evaluation purposes.

166 See e.g. Lambe, (2017).

167 See also Vadell (2015),15.

168 So also Thaman (2010 Typology) 396.

169 For an example of the extent to which victims are ignored in conditional disposals, as well as their inability to in any way make themselves heard, see Corruption Watch (2017). Note also that, of course, no restoration can be made to unidentified victims.

unable to rise to new challenges. At some point, taking stock and honest debate is imperative. The UK situation demonstrates this. Faced with the complication of regulating financial professions stepped in a culture of rule-bending, let alone the vagaries of public private partnerships running social housing like Grenfell, it seems ridiculous to expect our criminal justice systems to cope. And yet belief in them will be shattered if they do not so attempt.

The duty of criminal justice systems to effectively address crimes against humans, particularly when they threaten our humanity, is surely key? Discussion at a higher, principled level is owed not only to the public placing expectations upon criminal justice systems but indeed also to the professionals who work within them and operate with the daily danger of "facing the music"[170] for the perceived injustice of the justice they consistently, if pragmatically, work hard to deliver.

BIBLIOGRAPHY

- Albers, P., Beauvais, P., Bohnert, J-F., Böse, M., Langbroek, P., Reiner, A. & Wahl, T. (2013, March) *Towards a common evaluation framework to assess mutual trust in the field of EU judicial cooperation in criminal matters.* Ministry of Security and Justice, The Netherlands; Ministère de la Justice, France; Bundesministerium der Justiz, BRD.
- American Bar Association, Section of Legal Education and Professional Development. (1992, July) *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* ['MacCrate Report']. Retrieved from https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report).authcheckdam.pdf
- Amoury-Combs, N. (2007) *Guilty pleas in international criminal law – Constructing a restitutive justice approach*, Stanford University Press.
- Amoury-Combs, N. (2012). Obtaining Guilty Pleas for International Crimes: Prosecutorial Difficulties. In Luna E. & Wade, M. (eds.) *The Prosecutor in Transnational Perspective*, (331-348) Oxford University Press.
- Aprile, J. & Vicnent, II. (2014) Judicial Imposition of the Trial Tax: Criminal Justice Matters. *Criminal Justice. 29(1).* 30
- Ashworth, A. & Zedner, L. (2015) *Preventative Justice.* OUP
- Ashworth, A. & Zedner, L. (2008) Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions. *Criminal Law and Philosophy.* 2(1). 21. doi.10.1007/s11572-007-9033-02
- Attorney General's Office (2009, March 18) *Criminal Justice Measures to Enhance Fraud Prosecutions to be Introduced* [Press Release]
- Attorney General's Office (2009) *Guidelines on Plea Discussions in Cases of Serious or Complex Fraud*. London: Attorney General's Office
- Bachmaier, L. (2018) The European Court of Human Rights on Negotiated Justice and Coercion. *European Journal of Crime, Criminal Law and Criminal Justice. 26(3).* 236-259
- Baumann, Z. (1998) *Globalisation: The Human Consequences*, Columbia University Press.

[170] See e.g. press coverage of the Metropolitan Police's mass screening out of cases e.g. Mullin (2018) as well as Parveen (2016) on the use of cautions as a response to rape charges.

- Bennett, O. (2018, September 24) John McDonnell accused of a 'wilful misunderstanding of business' after radical conference speech. *City AM.* Retrieved from http://www.cityam.com/263550/john-mcdonnell-accused-wilful-misunderstanding-business
- Bowcott, O. (2014, November 1) Police cautions replaced with punitive sanctions for three English forces. *The Guardian.* Retrieved from https://www.theguardian.com/law/2014/nov/01/police-cautions-abolished-staffordshire-west-yorkshire-leicestershire-forces-chris-grayling
- Braun, K. (2019) *Victim Participation Rights: Variation across Criminal Justice Systems.* Palgrave Macmillan.
- Caianiello, M. & Hodgson, JS. (eds.) (2015) *Discretionary Criminal Justice in a Comparative Context.* Carolina Academic Press.
- Clarke, J. (2009) *Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation Critical Review of Jurisprudence: An Occasional Series. 20(2).* 415
- The Council of the European Union (2001). Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. [2001] OJ L 082. Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001F0220
- The Council of the European Union. (2009, July 7) *2954th Council Meeting: Economic and Financial Affairs* [Press Release] Retrieved from https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/109064.pdf
- Crown Prosecution Service. (2018, October) *Code for Crown Prosecutors.* Retrieved from https://www.cps.gov.uk/publication/code-crown-prosecutors
- Damaška, M. (1975) Structures of Authority and Comparative Criminal Procedure. *Yale Law Journal. 84.* 480
- Deal, D. (1982) Der strafprozessuale Vergleich. *Strafverteidiger*. 545.
- Decoeur, H. (2018) The Criminalisation of Armed Jihad under French Law: Guilt by Association in the Age of Enemy Criminal Law. *European Journal of Crime, Criminal Law and Criminal Justice. 25(4).* 299-326
- Downey, J. Stephens, M. & Flaherty, J. (2012) *The 'sluice-gate' public sphere and the national DNA database in the UK.* Media Culture and Society, 34(4), 439-456. Retrieved from https://dspace.lboro.ac.uk/dspace-jspui/handle/2134/13374
- European Court of Justice. Judgment of 11 February 2003, Gözütok, C-187/01, Brügge, C-385/01, EU:C:2003:87. Retrieved from http://curia.europa.eu/juris/liste.jsf?language=en&num=C-187/01
- European Commission (2013, July 17) *Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM/2013.0534 Final.* Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0534&from=EN
- European Commission (2013a, July) *Impact Assessment accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office*, *{COM(2013) 534 final} {SWD(2013) 275 final}.* Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013SC0275&from=GA
- European Commission. (2013, July 17) *Commission Staff Working Document Executive Summary of the Impact Assessment Accompanying the document: Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office. {COM(2013) 534 final}{SWD(2013) 274 final}.* Retrieved from https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0274:FIN:EN:PDF

- European Commission (2011) Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest /* COM/2011/0326 final - COD 2011/0154 * https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011PC0326
- European Parliament (2012). Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. [2012] OJ L 315/57. Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0029&from=EN
- European Parliament. Council Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. [2013] OJ L 294/1. Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0048&from=EN
- EU Presidency. (2007, February 20) *Conference on the Failed Framework Decision on Fundamental Rights in Criminal Proceedings.* Berlin. Paper on file with the author.
- Fair Trials (2016) *The Disappearing Trial: Towards a rights-based approach to trial waiver systems* [Report]. Retrieved from https://www.fairtrials.org/wp-content/uploads/2017/12/Report-The-Disappearing-Trial.pdf
- Forsyth, C. & Hare, I. eds. (1998) *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC.* Clarendon Press
- Goldstein, AS. & Marcus, M. (1977) Comment on Continental Criminal Procedure. *Yale Law Journal. 87.* 1570
- Kausch, E. (1980) *Der Staatsanwalt: Ein Richter vor dem Richter?* Düncker & Humblot
- Hales, L. (2017). The Criminalisation and Imprisonment of Migrant Victims of Trafficking. *Oñati Socio-legal Series* [online]. *8(1*). 50-70. Retrieved from: http://ssrn.com/abstract=3082873
- Hodgson, J. (2002) Hierarchy, Bureaucracy, and Ideology in French Criminal Justice: Some Empirical Observations. *Journal of Law and Society. 29:2.* 27.
- House of Commons Home Affairs Committee. (2015, March 3) *Out-of-Court Disposals: 14th Report of Session 2014-15.* Retrieved from https://publications.parliament.uk/pa/cm201415/cmselect/cmhaff/799/799.pdf
- Jehle, J-M. Smit, P. & Zila, J. (2008) The Public Prosecutor as Key-Player: Prosecutorial Case-Ending Decisions. *European Journal on Criminal Policy and Research. 14(2-3).* 161-179.
- Jehle, J-M. Wade, M. & Elsner, B. (2008) Prosecution and Diversion within Criminal Justice Systems in Europe. *European Journal on Criminal Policy and Research*. *14(2-3).* 161-237.
- Johnston, P. (2005, September 16) Why rules of the game have changed. *The Telegraph*. Retrieved from https://www.telegraph.co.uk/news/uknews/1498494/Why-rules-of-the-game-have-changed.html
- King, C. & Lord, N. (2018) *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements.* Palgrave Pivot
- Lambe, S. (2017, November 20) Youth prisons don't deter criminals. They enable them. *The Guardian.* Retrieved from https://www.theguardian.com/commentisfree/2017/nov/20/youth-prisons-criminals-cressida-dick-harsher-sentencing
- Lammy, D. (2017, September 7) *The Lammy Review: An Independent Review into the treatment of, and outcomes for, Black, Asian, and Minority Ethnic individuals in the Criminal Justice System* [Report]. Retrieved from https://www.gov.uk/government/publications/lammy-review-final-report

- Langbein, JH. & Weinreb, LL. (1978) Continental Criminal Procedure: "Myth" and Reality. *Yale Law Journal. 87.* 1549
- Langer, M. (2006) Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure. *American Journal of Criminal Law. 33.* 223
- Langsdon, M. (2013, February 20) Belgian prosecutors seek trial of ex-Fortis directors. *The Globe and Mail.* Retrieved from http://www.theglobeandmail.com/report-on-business/international-business/european-business/belgian-prosecutors-seek-trial-of-ex-fortis-directors/article8895503/
- Ludford, S. (2013, October) *The European Arrest Warrant: issues and solutions.* Speech given at the ALDE group, European Parliament. Brussels
- Luna, E. & Wade, M. (2010) Prosecutors as Judges. *Washington and Lee Law Review*. *67(4).* 1413-1532.
- Mazzacuva, F. (2014) Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US Systems of Criminal Justice*. Journal of Criminal Law. 78.* 249.
- Miller, ML. (2004) Domination & Dissatisfaction: Prosecutors as Sentencers. *Stanford Law Review. 56.* 1211
- Ministry of Justice & Grayling, C. (2014, November 1) *Putting an end to 'soft option' cautions* [Press Release]. Retrieved from https://www.gov.uk/government/news/putting-an-end-to-soft-option-cautions
- Ministry of Justice. (2015, October) *Code of Practice for Victims of Crime*. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/476900/code-of-practice-for-victims-of-crime.PDF
- Morris, N. (2008, September 4) More than 3,600 new offences under Labour. *The Independent.* Retrieved from https://www.independent.co.uk/news/uk/home-news/more-than-3600-new-offences-under-labour-918053.html
- Morris, V. and Scharf, MP. (1995) *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia.* Transnational Publishers, USA.
- Mullin, G. (2018, September 10) Metropolitan Police dropped more than 34,000 criminal investigations within 24 hours of victim making report last year. *The Sun.* Retrieved from https://www.thesun.co.uk/news/7216867/metropolitan-police-dropped-34000-criminal-investigations/
- Organisation Economic for Co-operation and Development (OECD) (2016) *Red Tape Challenge (United Kingdom).* Retrieved from http://www.oecd.org/gov/regulatory-policy/GBR-Red-Tape-Challenge.pdf
- Packer, HL. (1964) Two Models of the Criminal Process. *University of Pennsylvania Law Review. 113.* 1
- Parveen, N. (2016, November 9) Greater Manchester police gave 'slap on the wrist' cautions for rapes. *The Guardian*. Retrieved from https://www.theguardian.com/uk-news/2016/nov/09/greater-manchester-police-gave-slap-on-the-wrist-cautions-for-rapes
- Peters, J. (2011) Urteilsabsprachen im Strafprozess, Göttinger Studien zu den Kriminalwissenschaften. *Universitätsverlag*, 13.
- Pratley, N. (2017, January 16) Rolls-Royce's SFO settlement is big, ugly and serious. *The Guardian.* Retrieved from https://www.theguardian.com/business/nils-pratley-on-finance/2017/jan/16/rolls-royce-sfo-criminal-investigation
- Quinn, B. (2018, Nov 2) Met police chief backs calls to focus on violent crime not misogyny. *The Guardian.* Retrieved from https://www.theguardian.com/uk-news/2018/nov/02/metropolitan-police-chief-cressida-dick-backs-call-focus-violent-crime-misogyny

- Rawlinson, K. (2017, September 8) Chief prosecutor backs Lammy plan to tackle justice system bias. *The Guardian.* Retrieved from https://www.theguardian.com/law/2017/sep/08/chief-prosecutor-backs-lammy-plan-to-tackle-justice-system-bias
- RPT-BNP Paribas' CFO targeted by Fortis probe – paper (2013) *Reuters.* Retrieved from http://uk.reuters.com/article/2013/01/09/fortis-probe-bnp-idUKL5E9C96C120130109;
- Rigby, E. (2015, May 19) Javid to continue business 'red tape challenge' with £10bn cuts. *Financial Times.* Retrieved from https://www.ft.com/content/6e5c1882-fd75-11e4-9e96-00144feabdc0
- Rogers, J; (2017) A human rights perspective on the evidential test for bringing prosecutions. **Criminal Law Review** , 2017 (9) pp. 678-695.
- Rosett, A. & Cressy, DR. (1976) *Justice by Consent: Plea Bargains in the American Courthouse*. New York: J.B. Lippincott Company
- Roth, L. (2013, March 21) *Prosecutors coordinating Investigations across the EU.* Panel Discussion at the Institute for Judicial Administration: The Challenges of Transnational Investigations Conference, The University of Birmingham.
- Ruddick, G. (2017, April 2) Serious Fraud Office boss warns big names to play ball- or else. *The Guardian.* Retrieved from https://www.theguardian.com/business/2017/apr/01/serious-fraud-office-deferred-prosecution-agreements
- Secretary of State for the Home Department. (1998, December) *Legislation Against Terrorism: A Consultation Paper.* (Report No. CM 4178) TSO. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/265689/4178.pdf
- Serious Fraud Office: Annual Report and Accounts 2016-17 (For the year ended 31 March 2017) [HC277] (2017, July 19) Retrieved from https://www.sfo.gov.uk/publications/corporate-information/annual-reports-accounts/
- Shaw, D. (2013, April 30) 'Community resolutions' used in 10,000 serious violence cases. *BBC.* Retrieved from https://www.bbc.co.uk/news/uk-22346971
- Stephen, F. & Garoupa, N. (2008) Why plea bargaining fails to achieve results in so many criminal justice systems: a new framework for assessment. *Maastricht Journal of European and Comparative Law. 15.* 319
- Stuntz, WJ. (2001) The Pathological Politics of Criminal Law. *Michigan Law Review, 100,* 505
- Stuntz, WJ. (2004) Plea Bargaining and Criminal Law's Disappearing Shadow. *Harvard Law Review. 117.* 2548
- Stuntz, WJ. (2006) The Political Constitution of Criminal Justice. *Harvard Law Review. 119.* 780
- Sullivan, WM. Colby, A. Wegner, JW. Bond, L. & Shulman, LS. (2007) *Summary of the Findings and Recommendations from Educating Lawyers: Preparation for the Profession of Law.* The Carnegie Foundation for the Advancement of Teaching [Report]. Retrieved from http://archive.carnegiefoundation.org/pdfs/elibrary/elibrary_pdf_632.pdf
- Tak, P.J.P. (2004) *Tasks and Powers of the Prosecution Services in the EU Member States.* Wolf Legal Publishers.
- Tchorbadjiyska, A. (2004) Joint Cases C-187/01 and C-385/01 Gözütok and Brügge (E.C.J. February 11, 2003) 2003 E.C.R. I-1345. *Columbia Journal of European Law. 10.* 549.
- Thaman, SC. (ed.) (2010) *World Plea Bargaining: Consensual Procedures and the Avoidance of the Full Criminal Trial.* Carolina Academic Press.
- Thomas III, GC. (2008) When Lawyers Fail Innocent Defendants: Exorcising the Ghosts That Haunt the Criminal Justice Systems. *Utah Law Review.* 45

- Thornberry, E. (2013, October 1) Rape prosecutions will keep falling if corners keep being cut. *The Guardian.* Retrieved from https://www.theguardian.com/commentisfree/2013/oct/01/rape-prosecutions-falling
- Tonry, M. (2013) *Crime and Justice: Prosecutors and Politics: A Comparative Perspective.* University of Chicago Press.
- Toussaint, E. (2014) European Governments make "Gifts Galore" to Private Banks. *Global Research.* Retrieved from http://www.globalresearch.ca/european-governments-make-gifts-galore-to-private-banks/5399402
- Travis, A. (2015, March 6) 30% of police cautions and fines used inappropriately, say MPs. *The Guardian.* Retrieved from https://www.theguardian.com/uk-news/2015/mar/06/30-per-cent-police-cautions-fines-used-inappropriately-say-mps
- Travis, A. (2017, December 11) Amber Rudd announces new national economic crime centre for UK. *The Guardian*. Retrieved from https://www.theguardian.com/business/2017/dec/11/amber-rudd-announces-new-national-economic-centre-for-uk
- Trump: Executive Order signed on business regulations. (2017, January 30) *BBC News.* Retrieved from https://www.bbc.co.uk/news/business-38800090
- Tyler, R. (2011, Jan 5) Lord Goldsmith urges plea bargaining in bribery cases. *The Telegraph.* Retrieved from https://www.telegraph.co.uk/finance/newsbysector/industry/8239575/Lord-Goldsmith-urges-plea-bargaining-in-bribery-cases.html
- Vamos, N. (2009) Please don't call it "plea bargaining". *Criminal Law Review. 9.* 617
- Commissioner for Victims and Witnesses. (2010, July 20) *The poor relation – victims in the criminal justice system.* Retrieved from https://webarchive.nationalarchives.gov.uk/20110204215023/http://www.justice.gov.uk/about/docs/victims-in-justice-system.pdf
- Victims' Commissioner. (2015, November) *The Silenced Victim: A review of the victim personal statement.* Retrieved from https://s3-eu-west-2.amazonaws.com/victcomm2-prod-storage-119w3o4k-q2z48/uploads/2019/02/VC-Silenced-Victim-Personal-Statement-Review-2015.pdf
- Wade, M. (2006) The Power to Decide – Prosecutorial Control, Diversion and Punishment in European Criminal Justice Systems Today. In Jehle, J-M. & Wade, M. (eds.), *Coping with Overloaded Criminal Justice Systems*. Heidelberg, Springer. 27-126.
- Wade, M. (2008) The Januses of Justice – How Prosecutors Define the Kind of Justice Done Across Europe. *European Journal of Crime, Criminal Law and Criminal Justice. 16(4).* 433 - 455.
- Wade, M (2008a) When the Line is Crossed, *European Journal on Criminal Policy and Research*. *14(2-3)*
- Wade, M. (2011) *EuroNEEDS – Determining the Needs of and the Need for a European Criminal Justice System – Preliminary Report*. Retrieved from www.mpicc.de/ww/en/prs/forschung/forschungsarbeit/strafrecht/euroneeds.htm
- Wade, M. (2011) Prosecution of Trafficking in Human Beings Cases. In Winterdyk, J., Perrin, B. & Reichel, P. (eds.) *Human Trafficking: Exploring the International Nature, Concerns and Complexities.* CRC Press.
- Wade, M. (2013) A European Public Prosecutor: Potential and Pitfalls. *Crime, Law and Social Change. 59.* 439-486.
- Wade, M. (2015) Prosecutorial Decision-making to End Cases. In Ligeti, K (ed.) *Towards a Prosecutor for the European Union.* Vol. 2, Oxford, Hart.
- Watson, D. (2010) The Attorney General's guidelines on plea bargaining in serious fraud: obtaining guilty plea fairly? *Journal of Criminal Law. 74.* 77.

- Wheeler, B. (2011, March 6) David Cameron says enterprise is only hope for growth. *BBC News.* Retrieved from https://www.bbc.co.uk/news/uk-politics-12657524
- Wojciech, J. (2015) *Polish Criminal Process After the Reform*. Helsińska Fundacja Praw Człowieka: Warsaw. Retrieved from http://www.hfhr.pl/wp-content/uploads/2015/07/hfhfr_polish_criminal_process_after_the_reform.pdf
- Wood, M. Lepanjuuri, K. Paskell, C. Thompson, J. Adams, L. & Coburn, S. (2015) *Victim and Witness Satisfaction Survey.* Crown Prosecution Service
- Wright, R. & Miller, M. (2003) Honesty and Opacity in Charge Bargaining. *Stanford Law Review. 55.* 1409
- Wright, R. (2005) Trial Distortion and the End of Innocence. *University of Pennsylvania Law Review. 154.* 79
- Zielinska, E. (2015) Negotiated Prosecutorial Case-Endings. In Ligeti, K (ed.) *Towards a Prosecutor for the European Union.* Vol. 2, Oxford, Hart.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 37-58
ISSN 1512-5505

GENOCIDE IN NORTHWESTERN BOSNIA AND HERZEGOVINA: A SOCIOLOGICAL AND PEDAGOGICAL ANALYSIS OF CRIMES AGAINST HUMANS AND AGAINST HUMANITY DURING AND AFTER THE WAR

Goran BASIC
Zlatan DELIC

Abstract

The aim of this study is to reach a new understanding of genocide in northwestern Bosnia and Herzegovina during and after the Bosnian War (1992–1995). The analytical basis is a literature review of various studies from the domains of war sociology, social epistemology, and critical pedagogy. The analysis is based on the perspectives of the genocide in Bosnia as a process that began in northwestern and eastern Bosnia in 1992 and ended in Srebrenica in 1995 (in the Prijedor Municipality in northwestern Bosnia alone, more than 3000 civilians were killed in 1992). Even after mass crimes directed against the very idea of humanity – and after genocide – it is necessary to work on a pedagogy of notions focused on the politics of reconciliation and the politics of emancipation of the oppressed and disenfranchised. Therefore, it is important for the culture of peace and the politics of reconciliation to spread and promote the considerable theoretical experiences of critical pedagogy in education. We need a peaceful orientational knowledge that provides the basis for new identity politics to evolve, politics that respect the right to be different and the right to bravely distance ourselves from criminal identity politics.

Key terms

pedagogy, sociology, education, denial of genocide, war violence, interpersonal interaction, collective identity, narrative, peace potential, cosmopolitan education

INTRODUCTION

The starting point of this article is the war in northwestern Bosnia and Herzegovina (1992–1995)[1]. During the war, to drive away Bosniaks and Croats from northwestern Bosnia and Herzegovina, the Serbian army and police forces carried out mass executions and persecutions, used systematic rape, and opened concentration camps. Civilians were the direct target of these war operations (Basic, 2015a, b, c; 2017; 2018; Case No.: IT-09-92-PT; Case No.: IT-95-5/18-PT; Case No.: IT-95-8-S; Case No.: IT-97-24-T; Case No.: IT-98-30/1-A; Case No.: IT-99-36-T). For example, in the Prijedor Municipality in northwestern Bosnia alone, the number of Bosniaks and Croats killed during the summer of 1992 was more than 3000 (including more than 200 women and 100 children), while almost half of the pre-war population in the Prijedor Municipality (more than 40,000 Bosniaks and Croats) was displaced (Basic, 2015a, b, c; 2017; 2018; Cekic, 2009; Patria, 2000; Tabeau, 2009; Tokača, 2013; Wesselingh & Vaulering, 2005).

The war started in Prijedor and Ljubija at the end of the spring of 1992, when the Serbian soldiers and police forces took over the municipality offices without any armed resistance. Several villages in that area (e.g., Hambarine, Briševo, and Bišćani) were shelled by Serbian artillery, while media disseminated propaganda of "Muslim and Croatian war crimes against Serbs" in order to spread panic (Basic, 2015a, b, c; 2017; 2018; Case No.: IT-09-92-PT; Case No.: IT-95-5/18-PT; Case No.: IT-95-8-S; Case No.: IT-97-24-T; Case No.: IT-98-30/1-A; Case No.: IT-99-36-T). The inhabitants of these villages were unarmed and sought refuge in the mountains and valleys around Ljubija. Serbian soldiers and police officers caught a large number of refugees. Some of them were immediately killed in forests, and others were transported to Ljubija, where they were beaten on the main square or in the local football field. In the end, they were executed at the football field or in other locations near Ljubija (Basic, 2018; Case No.: IT-97-24-T).

The new war order in Prijedor and Ljubija normalized the existence of concentration camps in society. For example, in the Omarska and Kerterm camps, about 6000 to 7000 Bosniaks and Croats (including 37 women) were kept in terrible conditions in the summer of 1992. Hundreds of them died from hunger and abuse. Hundreds more were transported to various locations and shot dead (Basic, 2015a, b; 2017; 2018; Case No.: IT-09-92-PT; Case No.: IT-95-5/18-PT; Case No.: IT-95-8-S; Case No.: IT-97-24-T; Case No.: IT-98-30/1-A; Case No.: IT-99-36-T).

The participants in the interview (Basic, 2017; 2018), who were detained in the camps, have told stories of how the camp detainees died in large numbers because of food scarcity, diseases, beatings, and planned executions. Firearms were rarely used; instead the guards used batons, baseball bats, or knives. According to the interviewees, all prisoners lost between 20 to 40 kg of body mass, so much weight they could barely stand and move around. The general atmosphere and the ritualized violence in camps made the detainees apathetic, and sometimes it seemed as if they were waiting for death to end their suffering (Basic, 2015a, b).

This study is based on sociological and pedagogical analysis of the phenomenon of genocide as a process (Bećirević, 2009; Fein, 1979, 1993; Bischoping, 2004; Darder, 2011; Schneider, 2014; Bentrovato, 2017; Lybeck, 2018), which in the case of Bosnia began in the eastern and northwestern areas in 1992, continued during the war, and culminated in Srebrenica in 1995. Based on a sociological and pedagogical perspective, genocide in Bosnia is ongoing with a systematic denial that it happened by politicians in the Bosnian entity Republika Srpska (Bećirević, 2009, 2010; Medić, 2013; Mahmutćehajić, 2018).

Genocide because of war violence and the post-war denial of genocide form the primary focus of this paper. Previous studies of the violence that occurred during the war in Bosnia and Herzegovina are not sufficient for such an analysis because they show a one-sided image of the phenomenon of war violence and its participants – the perpetrators and the victims of violence – developing the image of the phenomenon of war violence in the analyses of town sieges and shelling, and of the killings, rapes, and displacement of civilians, both adults and children (Bougarel, Helms, & Duijzings, 2007; Stover & Weinstein, 2004). The examples of the perpetrators of violence are presented via the images of soldiers and police officers who killed, raped, and displaced civilian inhabitants. Among the examples of the victims of violence, we often see the images of killed, raped, and displaced adult and underage civilians (Bougarel et al., 2007; Stover & Weinstein, 2004). Researchers have discovered the importance of post-war stories (Bougarel et al., 2007; Stover & Weinstein, 2004) but have not paid attention to violence as a product of usual human interactions (Blumer, 1969/1986; Garfinkel, 1967/1984; Riessman, 2008).

The need for studies of the relationship among war violence, genocide, and the denial of genocide has never been as clear as today – after the many decades of Serbs denying mass crimes and the denial of the genocide carried out by the Serbian army and police forces in the war against the civilian population in Bosnia and Herzegovina from 1992 to 1995. In this paper, we analyze several aspects of the war against the Bosnian–Herzegovinian civilian, secular, multicultural, and multi-ethnic society and aspects of the post-war period. The main parts of this paper focus on war violence and genocide (1992–1995) and the Greater Serbian denial of the genocide (from 1995 to 2018), and on the relationship among genocide, the victims, the perpetrators of war violence, and need of peaceful orientational knowledge focused on the politics of reconciliation and the politics of emancipation of the oppressed and disenfranchised.

GENOCIDE AND DENIAL OF GENOCIDE AS INTERPERSONAL INTERACTION

Collins (2008) projects an image that violence is hard to follow through. In a normal violence-free social existence, individuals act much too peacefully and helpfully with others to engage in violence. Individuals gladly engage in verbal conflicts, but they are not portrayed as violently as one would presume. Collins argues that stories about violence almost always tend to be more violent than the situation they describe. He argues that all interaction – even violent interaction – is bound to a situation, context, and positional relations among the actors (Collins, 2004). In addition, he argues that the actors in the interaction produce and reproduce the inferior and the superior (dominant) actors. Often, the inferior and the superior are appointed in the narrative process, which contributes to the construction of a specific situation – even a violent situation (Collins, 2004, 2008).

Presser (2013) paints a diversified image of social reality, especially in a war situation, where an act seen as righteous by one side is the worst atrocity for the other. The split logic of a diversified reality is produced and reproduced, inter alia, through stories. These stories produce and reproduce dominant actors in these violent situations, actors who acquire a sort of permission to hurt the inferior actor. In an interesting way, Presser highlights how the dominant actors define themselves as being so powerless that they could not avoid hurting the inferiors. The dominant actors are not only given a permission from the society to use violence but also seem to have been caught in a violence-interactive web without a way out.

Presser (2013) writes that Tutsis in Rwanda, prior to and during the genocide in 1994, were called "cockroaches" and "dogs" and that Jews in Nazi Germany were called "rats." Disparaging those who are the target of a violent attack means that an object of lesser complexity than the perpetrator is created, which confirms the justification of the violence (cf. Katz, 1988; the term "righteous slaughter"). Presser notes that dominant perpetrators of violence are often under the influence of stories that are produced, reproduced, and distributed throughout the society. She argues that the new social order that emerges in a society during a war results in the de-humanization of those subjected to violence. It is also common that the use of violence is normalized into everyday interaction, thus becoming the prevailing norm in a war society.

The Holocaust during the Second World War was in many cases very efficient and industrialized; the usual goal was to kill from afar, impersonally, although those who held the power in concentrations camps were also involved in very personal and sadistic acts (Bauman, 1991; Browning, 1992; Megargee, 2013a, b). Is there interaction between action and power in wartime, and is a certain amount of motivation and energy necessary for violence (i.e., do those in positions of leadership need a smaller amount of energy because of the factors that placed them in the position to begin with)? The stories and formulations of the participants of this study do not emphasize a distant, evil, and/or powerful leader who motivates the masses (perhaps to some extent with a symbolic diminishing of the ethnic target) or gives orders. Instead, the leaders of violence in these stories are former neighbors, colleagues, and others known to the victims, in contrast to the violence that occurred during the Holocaust.

Also in contrast to the Holocaust, when the war in Bosnia and Herzegovina is discussed, violence is regarded as an *individualized use of violence* because the perpetrators were most often acquainted with the victims. As noted, stories reveal that firearms were seldom used and that baseball bats or knives were used instead. These features could be compared with the examples of violence in Rwanda, as in a study by Hatzfeld (2005), where the violence was more similar (perhaps even "crueler") to the violence that occurs in the descriptions analyzed by Basic (2017, 2018), in contrast to the typical examples of industrialized extermination during the Second World War.

The participants in these studies often describe the perpetrators as persons who enjoyed humiliating, beating, killing, and hurting others in different ways. This characterization differs from Collins' view (2008) that soldiers are not at their most competent when *violence occurs up close* and that individuals aspire to solidarity and agreement. One of the explanations for such acts committed by soldiers is the pressure they experience during war to show courage in close combat, with the aim to overpower the other, the enemy. During war, enemies are the target of violence; they must be exposed to violence and neutralized. Police forces and soldiers in northwestern Bosnia and Herzegovina were not close to any battlefronts; therefore, civilians were assigned the roles of enemies. By using force against the civilians, soldiers proved their supremacy over the enemy even when the enemy was abstract, unarmed, and harmless (Case No.: IT-95-8-S; Case No.: IT-97-24-T; Case No.: IT-98-30/1-A; Greve & Bergsmo, 1994; Medić, 2013). Another explanation could be found in the widespread militarization and emotional build-up that occurred before the war with demonization of the enemy. People most probably became more brutal because of that process.

Interpersonal interactions that cause violence continue even after the end of a violent situation. In fact, memories of the perpetrators and the victims of war violence do not exist solely as a verbal creation in contemporary Bosnia and Herzegovina. The stories of violent situations have their own lives after war and continue to be important both to individuals and to the social life. Individuals who were driven out of northwestern Bosnia during the war in the 1990s belong, from a legal perspective, to the recognized category of the victims of war violence. They have lived through a war against humanity, including most of various violent crimes (Case No.: IT-95-8-S; Case No.: IT-97-24-T.; Case No.: IT-98-30/1-A; Greve & Bergsmo, 1994; Medić, 2013). A number of perpetrators were convicted at the Hague Tribunal and the Court of Bosnia and Herzegovina, at the War Crimes Chamber (Court of Bosnia and Herzegovina, 2018; ICTY, 2018a, b). Criminal offences committed in Prijedor and Ljubija qualify as genocide based on the charges against former Serbian leaders Radovan Karadžić and Ratko Mladić (Case No.: IT-09-92-PT; Case No.: IT-95-5/18-PT).

To examine the processing of experienced or described violent situations in an environment arising from a series of violent events during a war, the analysis must be carried out simultaneously at the institutional and individual levels. In the entity of Republika Srpska, the Serbian Republic of Bosnia and Herzegovina, to which Prijedor and Ljubija belong administratively, the institutions deny the genocide. Such a perception of the wartime becomes the central subject of the post-war analyses of the phenomena of war violence, victimization, and reconciliation (cf. Bećirević's /2009, 2010/; Medić's /2013/ and Mahmutćehajić's /2018/ analysis of the denial of the genocide in Bosnia and Herzegovina). The existence of Republika Srpska is based on the genocide committed in Prijedor, Ljubija, and many other towns in Bosnia and Herzegovina. Therefore, it is crucial to analyze the denial of systematic violent acts committed during the war by the political elite, which was ascertained at the Hague Tribunal and the Court of Bosnia and Herzegovina, the War Crimes Chamber, and which daily influences the Bosnian population through media.

GENOCIDE – THROUGH HISTORY UNTIL BOSNIA, AND AFTERWARDS

Kuper (1971, 1981) argues that in modern times, genocide occurs as three types: (1) colonial genocide, (2) genocide as an incidental consequence of a more general and greater violation of political and social rights, and (3) genocide where mass killings, on an ethnic, national, religious, or racial basis, almost become state policies.

Colonial genocide began to be carried out in the 15th century when Europeans and (later) North Americans established their dominance throughout the world. However, one can most assuredly *not* say that the whole conflict between the West and the rest of the world is genocide. Nevertheless, during the widespread and complex process of European expansion, there were *individual cases* of genocide, like those committed against the Native Americans in California in the 1840s and the Aboriginals in Tasmania and Queensland (Australia). Sometimes these acts were committed by immigrants without an explicit authorization by their states, but it must be pointed out that the states rarely intervened in time to prevent or stop these mass crimes (Kuper, 1971, 1981; Bećirević, 2009, 2010; Fein, 1979, 1993; Bischoping, 2004; Darder, 2011; Schneider, 2014; Bentrovato, 2017; Lybeck, 2018).

When discussing the communist (socialist) regimes of the 20th century, especially, genocide occurred at the edges of the great processes of forced social changes. In the Soviet Union, China,

and Cambodia, repressions and murders were mostly directed against political opponents and social classes such as land owners, aristocracy, wealthy peasants, capitalists, and the middle class, all by their nature considered hostile to the goals of socialism. Notwithstanding the cruelty of these measures, according to the United Nations' definition, they cannot be considered genocide. However, a certain number of communist states carried out deportations and killings of targeted ethnic and national groups, as happened to the Chechens and the Tatars in the Soviet Union in the 1940s and the Muslim Chams (an ethnic group in rural areas in Cambodia) and the Vietnamese in Cambodia. In these cases, the communist regimes treated national and ethnic groups – and even social classes – on a "racial basis" because all the members of the group, regardless of what an individual did, were viewed as an enemy of the state. These groups usually refused to renounce their religious beliefs and traditions or were involved in small crafts, trade, or industries that were forbidden in communist regimes. In all cases, the murder of ethnic, national, religious, or racial groups presented a relatively small part of the general oppression and brutal acts of the state (Kuper, 1971, 1981; Bećirević, 2009, 2010; Fein, 1979, 1993; Bischoping, 2004; Darder, 2011; Schneider, 2014; Bentrovato, 2017; Lybeck, 2018).

Large-scale genocide occurs when racism or extreme nationalism become principles that govern a state. The most famous (but not the only) examples, claims Kuper (1971, 1981), are those committed by the Ottomans under the Young Turks and by Nazi Germany. In all of these cases, the state had promised their followers unlimited happiness and progress in the future when the allegedly hostile group was finally removed. At the same time, the moderate members of the ruling group who did not approve of genocide were also murdered. Genocide is always accompanied by violations of other human rights.

The Genocide Convention was latent for almost 40 years (Convention on the Prevention and Punishment of the Crime of Genocide, 1948). Its creators planned to establish an international criminal court that would prosecute and (as they believed) deter other perpetrators, but with the Cold War, all possibility of its establishment was ruled out. The international community did nothing, and even sometimes actively encouraged genocide or acts bordering on genocide in places such as Sri Lanka, East Timor, and Guatemala, and indeed in Bosnia and Herzegovina by imposing an arms embargo - which made it more difficult for the genocide victims to defend themselves (Denich, 1994; Bećirević, 2009, 2010; Denich, 1994; Malešević, 2011; Medić, 2013; Mahmutćehajić, 2018). In the 1990s, the United Nations and other great powers had even ignored the organized and systematic so-called "ethnic cleansing" of the non-Serbian population – that is, the genocide in Bosnia and Herzegovina – and the indications of genocide in Rwanda, and reluctantly involved themselves in actions that brought Bosnian Muslims into even greater danger in former Yugoslavia. Large public protests and especially the fears that this genocide's acts could largely endanger the international order finally compelled the United Nations and the United States of America to take action. The UN's security council established two special tribunals for the prosecution of war criminals and the perpetrators of crimes against humanity and for the genocides committed in Rwanda and former Yugoslavia. Both tribunals condemned genocide and significantly expanded the scope of the human rights law by prosecuting rape cases as "crimes against humanity." By the end of the decade, most of the states had signed the treaty to establish the International Criminal Court, finally fulfilling some hopes from the plans of the 1940s. The International Criminal Court and its role in prosecuting war criminals is significant not only for legal experts and theoreticians of international law but also for social

science researchers who are not jurists. From the perspective of Bosnia and Herzegovina, this role could also be crucial in a globally significant context of the need for justice and in the context of the search for an answer to the question of which values will rule the 21st century (Bećirević, 2009, 2010; Fein, 1979, 1993; Bischoping, 2004; Darder, 2011; Schneider, 2014; Bentrovato, 2017; Lybeck, 2018).

In the 21st century, it is possible to discuss the unsubdued excess of violence and the "fluid fear" of new violence. This excess of violence, viewed from the Bosnian–Herzegovinian perspective, could be interpreted as a global scarcity of justice – and as an uncertain search for answers to the hardest questions that can be asked after *genocide* (Denich, 1994; Bećirević, 2009, 2010; Denich, 1994; Malešević, 2011; Medić, 2013; Mahmutćehajić, 2018). If we consistently understand the meaning of what we call *crimes against humanity*, then clearly, *genocide* also connotes such a form of violence that surpasses local and regional frameworks with its universal meaning. For this reason, studies of this very complex social phenomenon require the greatest possible scientific responsibility.

The historic experience of genocide and the Holocaust demonstrates that genocide results from affirmation of a special system of interactions among its perpetrators, designated in the literature by the generic name of 'fascism', even though it encompasses a wide range of ideas and movements including Nazism, national socialism, far-right extremism, extreme nationalism, and, in more recent times, *neo-fascism*. Most genocide experts agree that *ideology* has the most significant role in the processes of preparing for genocide, and that ideology, and what makes it possible, should be seen as a significant causal force. Almost all historic, sociological and pedagogical studies of the crimes of genocide indicate the crucial significance of some sort of communal and unique ideology (Denich, 1994; Des Forges, 1995; Bischoping, 2004; Waldorf, 2009; Schwarzmantel, 2009; Kalanj, 2010; Darder, 2011; Malešević, 2011; Bellamy, 2012; Marinković & Ristić, 2013; Ravlić, 2013; Schneider, 2014; Sanín, & Wood, 2014; Vudli, 2015; Brehm, 2015; Nussio, 2017; Bentrovato, 2017; Basic 2017, 2018; Lybeck, 2018). The genocide in Bosnia and Herzegovina has shown how such an ideology is revitalized and how in the new social conditions it can mobilize a large number of followers ready to commit the most atrocious crimes against "the other" (Denich, 1994; Bećirević, 2009, 2010; Denich, 1994; Malešević, 2011; Medić, 2013; Mahmutćehajić, 2018). Močnik (1998/1999) correctly argues that the end of the Second World War was just a military victory. Only fascist states and their armies were defeated. Fascism as a historical practice, political method, ideological network, and a pattern of thought was not crushed. Fascism has survived and is now returning, even where it was defeated.

The experience of genocide in Bosnia and Herzegovina and the inadequate sanctioning of perpetrators (and deniers) of genocide call for caution and constant re-examination of social conditions that make something like that possible (Denich, 1994; Bećirević, 2009, 2010; Denich, 1994; Medić, 2013; Mahmutćehajić, 2018). The precedent of what happened in Bosnia and Herzegovina, where the perpetrator was recognized but not sanctioned, encourages followers of extreme ideologies to new forms of extremism and violence, where genocide towards others cannot be excluded in advance. The indications for such an attitude are visible in the statements of the European right and the neo-fascists, who in an ideological sense look up to the Serbian extremists who carried out the last genocide over Bosniaks in the war against the civilian population of the secular Republic of Bosnia and Herzegovina.

GENOCIDE AND THE SOCIETY OF RISK

The cases of genocide in modern times occur in war conditions or during great state upheavals, when old rules stop applying, when circumstances that lead to instability increase feelings of insecurity and inspire a vision of changes, and finally when the opportunity is created to remove internal social divisions and create a prosperous harmonious future (Denich, 1994; Des Forges, 1995; Waldorf, 2009; Schwarzmantel, 2009; Kalanj, 2010; Malešević, 2011; Bellamy, 2012; Marinković & Ristić, 2013; Ravlić, 2013; Sanín, & Wood, 2014; Vudli, 2015; Brehm, 2015; Nussio, 2017). The Great War – which only later came to be called the First World War – was a significant turning point because it created a culture of killing and revealed what highly organized states could accomplish (McCarthy, 1996). Already in the 19th century and at the beginning of the 20th century, especially during the Balkan Wars, the Balkan Peninsula was "ethnically cleansed" of the local Muslim population that constituted 52% of the population in the 19th century.

McCarthy (1996) claims that the Balkan Wars are among the greatest human tragedies because about 27 percent of Balkan Muslims perished in various ways, while a third found sanctuary in Anatolia, Turkey. The Jews in Nazi Germany experienced the greatest ever discrimination in the 1930s, but the Nazis started the Holocaust only in the conditions of all-out war. Simultaneously with the advance of an information society and *cyber*culture, various processes of controlling and manipulating people and their social existence arose. Social mechanisms of control, surveillance, and management can result in violence, conflicts, destruction, and mass crimes that distort the linear concepts of modern history as continuous progress and development of human society. The surveillance of the society over individuals takes place not only through consciousness or ideology but also in the body and with bodies. For a capitalist society, biopolitics is that which is the most important, somatic, and physical (Hardt & Negri, 2001, 2011). In a sense, history is investigated only from a forensic perspective that can give useful information during judicial proceedings (Buden, 2012).

Faced with the task of redefining basic notions while considering the concrete social problems of the first and second decades of the 21st century, sociologists have introduced new distinctions and notions such as "first modernity," "second modernity," and "reflexive modernity." Instead of non-critically imitating the favorite slogans of new economy, which claims we live in the "society of knowledge" (Hindess, 1995; Weber et al., 2011; Guile & Livingstone, 2012; Broome, 2014; Couldry & Hepp, 2016; Basic, Delić & Sofradzija, 2019) a few years ago, Ulrich Beck (1992) introduced the disturbing paradigm of a "global risk society." Living in a global risk society means living with unmastered non-knowledge (*Nichtwissen*), that is, more precisely, in the simultaneity of threats and non-knowledge, and the consequent political, social, and moral paradoxes and dilemmas. The story of a "society of knowledge" is a euphemism of the first modernity. The global risk society is a society of non-knowledge in a very precise sense. In comparison to premodernity, it cannot be overcome with more and better knowledge, with more and better science, but is, on the contrary, a *product* of more and better science. To live, therefore, in a milieu of non-knowledge means to search for unknown answers to questions no one can clearly formulate (Beck, 1992). The new global risks, among which we can also count risks from various *neo-fascist* and *genocide practices*, cannot be placed within the frameworks of national states, and they cannot be adequately analyzed by starting with the epistemological preconceptions of methodological nationalism.

Beck rightly calls "methodological nationalism" the non-critical equivocation of society with a national state (Beck, 2005). Because of the symbolic and political dominance of methodological nationalism and ethnonationalist ideologies, in the Bosnian–Herzegovinian environment, there are still strongly expressed reductionist tendencies that to a significant degree preclude comprehensive cognizance of the Bosnian–Herzegovinian post-war reality in a global context. The symbolic construct of the difference between "us" and "them," which can be based on even the most insignificant characteristics, can result not only in discrimination but also in the most monstrous forms of violence such as *genocide*. At the most general level, one can say that *genocide*, as a global civilizational – or anti-civilizational – phenomenon represents the peak of *violence* against the very *idea of humanity.* After the Second World War, all legal documents that speak of the universal human and citizen (of the world) rights were derived precisely from this humanistically understood and interpreted idea of humanity.

GENOCIDE – COLLECTIVE IDENTITY AND NARRATIVES

The division by ethnicity in post-war Bosnia and Herzegovina occurred because of the revival of the same erroneous logic that led to war against the civilian population of Bosnia and Herzegovina (Vlaisavljević, 2007, 2009, 2012). Vlaisavljević (2012: 16-17) states that we cannot know anything important about the state politics of a region unless we perceive its connection to war. All ruling politics in and around Bosnia that occurred from the 1990s to today are the politics of collective identity. These politics, which were created during the war and after its end, base their interpretation of social and cultural reality, their narration of history, and their future programs on the experience of large battles and mass casualties from the last war. Vlaisavljević (2012: 17) believes that we should take seriously the fact that after every Balkan war, the basic patterns of culture, politics, and society – and thus collective identity – change.

We should contrast the ethnic and religious fundamentalisms (which are again dangerously proliferating in the years, appearing under the various forms of neo-fascism, the Chetnik movement, the Ustasha movement, and Islamism) with citizen, peaceful, cosmopolitan, project, creative, and civilian identities (Costa-Pinto & Kallis, 2014). The identities before genocide and after genocide cannot remain the same. Within the wider Bosnian–Herzegovinian environment, one must learn about and understand the project identities that are established by acknowledging genocide among those who are close to the perpetrators, and insist on other forms of citizen activism, above all insisting on the culture of peace and on punishing war criminals (Costa-Pinto & Kallis, 2014). However, it is also necessary to simultaneously and urgently work in various fields to aspire to emancipation and to exiting the circle of violence by insisting that competent institutions punish the criminal groups that have since the 1990s continuously or discontinuously participated in robbing the working class, the public goods of Bosnia and Herzegovina, Serbia, Croatia, and other former Yugoslav republics and territories.

Vlaisavljević (2012: 19) believes that the existence of three ethnic nations in Bosnia and Herzegovina implies three great narratives in force and in circulation in public opinion. In the relentlessly told and retold war stories, the history of this country indicates that the three ethnic groups have three different versions of history. Because there cannot be three different truths but only one historic truth (related, in the case of Bosnia and Herzegovina, to the genocide committed by the Serbian army and police forces) the question arises of the influence of nar-

ratives on the current social, political, and security situation in Bosnia. If today's generation in Republika Srpska is compelled to keep the martial "us" from the times of slaughter and rapes of civilians, then the war against Bosnia and Herzegovina symbolically has not ended and will not end until the full extinction of its Bosnian population.

GENOCIDE AND IDEOLOGY

The time and space we occupy and every moment of time that approaches us from an unpredictable future seem to leave us with no chance, in the name of safe and available knowledge, to call for a clear (unambiguous, transparent) distinction of the states of peace and war that we indicate by these classic designations. The past is not private property: it is not an exclusive property of history as the 'science of the past', just like the future is not the property of futurology or private property of private companies that deal in risk management or deposit insurance. We may have entered a new dark age of dogma, an age of new totalitarianism, an age without precedent in the history of human society. For totalitarianism to act in what remains of it, something is required that determines the substituting structures of the ideology, such as political religions in the case of Islamism as jihadism, the renewal of neo-fascist movements because of the crisis of sovereignty of the nation-state in Europe, and immigration as the main problem of the 21st century. It is necessary for terrorism and absolute control to fully unite in a global state of emergency (Denich, 1994; Des Forges, 1995; Sim, 2004; Waldorf, 2009; Schwarzmantel, 2009; Kalanj, 2010; Malešević, 2011; Bellamy, 2012; Marinković & Ristić, 2013; Ravlić, 2013; Sanín, & Wood, 2014; Vudli, 2015; Brehm, 2015; Paić, 2016; Nussio, 2017). How can all of these different vocabularies be reconciled? Is that even possible?

Marinković and Ristić (2013: 26) argue that even though the debate about ideology has lasted more than 200 years, the notion and the debate were unjustly denied a specialization, a discipline, and a wider and clearer theoretical and methodological framework. It appears that for now, one of the most acceptable reasons that the notion of ideology is disciplinarily, theoretically, and methodologically marginalized and vague is the marginalization of the very sociology of knowledge. Moreover, it can appear that in our chaotic, post-normal, and "emerging society" – a society that is very difficult to precisely label – in this "global" or "post-global society" that is being born or is disintegrating in front of our very eyes, depending on the theoretical position of the researcher, the main reason for the marginalization of the studies of ideology lies in the non-existence of transdisciplinary critical studies of the ideology of the new economy of knowledge, that, by the way, flirts with market fundamentalism, conservatism, and neo-fascism.

We could only, perhaps, oppose ideology if we could clearly and unambiguously deconstruct the language, the narrative structure, of the new economy of knowledge about safety and of the entire managerial (new) speech of "improving," "advancing," and "accelerating," that is, about the alleged assurance of the quality of life at a time when it appears that life, in many parts of the world, has either become too cheap or appears purposeless for too long (Vlaisavljević, 2007, 2009, 2012).

Ideology could perhaps be opposed only by those rare individuals who are not involved in the political games behind the scenes and in the manipulations related to the fight for power (Schwarzmantel, 2009; Waldorf, 2009; Kalanj, 2010; Marinković & Ristić, 2013; Ravlić, 2013;

Sanín, & Wood, 2014; Vudli, 2015; Nussio, 2017). All "warring parties" (the victim and the perpetrator) and the so-called "international observers" (although the meaning of these terms in the second decade of the 21st century is neither stable nor homogeneous) should have confidence in such individuals, if they exist. For this reason, war, in the discursive and actual forms it appears today, is difficult to explain and understand, not only to people who did not experience it but also to philosophers and sociologists and those who have spent the entire time (of the duration of an actual war) "at the scene," in the field, where the war occurred (Katz, 1988; Collins, 2008; Žižek, 2008; Presser, 2013). The problem, however, is also that war does not occur just by itself, as a "clear" continuum of war that originates as the very event of war and takes place the entire time in an evident manner, thus demarcating and separating itself from the state of peace (the peace that existed before the start of the war and the state of peace that ensued after its ending).

GENOCIDE – SOCIETY AFTER ITS END

The sociology of the post-societal era studies a *society after its end*, the social contexts of the erosion of a society in history. Or, to be more precise, since the syntagm of society after its end contains an evident contradiction, the sociology of the post-societal era analyzes and critically studies *social contexts* where preceding social principles are undermined and replaced with other elements and relationships. A society cannot be established without any previous remnants and in perpetuity. However, to say that a society has no foundations does not mean that all concepts of social foundations are necessarily erroneous (Fukuyama, 1992; Beck 1992; Huntington, 2002; Beck, 2005). We are not talking about a complete absence of foundations but the weakening of their ontological status. Therefore, in the methodological and analytical sense, one should differentiate post-foundationalism from anti-foundationalism. Only the second one rejects the society's foundations. According to one interpretation, where there is a society, there are *zones*; however, such a statement deepens the inherited aporia between a *society after its end* – a society that disappears but not without trace, not without remnants – and the *social sphere*, which remains masked with cultural discourse in post-modernism that sweeps over the entire sphere of a *society after its end*, together with the *social sphere* (Fukuyama, 1992; Beck 1992; Huntington, 2002; Beck, 2005).

What is the difference, then, between a society, or a society after its end, and a social sphere? The social issue (concerning care) is definitely not one of the many political, cultural, economic, or moral issues we encounter during the second decade of the 21st century. On the contrary, it is constituted at the society. In accordance to how one responds to it, it impacts a society by constructing, sharing, or even disintegrating it (Fukuyama, 1992; Beck 1992; Huntington, 2002; Beck, 2005). The social issue concerns more than the quality of life in a society or an idea that life is made more safe, stable, meaningful, bearable, "human," dignified, and fair for its members. Essentially, the issue is what makes people members of a certain society, that is, social beings (Malešević, 2011).

The war against the Bosnian–Herzegovinian civilian population, the concentration camps for civilians, genocide, and the denial of genocide – these are not notions of a local geo-epistemology that arises in certain illuminating Bosnian, esoteric, and enclosed spaces of knowledge and experiences of the world. The said phenomena are global phenomena. They are deeply related to globalization and the defeat of the ideology of globalism (Hindess, 1995; Weber et al., 2011;

Guile & Livingstone, 2012; Broome, 2014; Couldry & Hepp, 2016; Basic, Delić & Sofradzija, 2019). They are related to the ideas of creating a world without boundaries and to the ideas of creating a global world of knowledge and information (Calhoun & Wieviorka, 2017).

The experience of war is never only a material experience of destruction, killing, and dying; it is always more than that. It is never reliably clear where the signs and portents of war catastrophes originate. But it is clear that there is no war without a sign, a language, an ideology. The war against Bosnia was conceived, led, and continued after 1995 under the idea that the *coexistence of peoples is not possible*. The ideology of a so-called "humane resettlement of population," of ethnic cleansing and the practice of genocide, was conceived in the heads of humans (Bećirević, 2009, 2010; Denich, 1994; Malešević, 2011; Medić, 2013; Mahmutćehajić, 2018).

The spectral reality of anti-Bosnian ideologies, politics, and practices consists of the fact that such ideologies, politics, and practices are trying to be formulated with an obscure language and obscure political narratives, in which the key words are "entities," "portents," "vital interests," and similar terms (Vlaisavljević, 2007, 2009, 2012). The language itself, the vocabulary, can become infected, impregnated, and hegemonized with violence. Žižek (2008) argues that language is infected with violence under the influence of contingent "pathologic" conditions that inverse the internal logic of symbolical communication.

Vlaisavljević (2012: 205) believes there is no clear national identity without racial and ethnical cleansing. A sign of the perpetual symbolic and actual war is the situation that has lasted from 1995 in the Bosnian–Herzegovinian semiotic, narrative, psychopolitical, and ethnomathematic environment, when human beings could once and for all be classified, sorted, presented, self-presented, and so on according to absolute "clear," beyond human, and beyond language criteria; when humans could be designated, differentiated, and recognized and could communicate not according to the criteria of conduct that arise from their particularities and individualities but according to a certain collective *a priori* criteria of differentiation that would be established based on preceding codes and signs that we could, conditionally, call "portents." "Portents" are not signs but something different, something unclear, mystical, and seductive. Only in post-war Bosnia and Herzegovina is the practice for political parties to be called "parties with national portent." Such a practice does not lead to optimism or hope that in Bosnia and Herzegovina there is the potential for a post-national, civilian establishment of a state and a society. The "portents" are, first and foremost, political, ideological, and identity mystifications. They are linguistically produced and reproduced illusions (delusions, appearances). Their use in political narratives has the goal to explicitly (or covertly) build on the normalization of the *pathological forms of the political representations of citizens* to rule people, things, and resources (Vlaisavljević, 2007, 2009, 2012). The "portents" are *excesses of purism*. They are the least post-modern ("post-normal") remnants of the collective nostalgia for the lost "*source*," the remnants of the pseudological and the pre-modern. It is with the help of the *seductive purism of "portents" that illiterate folk* dream in vain of a "racial," "ethnic," "national," and "religious" *purity*. In the post-war Bosnian–Herzegovinian ethnoclerical Nazi politics of the representation of the collective identities of the citizens of Bosnia and Herzegovina, "portents" function as rhetorical, political, logical, and identity tricks. These tricks enable the Bosnian–Herzegovinian politicians and tycoons to deprive people (individuals) of their capacity for thought and of their ability to perceive clearly, to "immunize" (amputate) against their ability to exercise their freedom of choice, to deprive them of their power to creatively interpret the world.

Therefore, "portents" cannot function as *rational communication signs* which would make a dialogue between human beings possible. On the contrary, "portents" can function only as "ghostly," "spectral" signs of *pathological identity politics*, that is, as "signs" of deliberately created collective deaths – genocide – the symptoms of "the death of man" as a *collective subject* and the carrier of universal human dignity.

GENOCIDE AS A PEDAGOGICAL CHALLENGE

Naming essential social problems in the post-genocide society, problems that individuals and communities face in the field, must not turn into a vacuous verbalism that arises from a position of power; true dialogue always implies a certain kind of humility. Paolo Freire (1968, 1992) believes in the possibility of the humanization of society and assumes the possibility of a contextual but historically conditioned dialogic learning and the exchange of education and political ideas with others. The essence of communication is openness and readiness to compromise, while faith in people is the precondition for the exchange of words during the communication process of an interactive designation of reality. Interpersonal communication is the foundation of the process of the creative emancipation of the oppressed. People can be classified in various ways: based on their class, ethnicity, gender, social role (for example, the role of a victim or a criminal), or otherwise. To name a social reality – to use the right term to describe it – already means to Freire to transform the society. In that sense, the communication of those who collectively construct and reconstruct the society should not be an act of arrogance (Bischoping, 2004; Darder, 2011, 2012; Fischman & McLaren, 2005; McLaren, 1996; McLaren & Jaramillo, 2010; Schneider, 2014; Bentrovato, 2017; Lybeck, 2018).

Freire (1968, 1992) believes that communication indicates faith in people and a hope that a more humane world is nonetheless possible. The humanization of society suggests a community of equal individuals who debate and can think for themselves during a dialogue with others, and as part of a social community (Bischoping, 2004; Darder, 2011, 2012; Fischman & McLaren, 2005; McLaren, 1996; McLaren & Jaramillo, 2010; Schneider, 2014; Bentrovato, 2017; Lybeck, 2018). We believe that in this lies the hope for a culture of peace in a post-genocide society (Basic, Delić & Sofradzija, 2019). An individual, as a member of a people, always has the freedom to self-distance from a crime committed in the name of an entire people the individual (completely accidentally) belongs to; they could not choose to be born or not as a member of this or that people. The ideas by Friere are significant in the context of the communication struggle against the deniers of genocide, as can be observed in the many decades of media and political denial of genocide, constantly employed by almost all politicians in the Bosnian–Herzegovinian entity called Republika Srpska (Bećirević, 2009, 2010; Medić, 2013; Mahmutćehajić, 2018).

It appears that education for peace in the 21st century is possible only as a critically and self-critically colored dialogic and emancipatory education that assumes the possibility of institutionalizing an optimistic version of citizenship (Basic, Delić & Sofradzija, 2019). The education for peace implies faith in the possibility of the existence of individuals who belong to different peoples, nations, cultures, and religions – although the meaning of these categories should not be equated, as is often done by an irresponsible media and its superficial journalists. The education for peace, as is needed today, should respect the various historical traditions of education, and especially the sociological and pedagogical traditions of critical thinking about education

that show that fertile dialogue and an exchange of the various experiences of globalization and transition are not only possible but also are indisputably necessary. The critical education for peace should respect the painful experience of the war against the Bosnian–Herzegovinian civilian population, led in the name of an anti-civilizational idea that the coexistence of differently categorized human beings is in reality not possible (Delić, 2017). On the contrary, Bosnia and Herzegovina and its peoples have continued to coexist even after the genocide. The painful war and post-war experiences of the Bosnian–Herzegovinian people indicate that people should never lose hope in the possibility of building together a better and a more humane society.

The anguish of the Bosnian–Herzegovinian experience of life in the conceptions of others that are essentially anti-Bosnian implies, however, the possibility of communication and the possibility of creating peaceful views of the world. The endeavors to deny the genocide and deny Bosnia and Bosnianhood were based on the claims of the impossibility of their being ethically generalized, clearly presentable, and understandable. Therefore, during the past two decades, both the voluntary and the involuntary expulsion of Bosnians from their identity and homes have taken place (Mahmutćehajić, 2018). The global promise of globalization, which had in the name of a free market proffered happiness for all, was also betrayed (Basic, Delić & Sofradzija, 2019). Today, we are again in the midst of a Cold War with intermingling of the dictatorships of great dictators and the transparent and seductive dictatorships of large corporations. These corporations skillfully hide their power to oppress human desire and to create a consumer identity for Western youth behind the false idea of a "free market," a great lie for little children (Basic, Delić & Sofradzija, 2019). Nevertheless, the existing concepts of education in a global consumer society that dominate the contemporary globalized educational institutions and their research practices are based on the neo-liberal ideology that aims to self-legitimize with the help of empty logic about the omnipotence of the market, that transforms people into just consumers and thus dehumanizes them and deprives them of their essence that could make them into something more (Basic, Delić & Sofradzija, 2019). The global society of spectacle – based on the hyperconsumer race for all sorts of sensual pleasures in the 20th century – during the past few decades is becoming an even more global society of a constant chain of "emergency states," as states that normalize violence. Thus, our society, which is hard to label, is finally becoming a global society of fear of violence, the source of which often stays hidden, while formal education frequently does not even raise questions about how it is possible to live in the 21st century in such a world full of violence, oppression, fences, walls, and restrictions (Basic, Delić & Sofradzija, 2019).

Freire calls these restrictive situations "borderline situations," situations that are only at first glance an undefeatable restriction and are to be approached as challenges (and not seen as insurmountable obstacles). After overcoming such challenges, we can in theory free ourselves and achieve transcendence. Human acts of the true humanization of reality (that refuse to passively accept all that appears to be given as permanent or as an unchangeable social structure) can overcome such situations, and we can call them "borderline acts." Borderline acts are possible only with a critical view of the world and with hope and trust in people (Freire & Macedo, 2002), in addition to considering reflective action in relation to concrete social reality. Once overcome, borderline situations reveal new situations and challenges that lead to new borderline acts. Humans as creatures of practice transform society and create history, becoming historico-social beings.

GENOCIDE, PEACE POTENTIAL, AND COSMOPOLITAN IDEAS OF EDUCATION

War and mass deaths of a large number of people that have led to genocide over an entire people – such as the genocide over Bosnian Bosniaks in the war against the Bosnian–Herzegovinian multicultural society, which lasted from 1992 until 1995 – have incited the need for the construction of peaceful *emancipatory identity politics* and the need for a *new pedagogy of emancipation* of a large number of oppressed and disenfranchised people who are difficult to unambiguously name (Basic, Delić & Sofradzija, 2019). A series of conceptual difficulties concerning certain obvious paradoxes contained in the politics of collective representation of citizens after genocide can be related to these processes. For example, a large number of the Serbian people were forced to carry the weight of the crimes committed by the Serbian army and police forces.

The dominant *politics of collective representation* of a people that have led to genocide cannot remain the same after the genocide is committed. That is why we need new education politics and new politics of peaceful socioeconomic development, based on the new emancipatory pedagogies of the oppressed (Basic, Delić & Sofradzija, 2019). This specifically means that the *Great Serbian identity politics* – in the neo-fascist politics of the 1990s based on the anti-civilizational idea that "Serbs cannot live with other nations" – should be changed. It is possible to express it differently. Considering the internationally confirmed fact of the genocide against Bosniaks committed in the name of the Serbian people as a non-differentiated collective, Serbs should reflexively and critically work on deradicalizing their own politics of collective representation, and in that way free themselves, in the name of humanity and in the name of the right to be different, from the anti-educational militaristic and mythomaniac politics of oppressors, who have pushed them into a fratricidal war against their neighbors: primarily against Muslim Bosnian Bosniaks and Catholic Bosnian Croats. This Great Serbian identity politics, based on the idea that Serbs have a "God-given right" to slaughter their neighbors, should be changed (pacified), primarily by Bosnian Serbs who currently live in the genocide entity of Republika Srpska. At the same time, such a criminal politics of education and a representation of a collective identity that is founded on the Chetnik ideology should be deconstructed from within and by the citizens of Serbia; Serbia was at an international level declared responsible for genocide, yet this finding has not prevented the Serbian army and police forces from committing genocide against Bosniaks. This simultaneously means that Serbs should, from a normative viewpoint and starting with a new *critical pedagogy* (Freire, 1968, 1992; Freire & Macedo, 2002; Bischoping, 2004; Darder, 2011, 2012; Fischman & McLaren, 2005; McLaren, 1996; McLaren & Jaramillo, 2010; Schneider, 2014; Bentrovato, 2017; Lybeck, 2018), educate themselves for peace and for coexistence with other peoples and nations and thus finally emancipate themselves from the predatory, transnational, cross-border politics of collective identity that have led to genocide.

Serbs are held responsible for the genocide that occurred, although it is clear that the blame cannot be collective. There are no non-genocide and genocide peoples. *However*, there is always a latent possibility that in certain circumstances, a social group carries out genocide against another social group. Add to it the possibility of an alliance of the two social groups that deny the plural singularity of Bosnians and Herzegovinians – and in the case of Bosnia and Herzegovina, these are the official politics of its neighboring states (primarily Serbia and Croatia) – and that they join forces with propaganda and a special war against the Bosnian interpretation of social reality, then

the complexity of the construction of future identity politics and future politics of differences in the Bosnian–Herzegovinian environment can appear even more bewildering. It is especially so if one has not lived during the past decades where this occurs, i.e., in Bosnia and Herzegovina. New wars in the Bosnian environment should definitely be prevented with dialogic and rational means and with the help of acquired knowledge from the culture of peace, considering also potential emancipatory pedagogies of the oppressed and the disenfranchised (Basic, Delić & Sofradzija, 2019). So that systematic reoccurrence of war violence does not transpire again in the future, international criminal courts exist to determine the responsibility of individuals and groups who have carried out genocide or mass crimes against humanity. Such convictions act as warnings that mass crimes and mass violations of human rights should not happen. The genocide committed in the heart of Europe during the last decade of the 20th century and mass crimes carried out in the name of the Serbian or any other people represent an important red line. At the end of the second decade of the 21st century, they are a sign that Serbs should finally and peacefully change their perspective with the help of a new critical pedagogy and together with their neighbors, Croats, Bosniaks, and Albanians. This change in moral outlook is possible only with the aid of an honest dialogue that aims to educate for peace – that is, with the help of *logos*, and not the help of a necrophilic insistence on *neo-fascist ideology* and a myth that Serbs *cannot coexist with other nations* (Basic, Delić & Sofradzija, 2019).

The *peace potential of the cosmopolitan idea of education of the sense and the meaning of coexistence*, is therefore as important in the long term for the *culture of peace* as the legitimization of universal human values such as freedom, love, solidarity, awareness, humility, critical thinking, faith in humanity, and the hope that human society can become more humane and a better place to live.

GENOCIDE IN NORTHWESTERN BOSNIA AND HERZEGOVINA – A SOCIOLOGICAL AND PEDAGOGICAL ANALYSIS

Bosnia and its civilian population were exposed to mass killings, mass deportations, and forced resettlement of the population. The foundations of this experience of war, both today and in 1992, were the ideology and mythology of a *racial*, *ethnic*, *religious*, and *lingual purity* and can be considered valuable for establishing a *culture of peace* and a *culture of non-violence* at a planetary level. A thesis presented by Vlaisavljević (2012: 31) claims that small ethnic groups today have great cultural bodies, as they have internalized great empires. With this philosophical thesis, one can understand the collective pathology of the Bosnian people. This pathology is evident in the fact that the dogmatized and indoctrinated Bosnians of different ethnic origins have shown their propensity to differentiate amongst themselves as much as possible, disregarding mutual similarities and the fact that they have for centuries lived with each other, and not just beside each other. According to one interpretation, this is occurring because *post-war Bosnian identities have been formed* according to the wishes of former intelligence elites who have become the rulers of reigning ethnic politics and the rulers of ethnic business. Based on that logic, which makes sense to certain parties but not to others, Bosnian Serbs try to show themselves as being as similar as possible to Russians, Bosnian Muslims as similar as possible to Middle East or Far East Muslims (depending on the trend, and on what is more "profitable"), and certain Bosnian Catholics as even greater Catholics than the Pope himself.

The sociological experience of war is the experience of a sociologist who, based on "participant observation" rigorously analyses and compares the "construction of social reality" in wartime, and the construction of social reality in peacetime, that is, during the period before and after the war. This experience is valuable precisely because the sociologist pays attention to how the meaning of the plural "us" is changed from the inside, gradually, and almost imperceptibly, but with far-reaching consequences.

During a longer time period marked with war (or wars), only those who have a long memory and a relatively objective perspective can clearly and precisely analyze the profound changes of the meaning of notions such as "us" and "them" and "ours" and "theirs." Maybe only unbiased scientists who observe the reality from the Moon would be able to keep a sufficient distance (non-ideological surveillance) from the ways of establishing discursive and real mechanisms of dominance (or of the resistance to this dominance) that lead to war conflict at a certain point in history.

War is one of the most unreal and mysterious phenomena of human existence. War is a real collective violence involving attempts to fully normalize, justify, and rationalize the killing of people, with reason and logic. Thus, war can appear completely unreal to many people, who cannot believe that something like war is even possible. War is unreal because there is no clear cognizance of what war really is and is not. It is not clear at what moment and in what location war begins, when and where it ends, which is why all classic wars before 11 September 2001 are most profoundly associated with the logic of space and time as well as with language, discourse, narratives, myths, legends, and ideologies. Ideologies are hard to counteract today. We can protest against a classic war, go on a hunger strike, even self-incinerate to, for example, warn of the pointlessness of mutual killing that is "normalized" or legitimized during war. Therefore, the issue of the relationship between science and ideologies in the 21st century has probably become as important as the issue of differentiating between the state of war and the state of peace.

The reason is precisely because differentiation is, in the time and space we live, becoming more and more unclear and opaque. It often leaves us without adequate instruments of determining and measuring differences between peace and war.

Malešević (2010) views war as, among others, a *material event* that includes organized physical destruction, killing, and dying. However, war does not just occur by itself. It is first born in the heads of "smart" individuals, in the heads of ideologists, professors, and academicians; it forms and intensifies in the "empty" heads of football fans, and in the heads of their leaders, and thus becomes real and almost as normal as differentiating into "ours" and "theirs."

Interpersonal interaction and social development (and society regression) evolve as a constant process of transformation within which a series of situations is perceived. They are not static or closed elements that determine humans, but their parts intertwine in a dynamic of process continuity. The preconceptions of love, hopes, values, and challenges of a certain social reality, and obstacles that prevent the full humanization of people, should be the subject of studies and analyses. Social reality is never isolated or static but is always in dialectic interaction with its opposites. As the incongruity of interactions and situations deepens to a state when the loss of their dynamic is a real threat, the result is irrationality and the transformation of social reality into myths (Freire, 1968, 1992; Freire & Macedo, 2002; Bischoping, 2004; Darder,

2011, 2012; Fischman & McLaren, 2005; McLaren, 1996; McLaren & Jaramillo, 2010; Schneider, 2014; Bentrovato, 2017; Lybeck, 2018).

These views of Freire and sociologically colored views sound as if they have been written during our twisted and difficult-to-label time – the time of media, warmongering, and biopolitical normalization of "hybrid wars," the time of denying genocides even in the face of such legal evidence as the organized killing of thousands of civilians in zones without any direct military operations in 1992. However, this situation is also becoming a matter with its own antithesis. In such a situation, the irrationality that creates myths becomes itself a fundamental matter. Its antithesis, the critical and dynamical view of the world, aims to reveal reality, unmask myths and their origins, and finally achieve humanity's task – the permanent transformation of reality for the benefit of truth and the liberation of people.

LITERATURE

- Basic, G. (2015a). Constructing 'Ideal Victim' Stories of Bosnian War Survivors. *Social Inclusion*, 3(4): 25-37.
- Basic, G. (2015b). Conditions for Reconciliation: Narratives of Survivors from the War in Bosnia and Herzegovina. *Journal of Criminal Justice and Security*, 17(2): 107-126.
- Basic, G. (2015c). Definitioner av våld i överlevandes berättelser efter kriget i Bosnien. *Sociologisk Forskning,* 52(4), 341–361.
- Basic, G. (2017). Concentration Camp Rituals: Narratives of Former Bosnian Detainees. *Humanity and Society*, 41(1): 73-94, DOI: 10.1177/0160597615621593.
- Basic, G. (2018). Definitions of Violence: Narratives of Survivors from the War in Bosnia and Herzegovina. *Journal of Interpersonal Violence*, 33(13): 2073-2097, DOI: 10.1177/0886260515622300.
- Basic, G., Delić, Z., & Sofradzija, H. (2019, accepted) Ideology of Neo-fascism, Education, and Culture of Peace: The Empirical Case of Bosnia and Herzegovina. *Critical Education*,
- Bauman, Z. (1991). *Modernity and the holocaust*. New York, NY: Cornell University Press.
- Beck, U. (1992). *Risk Society. Towards a New Modernity*. London: SAGE Publications Ltd.
- Beck, U. (2005). *Den kosmopolitiska blicken eller: krig är fred* (The Cosmopolitan Look Or: War Is Peace). Göteborg: Bokförlaget Daidalos.
- Bećirević, E. (2009). *Na Drini genocid* (Genocide on the Drina River). Sarajevo: Buybook.
- Bećirević, E. (2010). The issue of genocidal intent and denial of genocide: A case study of Bosnia and Herzegovina. *East European Politics and Societies*, 24(4): 480–502.
- Bellamy, A. J. (2012). Massacres and Morality: Mass Killing in an Age of Civilian Immunity. *Human Rights Quarterly*, 34(4): 927-958.
- Bentrovato, D. (2017). Accounting for genocide: transitional justice, mass (re)education and the pedagogy of truth in present-day Rwanda. *Comparative Education*, 53(3): 396-417, DOI: 10.1080/03050068.2017.1317997
- Bischoping, K. (2004). *Timor mortis conturbat me*: genocide pedagogy and vicarious trauma. *Journal of Genocide Research*, 6(4): 545-566, DOI: 10.1080/1462352042000320600.

- Blumer, H. (1969/1986). *Symbolic interactionism: Perspective and method*. Berkeley: University of California Press.
- Bougarel, X., Helms, E., & Duijzings, G. (2007). *The new Bosnian mosaic: Identities, memories and moral claims in a post-war society*. Aldershot, UK: Ashgate Press.
- Brehm, H. N. (2015). State Context and Exclusionary Ideologies. *American Behavioral Scientist*, 60(2): 131-149, DOI: 10.1177/0002764215607579.
- Broome, A. (2014). *Issues and actors in the global political economy*. London: Palgrave Macmillan.
- Browning, C. R. (1992). *Ordinary men: Reserve Police Battalion 101 and the final solution in Poland*. London, England: Harper Collins.
- Buden, B. (2012). *Transition Zone: About the End of Post-Communism*. Beograd: Edicija reč.
- Calhoun, C. & Wieviorka, M. (2017). *Manifest za društvene znanosti s komentarima Edgara Morina i Alaina Tourainea* (Manifesto for Social Sciences with Commentaries by Edgar Morin and Alain Touraine). Zagreb: Timpress.
- Case No.: IT-09-92-PT. (2011, 16 December). Fourth amended indictment and schedules of incidents in case of Ratko Mladić. The Hague: International Criminal Tribunal for the former Yugoslavia (ICTY).
- Case No.: IT-95-5/18-PT. (2009, 27 February). Third amended indictment in case of Radovan Karadžić. The Hague: International Criminal Tribunal for the former Yugoslavia (ICTY).
- Case No.: IT-95-8-S. (2001, 13 November). Judgment in case of Dusko Sikirica, Damir Dosen and Dragen Kolundzija. The Hague: International Criminal Tribunal for the former Yugoslavia (ICTY).
- Case No.: IT-97-24-T. (2003, 31 July). Judgment in case of Milomir Stakic. The Hague: International Criminal Tribunal for the former Yugoslavia (ICTY).
- Case No.: IT-98-30/1-A. (2005, 28 February). Judgment in case of Miroslav Kvocka, Mlado Radic, Zoran Zigic and Dragoljub Prcac. The Hague: International Criminal Tribunal for the former Yugoslavia (ICTY).
- Case No.: IT-99-36-T. (2004, 1 September). Judgment in case of Radoslav Brdjanin. The Hague: International Criminal Tribunal for the former Yugoslavia (ICTY).
- Cekic, S. (2009). *Research of genocide victims, with a special emphasis on Bosnia and Herzegovina: problems and issues in scientific theory and methodology*. Sarajevo: Institute for the Research of Crimes Against Humanity and International Law of the University of Sarajevo.
- Collins, R. (2004). *Interaction ritual chains*. Princeton: Princeton University Press.
- Collins, R. (2008). *Violence. A micro-sociological theory*. Princeton: Princeton University Press.
- Convention on the Prevention and Punishment of the Crime of Genocide. (1948). Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948. Entry into force: 12 January 1951, in accordance with article XIII. Retrieved from https://www.ohchr.org/en/professionalinterest/pages/crimeofgenocide.aspx , 180928.

- Costa-Pinto, A., & Kallis, A. (2014). *Rethinking fascism and dictatorship in Europe.* London: Palgrave Macmillan.
- Court of Bosnia and Herzegovina. (2018). *Cases before section I for war crimes*. Sarajevo. Retrieved from http://www.sudbih.gov.ba/?opcija=predmeti&;jezik=e , 20180928.
- Couldry, N., & Hepp, A. (2016). *The mediated construction of reality.* Cambridge: Polity Press.
- Darder, A. (2011). *A Dissident Voice: Essays on Culture, Pedagogy, and Power*. New York: Peter Lang Publishing Inc.
- Darder, A. (2012). Schooling bodies: critical pedagogy and urban youth. *The Victorian Adult Literacy and Basic Education Council (VALBEC)*, 35(2): 3-10.
- Delić, Z. (2017). Sociology of Knowledge and Epistemological Paradox of Globalization. In Z. Delić (Ed.), *Epistemology and Transformation of Knowledge in Global Age* (pp. 1-17). London: InTech.
- Denich, B. (1994). Dismembering Yugoslavia: Nationalist Ideologies and the Symbolic Revival of Genocide. *American Ethnologist*, 21(2): 367-390.
- Des Forges, A. (1995) The Ideology of Genocide. *Issue: A Journal of Opinion*, 23(2): 44-47.
- Fischman, E. G. & McLaren, P. (2005). Rethinking Critical Pedagogy and the Gramscian and Freirean Legacies: From Organic to Committed Intellectuals or Critical Pedagogy, Commitment, and Praxis. *Cultural Studies ↔ Critical Methodologies*, 5(4): 425-447.
- Fein, H. (1979). *Accounting for genocide: National Responses and Jewish Victimization during the Holocaust*. New York: Free Press.
- Fein, H. (1993). *Genocide: A Sociological Perspective*. London: Sage Publications.
- Freire, P. (1968). *Pedagogy of the Oppressed*. London: Penguin Classics.
- Freire, P. (1992). *Pedagogy of Hope. Reliving Pedagogy of the Oppressed*. London: Bloomsbury Academic.
- Freire, P & Macedo, D. (2002). *Ideology Matters*. Maryland: Rowman & Littlefield.
- Fukuyama, F. (1992). *The end of history and the last man*. New York: Macmillan.
- Garfinkel, H. (1967/1984). *Studies in ethnomethodology*. New York, NY: Prentice Hall.
- Greve, H. S., & Bergsmo, M. (1994). *The prijedor report* (Annex V. Final report of the United Nations commission of experts established pursuant to security council resolution 780[1992], S/194/674/Add. 2, Vol. I). New York, NY: United Nations.
- Guile, D., & Livingstone, D. W. (2012). *The knowledge economy and lifelong learning. a critical reader*. Rotterdam: Sense Publishers.
- Hardt, M. & Negri, A. (2001). *Empire*. Harvard: Harvard University Press.
- Hardt, M. & Negri, A. (2011). *Commonwealth*. Harvard: The Belknap Press.
- Hatzfeld, J. (2005). *Machete season: The killers in Rwanda speak*. New York: Farrar, Straus and Giroux.
- Hindess, B. (1995). *Discourses of power. From Hobbes to Foucault*. New Jersey: Blackwell Publishers.

- Huntington, S. P. (2002). *Clash of civilizations – and the remaking of world order*. New York: Simon & Schuster.
- ICTY, (2018a). The cases. Haag: International Criminal Tribunal for the former Yugoslavia. Retrieved from http://www.icty.org/action/cases/*4*, 20180928.
- ICTY, (2018b). Judgement List. Haag: International Criminal Tribunal for the former Yugoslavia. Retrieved from http://www.icty.org/en/cases/judgement-list, 20180928.
- Kalanj, R. (2010). *Ideologija, utopija, moć* (Ideology, utopia, power). Zagreb: Naklada Jesenski i Turk.
- Katz, J. (1988). *Moral and sensual attractions in doing evil*. New York: Basic Books.
- Kuper, L. (1971). Theories of Revolution and Race Relations. *Comparative Studies in Society and History*, 13(1): 87-107, DOI: 10.1017/S0010417500006125.
- Kuper, L. (1981). *Genocide: Its Political Use in the Twentieth Century.* London: Yale University Press.
- Lybeck, R. (2018). A Public Pedagogy of White Victimhood: (Im)Moral Facts, Settler Identity, and Genocide Denial in Dakota Homeland. *Qualitative Inquiry*, 24(8): 543–557, DOI: 10.1177/1077800417735659.
- Mahmutćehajić, R. (2018). *O antibosanstvu: muke života u tuđim predstavama* (Of Anti-Bosniasm: the Struggle of Life in the Conceptions of Others). Sarajevo: Connectum.
- Malešević, S. (2010). *The Sociology of War and Violence*. Cambridge: University Press.
- Malešević, S. (2011). Nationalism, war and social cohesion. *Ethnic and Racial Studies*. 34(1): 142-161, DOI: 10.1080/01419870.2010.489647.
- Marinković, D. & Ristić, D. (2013). *Nacrt za sociologiju ideologije (*An Outline for the Sociology of Ideology*).* Novi Sad: Mediterran.
- McCarthy, J. (1996). *Death and Exile: The Ethnic Cleansing of Ottoman Muslims*, 1821-1922. New York: Darwin Press.
- McLaren, Peter (1996). Paulo Freire and the Academy: A Challenge from the U. S. Left. *Cultural Critique*, 33: 151-184.
- McLaren, Peter & Jaramillo, E. Nathalia (2010). Not Neo-Marxist, Not Post-Marxist, Not Marxian, Not Autonomist Marxism: Reflections on a Revolutionary (Marxist) Critical Pedagogy. *Cultural Studies ↔ Critical Methodologies*, 10(3): 251-262.
- Medić, J. (2013). *Genocid u Prijedoru* (Genocide in Prijedor). Sarajevo: Grafis Cazin.
- Megargee, P. G. (2013a). *Encyclopedia of camps and ghettos 1933-1945: Volume I*. Washington, DC: U.S. Holocaust Memorial Museum.
- Megargee, P. G. (2013b). *Encyclopedia of camps and ghettos 1933-1945: Volume II*. Washington, DC: U.S. Holocaust Memorial Museum.
- Močnik, R. (1998/1999). *Koliko fašizma?* (How Much Fascism?). Zagreb: Heliks.
- Nussio, E. (2017). How ideology channels indeterminate emotions into armed mobilization. *Political Science & Politics*, 50(4), 928-931, DOI: 10.1017/S1049096517001007.
- Paić, Ž. (2016). *Totalitarizam* (Totalitarianism). Zagreb: Drugi smjer.

- Patria. (2000). *Ni krivi ni dužni. Knjiga nestalih općine Prijedor* (Without any reason. Book of the missing persons in the Prijedor municipality). Sanski Most: IPC Patria and Udruženje Prijedorčanki "Izvor".
- Presser, L. (2013). *Why we harm*. London: Rutgers University Press.
- Ravlić, S. (2013). *Svjetovi ideologije. Uvod u političke ideologije* (Worlds of ideology. introduction to political ideology). Zagreb: Politička kultura.
- Riessman, C. K. (2008). *Narrative methods for the human sciences*. Thousand Oaks: SAGE.
- Sanín, F. G. & Wood, E. J. (2014). Ideology in civil war. Instrumental adoption and beyond. *Journal of Peace Research*, 51(2): 213–226, DOI: 10.1177/0022343313514073.
- Schneider, S. (2014). Teaching the unthinkable: Counter-narratives, pedagogy, and genocide. *Theory in Action*, 7(1): 23-45.
- Schwarzmantel, J. (2009). *Ideology and politics*. Thousand Oaks: SAGE.
- Sim, S. (2004). *Fundamentalist World: The New Dark Age of Dogma*. Cambridge: Icon Press.
- Stover, E., & Weinstein, H. M. (2004). *My neighbor, my enemy: Justice and community*
- *in the aftermath of mass atrocity*. Cambridge, UK: Cambridge University Press.
- Tabeau, E. (2009). *Rat u brojkama: demografski gubici u ratovima na teritoriji bivše Jugoslavije od 1991. do 1999* (The war in numbers: Demographic losses in the wars in the former Yugoslavia from 1991 to 1999). Beograd: Helsinški odbor za ljudska prava u Srbiji (Helsinki Committee for Human Rights in Serbia).
- Tokača, M. (2013). *Bosanska knjiga mrtvih – Ljudski gubici u BiH 91-95* (The Bosnian
- book of the dead-human losses in BiH 91-95). Sarajevo: Istraživačko dokumentacioni centar (Research and Documentation Center).
- Vlaisavljević, U. (2007). *Rat kao najveći kulturnidogađaj. Ka semiotici etnonacionalizma* (War as the greatest cultural event. Semiotics and ethno nationalism). Sarajevo: Biblioteka razmeđa.
- Vlaisavljević, U. (2009). Bosnia and Herzegovina: The Continuiety of Ethno-politics in the Age of European Integration. In *Twenty Years After: Post-communist Countries and European Entegration* (pp. 78-90). Brussels: Heinrich-Böll-Stiftung, European Union.
- Vlaisavljević, U. (2012). *Avetinjska stvarnost narativne politike* (Spectral Reality of Narrative Politics). Sarajevo: Rabic.
- Vudli, D. (2015). *Fašizam i politička teorija: kritička perspektiva fašističke ideologije* (Fascism and political theory: critical perspective of fascist ideology). Novi Sad: Politička teorija.
- Waldorf, L. (2009). Revisiting *Hotel Rwanda*: genocide ideology, reconciliation, and rescuers. *Journal of Genocide Research*, 11(1): 101-125, DOI: 10.1080/14623520802703673.
- Weber, B., Herb, K., Marsal, E., Dobashi, T., & Schweitzer, P. (2011). *Cultural politics and identity: the public space of recognition*. Berlin: LIT Verlag.
- Wesselingh, I., & Vaulering, A. (2005). *Row memory. Prijedor, laboratory of ethnic cleansing*. London: Saqi Books.
- Žižek, S. (2008). *Violence: Six Sideways Reflections*. London: Picador.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 59-73
ISSN 1512-5505

SELF-REPORTED JUVENILE DELINQUENCY AND FAMILY RELATIONS IN BOSNIA AND HERZEGOVINA*

Muhamed BUDIMLIĆ
Haris HALILOVIĆ

Abstract

Physical punishment by parents, as indicated by a study conducted in 2015/16, is the most common form of victimisation reported by students in Bosnia and Herzegovina (29.2% N=758 RS, 31.4% N=1.326 FBiH). This paper will analyse the relationship between the variable "Did your mother or father (stepmother or stepfather) ever hit, slap or push you? (Including the times when this was punishment for something you did.)?" and variables used to measure delinquent forms of behaviour as well as those used for analysis of students' family relations.

Preliminary cross-analyses of collected data on the victimisation of students and families and manifested socially unacceptable behaviours of children indicate that this group of factors is of exceptional significance. Previously presented study results have demonstrated that in families with pronounced problems between parents (conflict, violence, divorce) or parents' abuse of alcohol and drugs they represent risk factors for socially unacceptable behaviour in children. Students who committed offences (graffiti, vandalism, shoplifting, illegal content download from the Internet, alcohol consumption) were twice as likely to indicate that their families have the problems described above.

We believe that the results of these analyses can contribute to better understanding of the factors influencing delinquent behaviours in minors and thereby to the improvement of the system for prevention of undesirable behaviours. Considering that our legislation contains provisions concerning adequate supervision of children, we believe that the situation in this area can be improved through consideration of the results of studies dealing with this important social issue.

Key **words**

offending behaviour, victimization, children, young people, self-reporting, prevention

* This paper represents an extended version of the work presented at the ESC 2018 conference in Sarajevo. The first author primarily dealt with the analysis and interpretation of data on delinquency. Due to his extensive work and expertise in the field of victimology, the second author was tasked with analysis and interpretation of the data on victimisation. Literature review, as well as the section on discussion and conclusions represent a collaborative work of the co-authors.

1. INTRODUCTION

During the 2015-2016 school year, within the International Study on Self-Reported Juvenile Delinquency, a research was undertaken in Bosnia and Herzegovina on the total sample of 2,149 students in final grades of randomly selected primary schools. For this type of research, it must be noted that such study was also carried out in Bosnia and Herzegovina in the 2005-2006 school year, again as a part of an international research project that included representatives from more than twenty European countries. The study is focused on the collection of data which can be used to estimate a dark figure of juvenile delinquency. The results of analyses could be used not only to acquire new information on its phenomenological and etiological characteristics, but also to provide recommendations and guidelines for actions to experts on the matter of countering juvenile delinquency. Therefore, it is a scientifically relevant source which can be used by various national and expert authorities responsible for the child protection in our community.

The methodological research framework was established at the level of the international working group, which defined the basic parameters, and the participating countries were able to opt for a sampling option and data collection method. The instrument used in the research was designed in cooperation between representatives of the scientific research community from 40 countries of Europe and the world, and during the preparations it was adjusted in some segments to the needs of individual countries. In our research, we opted for a representative national sample, and the questionnaire, suitable for children of 12 to 16 years of age, was used as an on-line form.

The issue covered in this paper refers to victimisation types among the surveyed category of students, with a particular focus on physical punishment of children by their parents as one of the assumed widespread types in our society. From the identified issue, we singled out the relationship between the parents and children, types of victimisation, and self-reported forms of delinquency, in order to identify basic statistical indicators of the researched phenomena and their specific interrelationships. The expected purpose and contribution of the paper is utilisation of the obtained results, which we believe could be used to draft recommendation proposals and guidelines for the competent institutions for preventive actions against delinquent behaviour of children and youth.

2. SELF-REPORTED DELINQUENCY AS A RESEARCH CONCEPT IN CRIMINOLOGY

Studies on self-reporting, in which small samples of respondents are asked questions about committed unregistered criminal offences (and other unlawful behaviour, A/N), have been a part of criminology studies for several decades. The most frequent information collecting techniques are surveys and interviews. This way, it is possible to identify a certain number of unlawful behaviours, which remains unknown to the competent institutions, wherefore they are not registered in the official records. These findings have significant importance in the developing of specific counter-crime strategies, since they must be based on as accurate information as possible on the prevalence and distribution of crime through different segments of society (Ignjatović, 2005, pp. 125-127). Therefore, studies on self-reporting, along with studies on victimisation and fear of crime, are used for estimates of dark figures of the selected crime types. While victimisation studies deal more with victims of crime and their characteristics, studies

on "self-reported" delinquency are focused on the collection of information on forms of criminal behaviour confessed in survey questionnaires by respondents from the selected research sample. Results of analyses of collected and processed information are used as a supplement to official statistics on crime. Such research has been recently frequently carried out in Europe and USA, it has been usually referred to the population of children or adolescents, and implemented in order to project as clearly as possible characteristics of delinquent behaviour of the youngest population members in a particular community (Budimlić, 2008, p. 190).

Studies on self-reporting are often carried out in several countries at the same time, and in the past two decades three cycles of international research were completed in Europe. The importance of cross-national studies is also pointed out by Junger-Tas, et al. (2010, p. 1), cross-national research is not an easy undertaking. In order to achieve interpretable results, cross-national standardization and compatibility in the selection of samples, in the content and administration of questionnaires, and in the defining and coding of data, are vital. Only if the surveys are carried out with similar instrumentation, will they yield internationally comparable data of youth crime and victimization. In another study undertaken in 2005 and 2006, information from this type of research was collected and published for the first time in Bosnia and Herzegovina. In the research results, Budimlić et al. (2010, p. 357) in their conclusions point out that juveniles in Bosnia and Herzegovina are quite frequently involved in delinquent behaviours which include violence. They do carry weapons on various occasions; they are vandalising property, committing assaults and inflicting injuries. In doing so, they tend to associate with their peers but with adults as well. It seems that we may conclude that the dark figure of violent juvenile delinquency is the highest in the case of vandalism and the lowest in the case of group fights. Still, it should be concluded that the detection rates in any case are lower than the dark figures are. On the other hand, in the results of study undertaken in 2015 and 2016, Maljević et al. (2017., p. 11) conclude, among other things, that it is difficult to differentiate between types of delinquency, since each includes certain particularities and problems. However, they state that preventive actions in the Federation of Bosnia and Herzegovina should primarily be focused on the alcohol consumption, graffiti writing, vandalism, possession of weapons, illegal internet downloads, and animal cruelty. In Republika Srpska, a more significant importance would have to be placed on alcohol consumption, graffiti writing and illegal internet downloads. In addition, and taking into account an increasing presence of girls of all ages in delinquent behaviour, equal attention must be paid to girls, when taking preventive actions, as to boys.

Surely, it should be noted that there are numerous limitations both in the implementation and in interpretation of the results of studies on self-reporting. The results of such research should be used only as a supplement to the existing official data and data from other reference research studies obtained using different methodological approaches. Differences, particularly in multinational and multicultural communities, are particularly pointed out by Battenburg-Eddes et al. (2012, p. 36), who, based on the completed study, conclude that using self-report data alone is insufficient to capture the true prevalence of delinquency in an ethnically diverse population. They recommended using multiple sources to achieve a more complete picture of delinquency patterns.

3. OVERVIEW OF RESEARCH RESULTS

As already pointed out, the final research sample for Bosnia and Herzegovina included questionnaires completed by 2,149 students of final grades of primary schools (grades 7, 8 and 9), of whom 51.5% were girls and 48.5% were boys. The average age of respondents was 13.5% years, and the age range of the surveyed children was from 11 to 18 years. The majority, or 38% of students, was in the eighth grade, followed by 31.4% from the seventh grade, and 30.6% from the ninth grade. For the origin of birth, almost 92% of the students stated they were born in Bosnia and Herzegovina, wherefore a small number of children in the surveyed sample are immigrants in our country (Maljević, et al., 2017.). The data collected in this survey were also used for the analyses undertaken in this paper.

The answer to the question whether they liked school was by 80.3% of the students that they liked school, and out of this number 45.4% completely agreed to like school. On the other hand, almost every fifth child, or 19.7%, answered they did not like school, of whom 9.3% selected the option of completely disagreeing to like school. Taking into account the results of their school achievements, 99.6% of the students never repeated a grade, whereby we can conclude that our research included children with almost no negative experiences which would cause them to repeat a grade.

In the next part, we will focus on the presentation of processed data regarding variables used for the examination of family relationships and parental control, scope, and structure of victimisation among the population of children included in the research. In the final part of the analyses presentation, we will specify the core indicators of frequencies and forms of self-reported delinquency among the student population form this research.

2.1. Family life and parental control

The first part of the analysis of results of the collected data refers to variables examining the status, relationship and level of parental control of the students who participated in the research. Figure 1 shows answers on the quantity dimension of the children's family composition. It is clear that the majority of respondents states to live in numerically complete families (variable 1.6). Although many press reports, and often reports from the agencies of statistics, indicate a rise in the number of divorces in our country, based on the presented data it could be said that a significant number of the students live in complete families. For family relationships, although we had this type of data as well, we did not analyse income and economic status of the families. Finally, the research undertaken by Galloway and Skardhamar (2010, p. 438) suggests that this type of factor must be considered taking into account a wider family context and other factors, particularly its functionality. They noted that low income and educational attainment may be the result of other (unobserved) attributes of the parents that also lead to behavioural difficulties among their offspring. Those who have persistently low income from work tend to be from a group of people who are chronically underemployed, so the search for the specific mechanisms behind the relationship between low income and crime should be sought on a structural level as well as relative to family functioning.

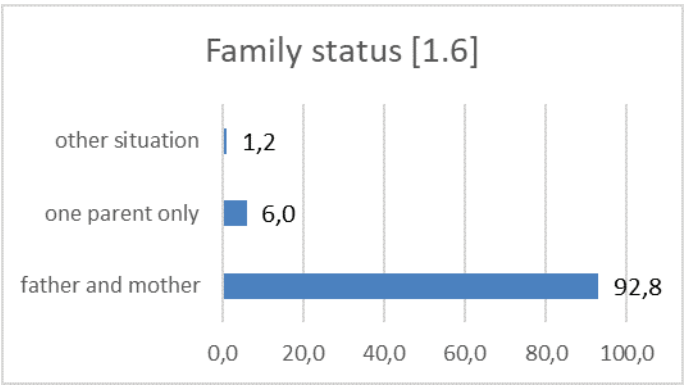


Figure 1

The next set of variables was used to examine how students evaluate quantitative and qualitative contents of relationships with their parents (variables 2.1.1 and 2.1.2). Therefore, Figure 2 shows that the majority of respondents answered they spent a lot of time with their parents, and only approximately 2% of the respondents answered they did not spend much time with their parents. We can conclude that, in addition to the majority of students confirming they live in complete families, in their answers they also note to spend a lot of time with their parents.

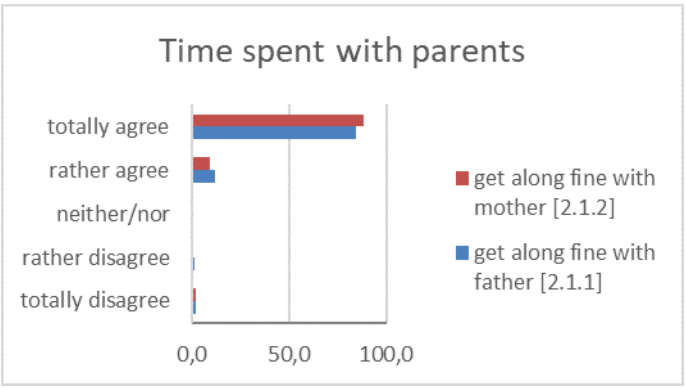


Figure 2

Figure 3 (variables 2.1.3 and 2.1.4) shows, in very similar ratios as the previous Figure, that the majority of children who answered this question confirmed the assumption that they had substantial support from their parents, both by the wish not to disappoint their parents and in the emotional support from their parents (83.3% and 84.6% completely agreed, and 11.5% and 11.4% agreed). Results of the analysis of this question also confirm that the children find substantial support in life from their parents.

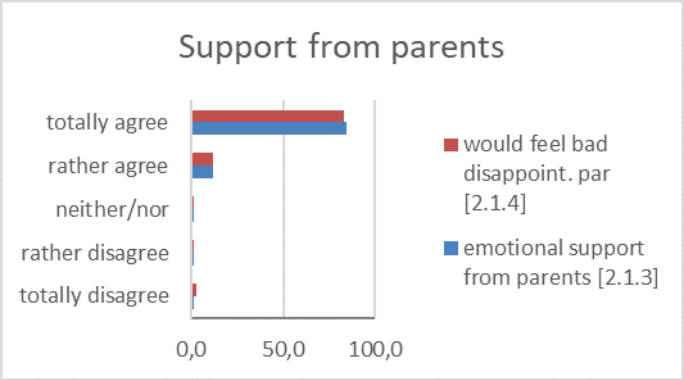


Figure 3

When it comes to habits, Figure 4 shows a distribution of answers on joint family meals (variable 2.2), and it can be concluded that, in accordance with the presented values, there is a prominent habit of joint meals, which makes an important link of family homogeneity in which the students from our sample live. However, it is not negligible that more than 11% of the children confirm that they have a joint meal three times a week or less, which might reflect a hectic pace of life in a contemporary community, and not necessarily a lack of meaningful communication within the families.

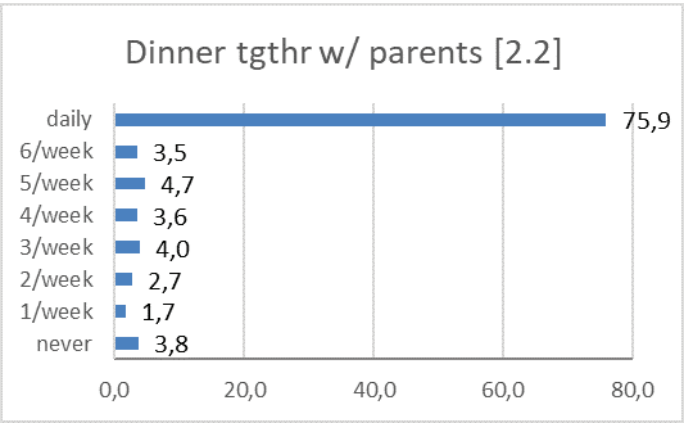


Figure 4

The following analyses covered questions which provide the estimate of a control level felt by the surveyed students from their parents (variables 2.3.01, 2.3.02, 2.3.03, and 2.3.04). Figure 5 presents answers to four variables from this group ("parents know where I am", "parents know what I am doing", "parents know my friends", and "parents ask where I am, whom I am with, and what I am doing"). A graphical presentation of the analysis of these variables shows that all the questions were given a positive answer ("often" or "always") by 80% of the students, that the answer "sometimes" refers to the variables "parents know what I am doing" (10.8%)

and "parents ask where I am, whom I am with, and what I am doing" (13.9%), and that to a somewhat higher degree these variables are selected by the students who give the answers "rarely" or "never".

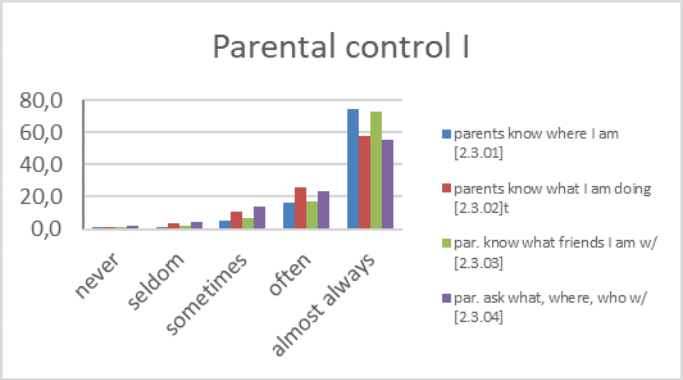


Figure 5

The next set of variables on parental control, Figure 6 (variables 2.3.05, 2.3.06, 2.3.07, and 2.3.08) show results of the analysis of answers to questions on daily communication in the family ("parents tell me when to come back home", "I must call my parents if I am coming home late", "parents check my homework", and "parents check age limit for films I watch"), which are considered an important segment of parental involvement in the lives of adolescents. The data obtained show that more than 80% of the students ("often" or "almost always") positively evaluate communication with their parents regarding going out (time for return or calling if late), and almost 50% answered "sometimes", "rarely" or "never" to the other two analysed variables (homework checks and age limit for films).

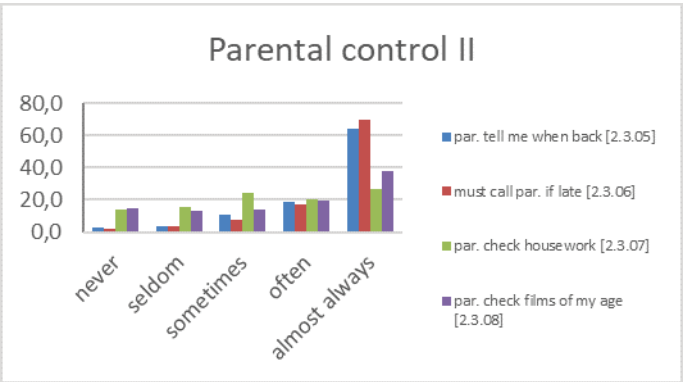


Figure 6

The last set of variables on parental involvement in Figure 7 (2.3.09, 2.3.10, 2.3.11, and 2.3.12) graphically presents results of the analysis of answers to questions on communication with the

parents on going out ("I tell my parents who I am with", "I tell my parents how I have spent money", "I tell my parents where I am", and "I tell my parents what I am doing"). It is evident that almost all the question are answered by more than 80% of the students with "often" and "almost always", and 30% of the students answered "sometimes", "rarely" and "never" when asked whether they tell their parents what they are doing when they go out, and around 20% gave these answers when asked on how they spent their money.

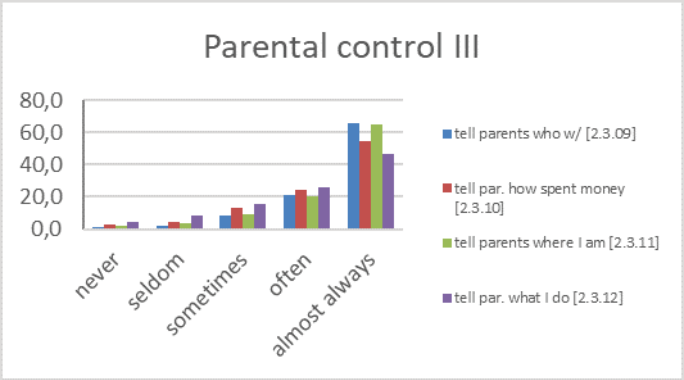


Figure 7

2.2. Victimisation and self-reported delinquent behaviour

This chapter will present the main results of the analysis of collected data on self-reported forms of delinquent behaviour and victimisation of juveniles included in the research sample. Variables used to measure the scope and structure of delinquent forms of behaviour of students with the self-reporting method are the main segment of international longitudinal criminology study. In this part of the research, questions were not asked about all forms of delinquent behaviour among children and youth, but only about the forms most frequently registered by the institutions of formal social control, on the one hand, and about the forms indicated in the dark figure by criminology studies, on the other hand. Therefore, the research includes "conventional" forms against property or those with elements of violence, but also the forms of unlawful behaviour in the on-line world, and consumption of alcohol and other intoxicants rarely included in official reports of the repressive state apparatus. The research on self-reported forms of delinquent behaviour of primary school students also includes the survey on victimisation, or how many juveniles have been victims and of what type of delinquency, what type of injuries occurred, and whether an injury or threat have been reported to the institutions responsible to take actions. Finally, we will present results of a cross-reference analysis of delinquent behaviour and selected type of victimisation, to provide indicators of strength and nature of connection between delinquency and physical punishments of children by their parents, as one of the most frequent types of victimisation noted in the answers from students.

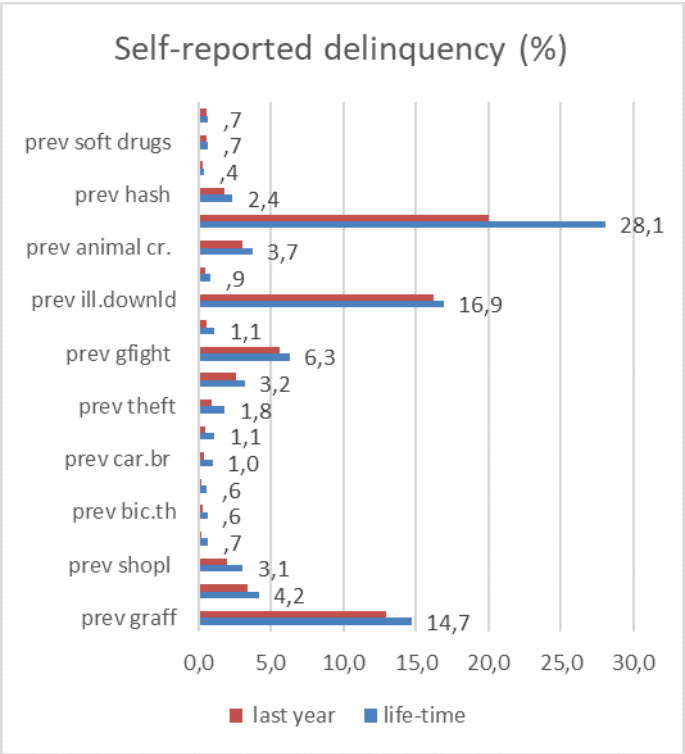


Figure 8

Delinquent forms of behaviour among the students of final grades of primary schools included in the research using the self-reporting method can be classified into four categories, offences against property, offences with elements of violence, internet offences, and alcohol consumption and drug related offences. The majority of these behaviours refers to offences against property, focused on damaging or destroying property (vandalism and graffiti writing), and offences of theft (theft and theft from a store, robbery, burglary, bicycle theft, car theft, theft from cars and extortion), followed by offences with elements of violence (possession of weapons, group fight, physical injury, and animal cruelty). The only behaviour from the on-line offences are illegal internet downloads, and unlawful alcohol and drug related forms include consumption (alcohol, marijuana, relevine, and soft and hard drugs) or drug trafficking. The indicators presented in Figure 8 show that, in terms of frequency of their occurrence ("ever in life"), the most frequent are alcohol consumption (28.1%), illegal internet downloads (16.9%), and graffiti writing on walls of public or private buildings (14.7%). The behaviours with values exceeding 10% are followed by forms of unlawful behaviour in values exceeding 3% in the total student population, including group fight (6.7%), vandalism (4.2%), animal cruelty (3.7%), possession of weapons (3.2%), and theft from stores (3.1%). Other forms of delinquent behaviour are recorded in values lower than 3%. Although some behaviours are presented in values lower than 1%, we believe it is important to note that in some cases (e.g. consumption of hard drugs, car theft or robberies) these are extremely socially dangerous behaviours with severe

and harmful effects and in no way expected among the population of children and youth of 13 to 15 years of age.

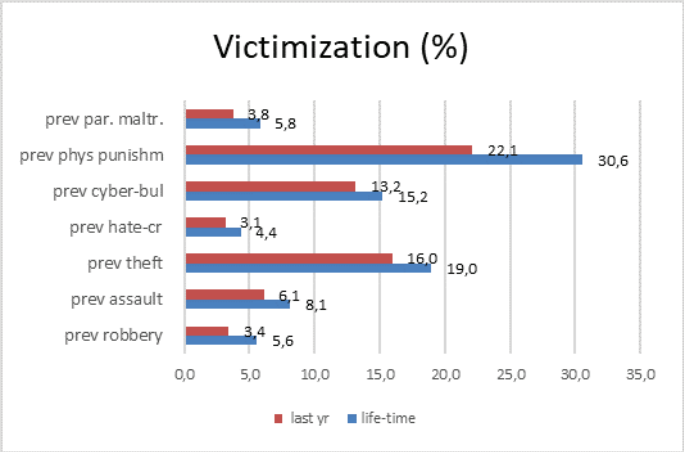


Figure 9

Juvenile delinquent behaviour most frequently results in an injury or danger to other juveniles or children, as confirmed both by the indicators from official institutions and by research in this field. However, since a significant number of cases remains in the unreported zone, it is also necessary to undertake research to collect data on the number and forms of harmful behaviours against juveniles, committed both by other juveniles and by adults. As pointed out at the beginning, the completed research also includes surveying of types and levels of victimisation among the student population included in this international study.

The research results for the victimisation part of the questionnaire are presented in Figure 9. It shows that, according to their scope, types with a frequency of up to 10% and types exceeding this scope in the total sample can be singled out. Therefore, the types of victimisation most frequently noted in the answers of students include physical punishment by parents (almost every third child or 30.6% in their life, 22.1% in the year before), theft (almost every fifth child or 19% in their life, 16% in the year before), abuse and bullying using information and communication technologies (almost every sixth child or 15.2% in their life, 13.2% in the year before). Types of victimisation including physical injuries are present to a somewhat lesser degree (8.1% in their life, 6.1% in the year before), psychological abuse by the parents (5.8% in their life, 3.8% in the year before), robbery (5.6% in their life, 3.4% in the year before), and hate attacks (4.4% in their life, 3.1% in the year before). Therefore, it can be clearly concluded that the types of victimisation selected as the most frequent in the survey student sample are within the dark figure, or that official procedures are rarely or never initiated for these types, although they have extremely harmful consequences ("physical punishment" and "cyber bullying"). In the discussion and conclusions we will mention these indicators again with appropriate recommendations.

	"Pure" offender		"Pure" victim		Both victim and offender		Neither victim nor offender		Valid	Missing	Total
life-time prev graff [7.1.01]	159	**7,6%**	486	23,3%	**148**	**7,1%**	1292	62,0%	2085	64	2149
life-time prev vandal [7.1.03]	39	**1,9%**	586	28,1%	**48**	**2,3%**	1412	67,7%	2085	64	2149
life-time prev shopl [7.1.05]	24	1,2%	594	28,5%	**40**	**1,9%**	1427	68,4%	2085	64	2149
life-time prev burgl [7.1.07]	7	0,3%	627	30,1%	**7**	**0,3%**	1443	69,2%	2084	65	2149
life-time prev bic.th [7.1.09]	4	0,2%	625	30,0%	**9**	**0,4%**	1446	69,4%	2084	65	2149
life-time prev car.th [7.1.11]	5	0,2%	627	30,1%	**7**	**0,3%**	1445	69,3%	2084	65	2149
life-time prev car.br [7.1.13]	6	0,3%	620	29,8%	**14**	**0,7%**	1444	69,3%	2084	65	2149
life-time prev extort. [7.1.15]	12	0,6%	623	29,9%	**11**	**0,5%**	1437	69,0%	2083	66	2149
life-time prev theft [7.1.17]	12	0,6%	608	29,2%	**26**	**1,2%**	1436	69,0%	2082	67	2149
life-time prev weapon [7.1.19]	28	1,3%	596	28,6%	**38**	**1,8%**	1420	68,2%	2082	67	2149
life-time prev gfight [7.1.21]	65	**3,1%**	568	27,3%	**66**	**3,2%**	1383	66,4%	2082	67	2149
life-time prev assault [7.1.23]	14	0,7%	625	30,0%	**9**	**0,4%**	1434	68,9%	2082	67	2149
life-time prev ill.downld [7.1.25]	182	**8,7%**	464	22,3%	**170**	**8,2%**	1266	60,8%	2082	67	2149
life-time prev drugd. [7.1.27]	8	0,4%	624	30,0%	**10**	**0,5%**	1439	69,1%	2081	68	2149
life-time prev animal cr. [7.1.29]	34	**1,6%**	590	28,4%	**44**	**2,1%**	1413	67,9%	2081	68	2149
life-time prev alcohol [8.1.1]	334	**16,1%**	383	18,4%	**250**	**12,0%**	1112	53,5%	2079	70	2149
life-time prev hash [8.2.1]	27	1,3%	611	29,4%	**22**	**1,1%**	1417	68,2%	2077	72	2149
life-time prev relevin [8.3.1]	4	0,2%	628	30,3%	**22**	**1,1%**	1417	68,4%	2071	78	2149
life-time prev soft drugs [8.4.1]	7	0,3%	625	30,1%	**7**	**0,3%**	1437	69,2%	2076	73	2149
life-time prev hard drugs [8.5.1]	6	0,3%	624	30,1%	**8**	**0,4%**	1438	69,3%	2076	73	2149

Table 1

In terms of mutual impact between youth victimisation and their delinquent behaviour, earlier research does not confirm any significant connection. Therefore, according to Cops and Pleysier (2014., p. 368/370), the number of adolescents who have been both a victim and an offender is for most crimes the smallest group. Overall, most adolescents have not been either an offender or a victim. Using the data presentation structure from this research, Table 1 presents analysis results of the data collected in Bosnia and Herzegovina on the "punishments by parents" type of victimisation and variables referring to delinquent forms of behaviour. The most interesting column for us is the one showing how many students noted to have at the same time been victims of a selected type of victimisation and carried out any of the prohibited behaviours themselves ("Both victim and offender" column). Therefore, it is evident that only alcohol consumption is presented at a level exceeding 10% of the total population of students who noted to have been physically punished by their parents at some point. The range of 5% to 10% of students who noted to have been victims of a selected type of victimisation includes illegal internet downloads (8.2%) and graffiti writing (7.1%), and the 2% to 5% range includes group fights (3.2%), vandalism (2.3%), and animal cruelty (2.1%). It is also shown that, com-

pared to the number of students who stated that they had committed these offences but they had not been victims of parental punishment, there are no significant differences. Therefore, it can be concluded that there is no sufficient evidence to confirm the assumption that the children who have been physically punished by their parents occur more frequently as delinquents than "delinquent children" who stated they had not been subjects of this type of victimisation.

Compared to the results of analyses carried out by Cops and Pleysier, we have observed that the most frequent forms of delinquent behaviour preceded by some type of victimisation include vandalism (18.6%), theft (18.5%), and physical violence (4.8%). Possession of weapons (3.3%) and harassment (3.3%) are significantly less present types of behaviour corresponding to victimisation experience according to this analysis (Cops & Pleysier, 2014., p. 370). Delinquent forms of behaviour significantly less present with reference to victimisation experience are possession of weapons, theft and theft from stores, consumption of marijuana or relevine, and other forms of delinquent behaviour included in this research are present less than 1% in correspondence with punishments by parents.

4. DISCUSSION AND CONCLUSIONS

The results of analyses of the selected data, presented in two previous chapters, provide numerous findings which could be useful in planning and programming of measures and actions of all social actors responsible for the matters of unacceptable and eventually delinquent behaviour. The first part presents indicators with reference to the analysis of family situation of the students, with a special emphasis on elements of parental control as an important segment in correcting unwelcome behaviour of children and youth. To this extent, we have seen that, notwithstanding frequent information in mass media on the problem of a significant number of quantitatively deficient families, our research shows that a large majority (more than 92%) of the respondents answered they lived in a complete family. Also, contrary to frequent information in the media, answers of the surveyed children show that they spend a lot of time with their parents, from whom they feel they receive substantial support in daily challenges they face. This is also confirmed in answers to the question on frequency of joint family meals, in which in our country has evidently retained numerous traditional patterns of behaviour, and a joint meal is certainly one of these. Although a certain number of the surveyed students (around 11%) states to have joint meals with the family less than three times, we still believe that the answers show a significant potential of homogenous families in our community, which could have an even more important role in the prevention of unacceptable forms of behaviour with a more substantial wider social encouragement.

The next set of questions was focused on the measurement of effects of various elements of parental control and general parental involvement in daily lives of the surveyed student population. The first group of variables examined the extent to which the parents know where and with whom their children spend time outside their homes or school, and the answers show than more than three fourths of the students confirm that the parents are familiar with these circumstances completely or frequently. An indecisive answer ("sometimes") was provided by approximately every tenth student, and negative answers were provided by less than 5% of the sample, which indicates that there is a high degree of parental control of primary behaviour patterns of the students during their free time in the community.

Answers to the next set of questions regarding more detailed elements of social control indicate that there are certain behaviours in daily life in which the parents do not have the same degree of control as in the previous series of variables. Therefore, for the variables of "parents tell me when to come back home" and "I must call my parents if I am coming home late", it is evident that answers are very similar as to the previous group of questions. There are a lot of positive answers, which is not the case with answers to the questions on whether the parents check "homework" or "age limit for films I watch". Namely, almost half of the students gave negative or indecisive answers to these questions, which tells us it is obvious that the parents put a lot less pressure on the children in these matters. In itself, this result does not have to indicate larger problems. However, taking into account that these are highly sensitive matters (success in school and impact of mass media), we believe they should be given more attention in educational programmes, since a lack of parental care in these spheres of life can have more damaging consequences both on behaviour and on general upbringing of children.

An attempt has been made to use the final group of questions to learn more about additional circumstances of daily lives of adolescents. Compared to the variables of "I tell my parents who I am with" and "I tell my parents where I am", it could be said that the answers are not much different than the answers to previous questions, which had a higher percent of positive answers, but the same cannot be concluded for the answers to questions "I tell my parents how I have spent money" and "I tell my parents what I am doing". To be more specific, a negative or indecisive answer to the question about spending was provided by every fifth respondent, and the same answers to the question on their activities outside are provided by almost every third respondent. Based on the presented results for these questions, it can be concluded that the parents should put more energy into building more trust to minimise the number of circumstances in the lives of students which remain unknown to their parents, and which are certainly regarded as having a significant importance both in upbringing and in everyday situations in which the children find themselves.

The other segment in the presentation of research results referred to the analysis of data on frequencies of self-reported forms of delinquency and types of victimisation confirmed with reference to the incidence in the past twelve months or overall prevalence in life. In terms of scope and frequency, the delinquent forms of behaviour can evidently be classified into three categories, up to 1%, up to 10%, and more than 10%. Therefore, the most frequent types of self-reported delinquency include alcohol consumption, illegal internet downloads, and graffiti writing as a form of destroying or damaging private or public property. The category of behaviour occurring within the range of up to 10% includes group fights, vandalism, animal cruelty, possession of weapons, theft from stores, consumption of marijuana, theft, extortion, physical injury, and theft from cars. The lowest frequency occurrence includes drug trafficking, consumption of hard and soft drugs, robbery, and car or bicycle theft. The most prominent findings refer to the fact that offences against property are present to a relatively low degree compared to other forms, which differs significantly from the indicators of officially registered juvenile delinquency dominated by committed offences against property. In addition, it is evident that the most frequent forms of delinquent behaviour are directed primarily against general and collective property (public property, animals, copyrights), then against general public order and peace (group fights and possession of weapons), and against personal values (physical integrity). It is well known that these forms of unlawful behaviour are very rarely or not at

all present in official statistical reports, which means they might be for the most part a segment of dark figure of crime in our community. The results on self-reported forms of delinquent behaviour unambiguously indicate that a number of these offences, although they are very serious offences both by actions and their consequences, remain unreported, which certainly has far-reaching negative consequences both on witnesses of such offences and on the offenders. We believe that more important and active steps must be taken in the domain of registration and first response, because this overall policy of response to delinquent behaviours remains unimplemented and therefore very uncertain, which significantly undermines the overall rule of law in the community.

In the category of surveyed types of victimisation, the most frequently repeated, both in the last year and in life in general, are physical punishment by parents, theft, and harassment using information and communication technologies. This finding is particularly interesting, since in the previous research segments we have obtained the data indicating rather good relationships between children and parents. We could not obtain evidence for this finding even in additional cross-reference analysis of these variables, since statistical importance is not presented with the students who expressed a negative position towards their parents and their relationship and those who stated that parents were punishing them. We can only attempt to assume and understand the presented result with reference to the fact that unfortunately physical punishment in our community is still regarded as a normal part of growing-up and upbringing, which certainly does not mean that more attention should not be paid to this matter in the future. Physical injuries, robberies, hate offences and psychological harassment by the parents are presented in the range of 3% to 8% of the total sample, which is certainly not insignificant, since these are still harmful behaviours to which more or less every tenth child is exposed, or in the context of school not less than one child from the same class. This finding is also important for taking into consideration in special programmes of prevention and suppression of unacceptable behaviours among the population of school children.

Finally, by cross-referencing the variable on physical punishment of students by their parents with delinquent forms of behaviour, we have obtained indicators showing a certain degree of mutual impact of this type of victimisation on some forms of unacceptable and prohibited behaviour. In this regard, the analysis results show that three such forms are pointed out according to the presented correspondence values, alcohol consumption, illegal internet downloads, and graffiti writing. These forms of behaviour occur within frequencies from every tenth to every twentieth child, who have confirmed to have been physically punished by their parents on one or more occasions. Approximately, every thirtieth or every fiftieth child who has had a victimisation experience is involved in group fights, vandalism and animal cruelty. With other forms of delinquent behaviour, correspondences are present to far lower degrees. Therefore, we can conclude that, besides some presented positive values in cross-referencing of data, we believe there is still not enough evidence to confirm firmly the assumption that there are more statistical differences between the children who have been physically punished by their parents, and who are delinquents, and the children who have not had such victimisation experiences and who confirmed their experiences with delinquency by “self-reporting”.

REFERENCES

- Batenburg-Eddes, T. v., Butte, D., Looij-Jensen, P., Sciethart, W., Raat, H., Wart, F., & Jansen, W. (2012). Measuring juvenile delinquency: How do self-reports compare with official police statistics? *European Journal of Criminology*(9), str. 23-37.
- Budimlić, M. (2008). Prevalencija nasilničkog ponašanja među djecom i adolescentima u Bosni i Hercegovini- studija samoprijavljivanja (ISRD2-BiH). *Kriminalističke teme, Časopis za kriminalistiku, kriminologiju i sigurnosne studije*(1-2), str. 189-201.
- Budimlić, M., Maljević, A., & Muratbegović, E. (2010). Bosnia and Herzegovina - Chapter 24. U *Juvenile Delinquency in Europe and Beyond* (str. 341-358). New York: Springer.
- Cops, D., & Pleysier, S. (2014.). Usual suspects, ideal victims and vice versa: The relationship between youth offending and victimization and mediating influence of risky lifestyles. *European Journal of Criminology*(3), str. 361-378.
- Galloway, T. A., & Skardhamar, T. (2010). Does parental income matter for onset offending? *European Journal of Criminology*, str. 424-441.
- Ignjatović, Đ. (2005). *Kriminologija* (šesto ed.). Beograd: Službeni glasnik.
- Junger-Tas, J., Haen Marshall, I., Enzmann, D., Killias, M., Steketee, M., & Gruszczynska, B. (2010). History and Design of the ISRD Studies - Chapter 1. U *Juvenile Delinquency in Europe and Beyond* (str. 1-12). New York: Springer.
- Maljević, A., ŠućurJanjetović, V., Budimlić, M., Jović, N., Miodragović, B., & Vujović, S. (2017.). *Međunarodna studija o samoprijavljenom prijestupništvu djece u Bosni i Hercegovini - Izvještaj za stručne radnike u oblasti zaštite djece.* (E. Muratbegović, Ur.) Sarajevo: Centar za istraživanje politike suprotstavljanja kriminalitetu.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 75-94
ISSN 1512-5505

HOMICIDE TRENDS IN MALTA FROM 1970-2018: FIRST FINDINGS

Trevor CALAFATO

Abstract

Homicide in Malta is not a common crime. Till the present day there is no academic research that inquires the trends associated with this heinous act. After analysing aspects related to homicide committed between 1970 till the latest in 2018, the paper aims at providing the first findings on homicide trends in the islands of Malta. The findings aim at providing the significant statistical outcomes related to homicide trends particularly in relation to the modus operandi, gender, relationship between the offender and homicide clearance.

Key words

Homicide research, homicide incidence, modus operandi, gender, relationships, age and nationality and homicide clearance

INTRODUCTION

Research on homicide in Malta per se is practically non-existent. A quick search within the library of the University of Malta one finds that the phenomenon of homicide is tackled only from a legal perspective. These few works explore the legal notions treating the following: the intent (Camilleri, 2010); the excusability of homicide (Demicoli, 1983); the duty of care in relation to crime of wilfulness and involuntary homicide (Cutajar, 2013); and the development of the law on homicide in relation to euthanasia and assisted suicide (Camilleri, 2008). From a criminological point of view homicide has never been scrutinised in-depth and homicide trends in Malta tend to remain very much unveiled. Additionally, when researchers attempt to analyse homicide trends in Malta one can notice that the results obtained from these islands is very limited. For instance, Smit, de Jong and Bijleveld (2012) explained that Malta was one of few countries that did not respond to their questionnaire which was aimed at looking at the definitions, sources and statistics of homicide data in Europe.

Being a small island state Malta is sometimes excluded from the analysis of homicide trends among European nations for pragmatic reasons (Marshall and Summers, 2012: 42). These different reasons and approaches limit the analysis of trends of homicide in Malta even though this could be potentially significant, as countries like “Estonia, Malta, and Sweden have the

highest proportion of homicides committed with knives and sharp implements, at 60% or more" (Marshall and Summers, 2012: 62) In cross-national observations on homicide research Rogers and Pridemore (2012) explicated the geographic and temporal variations on homicides, and indicated that in 2010 the homicide rate in Malta was of 1.0, where the rate for male homicides was of 1.5 while for females was of 0.5. Rogers and Pridemore (2012: 33-34) also stressed that, together with a number of other countries, Malta experienced an increase in both male and female homicide victimization rates in the period analysed.

Looking at *Homicide in Europe*, Liem (2017: 291) explained how Europe does not have a long tradition of studying trends and patterns of homicides and there are large differences among European countries. Among the difference there legal inconsistencies in defining homicide as well as the data sources of this crime. In the same work Liem (2017) explicated how the European Homicide Monitor (EHM) is enabling comparison among European countries where Malta is included. The EHM looks at homicides that occurred between 2000 and 2015 outlining the sources of the data, the homicide counts and the rate per 100,000 among other details. As indicated later in this paper the most distinctive year was 2012 where with 10 homicides the rate per 100,000 inhabitants rose to 2.4, where 75% of the victims were male. However, the EHM ignores the previous years and the respective incidences. For instance in 1981 and 1999 indicate the highest incidence of homicides for male and female victims respectively (see Figure 3).

The four main approaches existent in the research on homicide in Europe, namely sociological, historical, psychological and descriptive (Liem, 2017: 292). Of these four approaches Malta had a direct contribution only in the descriptive approach, which is the most voluminous and fast growing (Kivivuori, Suonpää, and Lehti, 2014). The by-product of the COST Action on femicide was the book *Femicide across Europe: Theory, research and prevention*, by Weil, Corradi and Naudi (2018), with the latter being a Maltese academic. In discussing the challenges and opportunities of data collection, Schröttle and Meshkova (2018: 45) referred to Naudi's (2015) contribution in a meeting in Brussels among the stakeholders of COST Action Femicide across Europe while stressing, "it is very clear that Europe needs more accurate data and statistics on femicide in order to gain a better understanding of the issue of femicide as well as data and information that are necessary for prevention. The aim is to collect meaningful data, and to evaluate and document it in a way that is useful for social

policies and practice." Though the focus of this COST Action was on femicide, the research on homicide should be exploited to potentially prevent similar cases. However, when considering the phenomenon of homicide in its totality, particularly in Malta, though the numbers are not particularly big, details of heinous cases of homicide should be thoroughly examined to identify potentially preventative measures.

Being aware of the lacunae in the analysis of homicide in Malta and forming part of the European Homicide Research Group, as part the European Society of Criminology I decided to present a series of analysis on homicides that occurred in Malta from 1970 to the latest cases of that occurred in 2018. This paper aims at providing an overview of the first results of the homicide trends in the Maltese islands with the aim of expanding the research on homicide in Malta.

METHODOLOGY

Before providing the methodological approach adopted to research the trends of homicide in Malta it was important that the term homicide was defined in a legal manner as this determine the approach of the police force. Found under Title VIII of the Criminal Code of Malta (Chapter 9 of the laws 'Of crimes against the person' includes the definitions and punishments of wilful, involuntary and justifiable homicide as well as the terms of concealment of homicide, dead bodies and bodily harm and also includes infanticide and ill-treatment of children. Article 211 (2) defines 'wilful homicide' as follows "a person shall be guilty of wilful homicide if, maliciously, with intent to kill another person or to put the life of such other person in manifest jeopardy, he causes the death of such other person." Although there are may be different circumstances and intentions behind the death of a person, the cases that were included in this research were only those cases that were deliberate and intended to cause death and those were death ensued following the intention to cause serious bodily harm. Those cases there where there was no direct intention to kill at all but death still occurs through an act of negligence or were where there was the intention to kill but for some reason the homicide did not occur were not included in the list.

In order to access the data of the homicide that occurred in the Maltese islands in the last 48 years I used multiple methods that were superimposed to ensure the all relevant details for this study were gathered. The primary source of such data was gathered from the Homicide Squad within the Malta Police Force. The Homicide Squad had already some of the data available mainly because of request from the Maltese parliament. For instance one of the parliamentary questions posed in October 2017 queried the number of homicide cases that occurred between 1996 and 2017 and how many of these were solved or otherwise[1]. In addition to the data available with the Homicide Squad I requested for further details which could eventually facilitate the analysis found below such as for instance the involvement of drugs and alcohol or the relationship between the victim and the offender.

To add information which was somehow missing or unavailable within the police records, particularly for old cases, I used the Attard's (2011; 2012) books *Delitti f'Malta*[2]. Attard's works provide details from open sources, mainly newspapers and court sentences, on all homicide cases that occurred between 1800 to 2012. If details were missing from more recent cases open sources proved to be the perfect tool to fill in the blanks.

The data on over 200 cases of homicide was analysed using mainly SPSS version 24. However, it is important to indicate that since that the results below focus on the victims of these homicides. Further analysis will be undertaken to analyse details on the respective cases that would delve into the offenders' mental state and motivation vis-à-vis their modus operandi and how this could have influenced sentencing. The main findings of this paper provide a description as well as results through cross analysis, employing mainly the chi-squared test.

---

1 http://pq.gov.mt/PQWeb.nsf/7561f7daddf0609ac1257d1800311f18/c1257d2e0046dfa1c12581c900445504!OpenDocument

2 Translated to *Homicide in Malta*

FINDINGS AND DISCUSSION

The first findings of the homicides analysed in the window from 1970 to 2018 are divided into three aspects and discussed vis-à-vis literature. First this work will delved into the statistics of homicide in comparison with international incidence. Secondly this paper will look at the trends of the modus operandi in homicides in Malta. The third aspect will explore how the relationship between the victim and the offender tends to influence the way a person is killed.

HOMICIDE INCIDENCE

In 48 years in Malta occurred 239 cases of homicides. Most (92.5%) of these cases (see Table 1) involved only one victim. Almost 6% of the cases involved 2 victims, while only 2 cases involved 3 victims. One of these two cases involved a killing spree with a shotgun, while the other was a mother pregnant with two kids. In the latter case the police considered a homicide with three victims even though the kids were still not born. It was important to describe this case because in cases where gender is involved these two unborn victims were never identified as male or female and consequently affected results that included gender.

There are cases committed by the same offender in different days and periods. Though the offender is a common element the cases were still listed down separately since the focus is purely on the victims. When analysing the data focusing on the offenders this could eventually change. does not exclude that there were cases that were eventually linked to the same offender/s. Though this is not a frequent occurrence, since it was identified only a couple of times in all these years, this aspect will not be explored in this paper. The total number victims of homicide in all these years amounts to 255.

Table 1: Number of victims

		Frequency	Valid Percent
Homicide cases	1 Victim	221	93.2
	2 Victims	14	5.9
	3 Victims	2	.8
	Total	237	100.0

Slightly over 67% of all the homicide victims were male while almost 33% were female (see Figure 1).

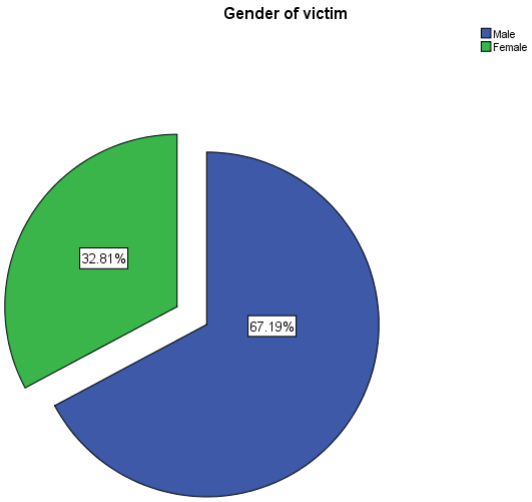


Figure 1: Gender of victims

From all the ages available of the victims it is indicated that the highest percentages of are those in the range from 21 to 50 years which cover 56.9% of all homicides in the last almost 50 years (Table 2). As for the age of the offender, results show that the highest percentage fall in the ranges of 21 to 30 years (20.9%) and 31 to 40 years of age (19.9%).

Table 2: Age of victim

		Frequency	Valid Percent
Valid	0-10 years	5	2.1
	11-20 years	16	6.7
	21-30 years	51	21.3
	31-40 years	55	22.9
	41-50 years	39	16.3
	51-60 years	29	12.1
	61-70 years	24	10.0
	71-80 years	14	5.8
	81-90 years	7	2.9
	Total	240	100.0
Missing	System	15	
Total		255	

For the purpose of this paper the victims of homicides were separated as Maltese and non-Maltese. 84.7% of the victims were of Maltese nationality, of which 66.4% were male and 33.6% were female.

The overall average of homicides as from 1970 to 2018 in Malta is of 4.1. The highest number of case of homicides occurred in 2012 where the number rose up to 13. When analysing the incidence per 100,000 the rate of homicide in Malta is of 1.4 (Figure 2). When considering that non-Maltese offenders tend to target non-Maltese victims (see Table 9, below), it was considered viable filter the homicide incidence by excluding those homicide cases that were committed by non-Maltese offenders. The homicide incident would go down to 1.2 (Figure 3).

Figure 4 shows the homicide incidence of homicide incidence between male and female victims per 100,000 population of the same gender between 1977 and 2017. The change in the span of time was determined by the data available on the respective genders found on Eurostat. The overall incidence is that there are more male tend to be victims of homicide than female. For both genders the incidence has been going down through the years though for male it appears to be more evident. The highest peak for male homicides occurred in 1981 with 5.2, while in case of homicide of female victims the main peak was in 1999, with 3.6.

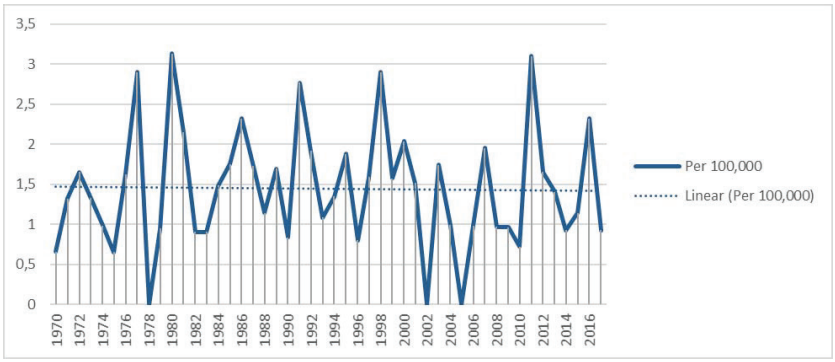


Figure 2: Homicides per 100,000

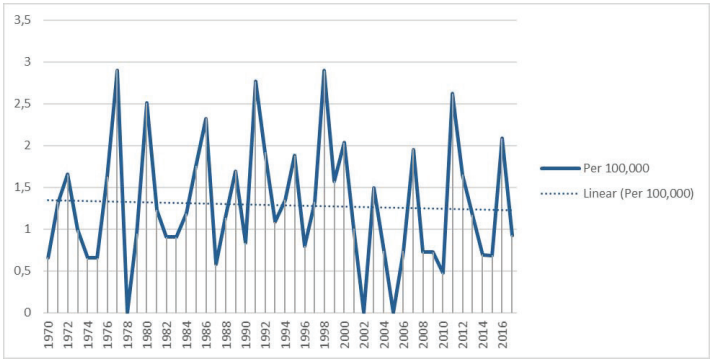


Figure 3: Homicides per 100,000 excluding homicides committed by non-Maltese

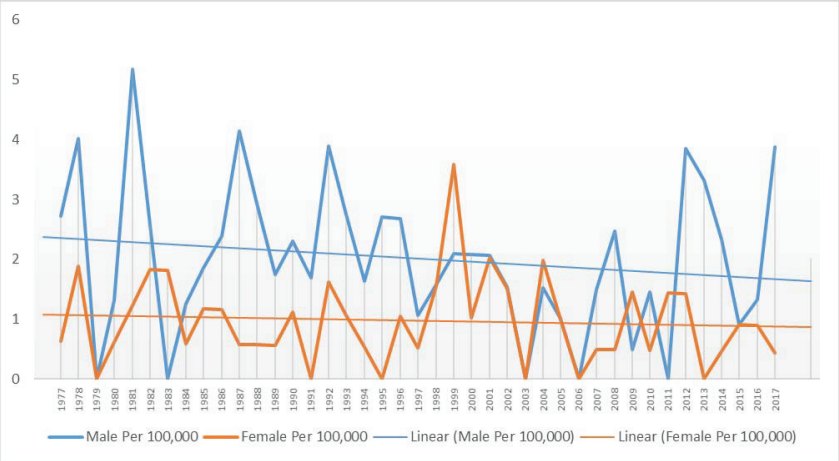


Figure 4: Homicides incidence: Male and Female per 100,000 (1977-2017)

HOMICIDE TRENDS

Some of methods employed in killing remain quite rudimentary and thus easy to classify. However, other modus operandi were so unique and unusual that were considered as 'other or unknown'. Some of these unusual methods employed included the burning of the victim alive, firing nails at the head of the victim and induced overdose. In other cases the bodies were so severely decomposed that the method of killing could not be identified. Table 3 indicates that two mores common methods of killing used on the victims were shooting (40.8%), followed by stabbing (24.3%). It is also important to take note that there are instances where more than one modus operandi (MO) is employed. Table 4 shows that there a second MO was employed in combination with the first methods in 6.2% of the cases (N=16) The two MOs that were mostly used as a second method were stabbing and hitting with a blunt object.

Table 3: Modus operandi

		Frequency	Valid Percent
Valid	Stabbing	62	24.3
	Shooting	104	40.8
	Asphyxia/Strangulation	26	10.2
	Hit by blunt object / Blows / Fall	30	11.8
	Run over by vehicle	4	1.6
	Explosion	15	5.9
	Hijack	2	.8
	Other / unknown	12	4.7
	Total	255	100.0

Table 4: Second *modus operandi* employed

			Primary modus operandi				Total
			Shooting	Asphyxia / Strangulation	Hit by blunt object / Blows / Fall	Other / unknown	
Second modus operandi	Stabbing	Count	4	1	0	0	5
		% MO2	80.0%	20.0%	0.0%	0.0%	100.0%
	Asphyxia/ Strangulation	Count	0	0	2	0	2
		% MO2	0.0%	0.0%	100.0%	0.0%	100.0%
	Hit by blunt object / Blows / Fall	Count	3	1	0	0	4
		% MO2	75.0%	25.0%	0.0%	0.0%	100.0%
	Killed & burned body	Count	1	0	1	0	2
		% MO2	50.0%	0.0%	50.0%	0.0%	100.0%
	Dissected body / Buried / Found in Well	Count	1	0	0	2	3
		% MO2	33.3%	0.0%	0.0%	66.7%	100.0%
Total		Count	9	2	3	2	16
		% MO2	56.3%	12.5%	18.8%	12.5%	100.0%

X^2 (12) = 22.770, p=0.030

The method employed to commit the homicide was also compared to the time when the case was reported to the police. The time when a case was reported does not always reflect when the time of the actual commission of the homicide. Also one can notice that the hours were categorised in morning (6:00am to 11:59am), afternoon (12:00pm to 05:59pm), evening (6:00pm to 5:59am) and unknown. It is evident that the number of evening hours doubles the hours in the morning and afternoon. In 47.5% of the cases the police received the report during evening hours. However, this does not exclude that part of the 20.8% of the cases reported during morning hours and those listed as 'unknown' (17.6%) were committed during night time. This would signify that more around 85% of the homicide cases are committed during evening time. An interesting outcome (Table 5) is that homicide caused by an explosion occurred mainly in morning (40%) and afternoon hours (26.7%). The number of cases that occurred during morning and afternoon hours doubles the number of homicide by explosion that occurred during evening hours.

Table 5: Modus operandi vs Approximate time

			Approximate time				Total
			Unknown	Afternoon (1200pm - 0600pm)	Evening (06:00pm - 05:59am)	Morning (06:00am - 11:59pm)	
Modus operandi	Stabbing	Count	11	6	32	13	62
		% within Modus operandi	17.7%	9.7%	51.6%	21.0%	100.0%
	Shooting	Count	10	18	51	25	104
		% within Modus operandi	9.6%	17.3%	49.0%	24.0%	100.0%
	Asphyxia/ Strangulation	Count	12	4	6	4	26
		% within Modus operandi	46.2%	15.4%	23.1%	15.4%	100.0%
	Hit by blunt object / Blows / Fall	Count	7	3	16	4	30
		% within Modus operandi	23.3%	10.0%	53.3%	13.3%	100.0%
	Run over by vehicle	Count	1	1	1	1	4
		% within Modus operandi	25.0%	25.0%	25.0%	25.0%	100.0%
	Explosion	Count	0	4	5	6	15
		% within Modus operandi	0.0%	26.7%	33.3%	40.0%	100.0%
	Hijack	Count	0	0	2	0	2
		% within Modus operandi	0.0%	0.0%	100.0%	0.0%	100.0%
	Other / unknown	Count	4	0	8	0	12
		% within Modus operandi	33.3%	0.0%	66.7%	0.0%	100.0%
Total		Count	45	36	121	53	255
		% within Modus operandi	17.6%	14.1%	47.5%	20.8%	100.0%

$X^2(21) = 41.325$, p=0.005

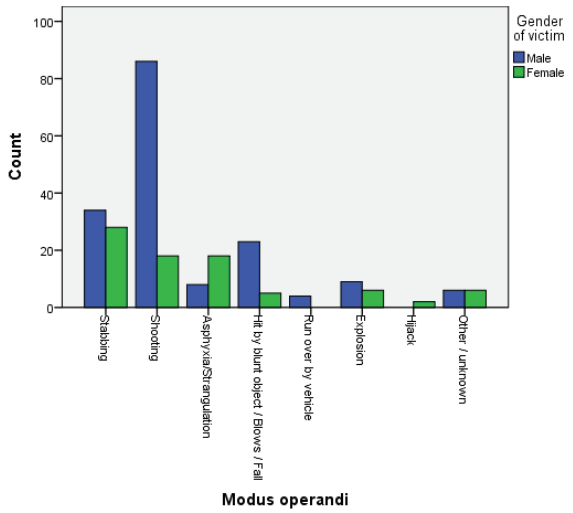
Another interesting outcome outlines the different MO in relation to the gender of the victim. Most of the MOs tend to be more frequent on male victims. The only exception is asphyxia or strangulation, where the use of such method of killing tends to be significantly more common in case of female victims (as shown in Table 6 and Figure 5).

Table 6: Modus operandi vs Gender of victim

			Gender of victim		Total
			Male	Female	
Modus operandi	Stabbing	Count	34	28	62
		% within Modus operandi	54.8%	45.2%	100.0%
	Shooting	Count	86	18	104
		% within Modus operandi	82.7%	17.3%	100.0%
	Asphyxia/Strangulation	Count	8	18	26
		% within Modus operandi	30.8%	69.2%	100.0%
	Hit by blunt object / Blows / Fall	Count	23	5	28
		% within Modus operandi	82.1%	17.9%	100.0%
	Run over by vehicle	Count	4	0	4
		% within Modus operandi	100.0%	0.0%	100.0%
	Explosion	Count	9	6	15
		% within Modus operandi	60.0%	40.0%	100.0%
	Hijack	Count	0	2	2
		% within Modus operandi	0.0%	100.0%	100.0%
	Other / unknown	Count	6	6	12
		% within Modus operandi	50.0%	50.0%	100.0%
Total		Count	170	83	253
		% within Modus operandi	67.2%	32.8%	100.0%

$X^2(7) = 42.124$, p=0.001

Figure 5: Modus operandi vs Gender of victim



Another interesting aspect explored inquired in this paper was the effect of the relationship with the perpetrator. The categories of relationship were group as follows: intimate relationship, burglary, acquaintance (friend or business partner), fight (argument or altercation), domestic, unknown, self-defence and terrorism (or political incident). Intimate relationships included all those cases that are linked to uxoricide where the victim was the husband, wife, partner, ex-partner or the new partner of an ex-partner. For the purpose of this paper domestic relationships include all those relationships that encapsulate fratricide, matricide, patricide, prolicide, as well as homicides of in-laws. The highest rates of homicides were in cases of intimate relationships (20.4%), friendships (20.9%) and altercations (20.4%) respectively

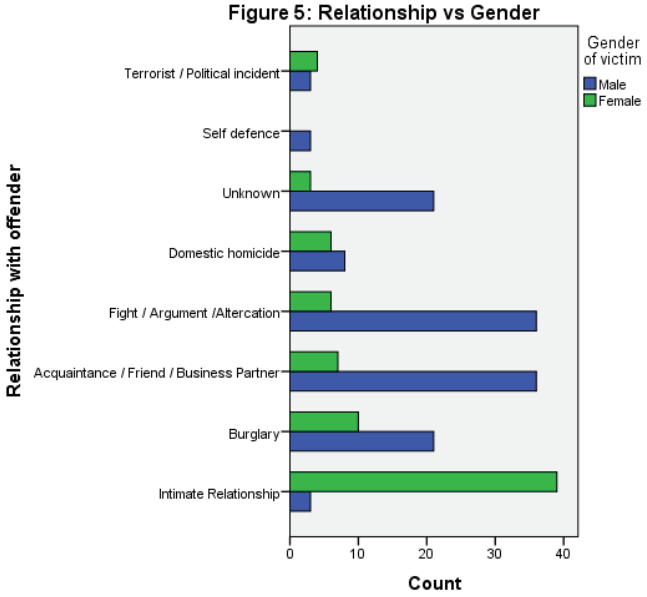
In looking at how the kind of relationship of the victim with the perpetrator could relate to the gender of the victim, it was evident that intimate relationships are significantly related to female victims. Table 7 shows that in almost 93% of the homicides where the perpetrator had an intimate relationship with the victim, the victim was female. Cases that involved acquaintance, business or friendship or some kind of altercation, self-defence and also for some unknown reasons, the results were much higher for male victims. These significant relations are also evident in Figure 5.

Table 7: Relationship with offender vs Gender of victim

			Gender of victim		Total
			Male	Female	
Relationship with offender	Intimate Relationship	Count	3	39	42
		% within Relationship with offender	7.1%	92.9%	100.0%
	Burglary	Count	21	10	31
		% within Relationship with offender	67.7%	32.3%	100.0%
	Acquaintance / Friend / Business Partner	Count	36	7	43
		% within Relationship with offender	83.7%	16.3%	100.0%
	Fight / Argument / Altercation	Count	36	6	42
		% within Relationship with offender	85.7%	14.3%	100.0%
	Domestic homicide	Count	8	6	14
		% within Relationship with offender	57.1%	42.9%	100.0%
	Unknown	Count	21	3	24
		% within Relationship with offender	87.5%	12.5%	100.0%
	Self defence	Count	3	0	3
		% within Relationship with offender	100.0%	0.0%	100.0%
	Terrorist / Political incident	Count	3	4	7
		% within Relationship with offender	42.9%	57.1%	100.0%
Total		Count	131	75	206
		% within Relationship with offender	63.6%	36.4%	100.0%

$X^2(7) = 81.099$, $p = 0.001$

Figure 5: Relationship vs Gender



As the relationship between perpetrators and victims proved to be such a significant element, this paper moved on to explore whether these relationships were significant in the modus operandi employed in the homicide. Table 8 indicates that there is a significant likelihood that

the relationship with the perpetrator affect the modus operandi employed in homicides committed in Malta. In cases were intimate relationship is involved there is a higher probability that stabbing (45.2%) would be used in comparison to shooting (21.4%), asphyxia (14.3%) and hit with a blunt object (14.3%). Stabbing also proved to be more likely to be used in cases of self-defence. Cases of burglary indicated a higher likelihood (41.9%) that shooting is the primary method of committing homicide. With 32.3% strangulation proved to be second most preferred method to be used in burglaries. Table 9 indicates that the modus operandi of a homicide is significantly associated with the age of the victim. In 48% of homicide by asphyxia the victims were 61 years or older. This method scored high following a series of home burglaries on elderly who were tied so firmly that eventually asphyxia took place. Homicide by shooting proved to be significantly high in arguments with friends and/or colleagues, altercations, domestic cases as well as in cases with an unknown motive, hence relation. Homicide by shooting tends to occur mainly in between the ages of 21 to 50 years, which amount 64.3% of the all shooting cases under analysis.

Table 8: Relationship with offender vs Modus operandi

			Modus operandi								Total
			Stabbing	Shooting	Asphyxia / Strangulation	Hit by blunt object / Blows / Fall	Run over by vehicle	Explosion	Hijack	Other / unknown	
Relationship with offender	Intimate Relationship	Count	19	9	6	6	0	1	0	1	42
		% within Relationship with offender	45.2%	21.4%	14.3%	14.3%	0.0%	2.4%	0.0%	2.4%	100.0%
		% within Modus operandi	32.8%	10.6%	31.6%	23.1%	0.0%	16.7%	0.0%	14.3%	20.4%
	Burglary	Count	4	13	10	2	0	0	0	2	31
		% within Relationship with offender	12.9%	41.9%	32.3%	6.5%	0.0%	0.0%	0.0%	6.5%	100.0%
		% within Modus operandi	6.9%	15.3%	52.6%	7.7%	0.0%	0.0%	0.0%	28.6%	15.0%
	Acquaintance / Friend / Business Partner	Count	13	20	0	5	2	0	0	3	43
		% within Relationship with offender	30.2%	46.5%	0.0%	11.6%	4.7%	0.0%	0.0%	7.0%	100.0%
		% within Modus operandi	22.4%	23.5%	0.0%	19.2%	66.7%	0.0%	0.0%	42.9%	20.9%
	Fight / Argument / Altercation	Count	14	17	1	9	0	0	0	1	42
		% within Relationship with offender	33.3%	40.5%	2.4%	21.4%	0.0%	0.0%	0.0%	2.4%	100.0%
		% within Modus operandi	24.1%	20.0%	5.3%	34.6%	0.0%	0.0%	0.0%	14.3%	20.4%
	Domestic homicide	Count	2	10	1	1	0	0	0	0	14
		% within Relationship with offender	14.3%	71.4%	7.1%	7.1%	0.0%	0.0%	0.0%	0.0%	100.0%
		% within Modus operandi	3.4%	11.8%	5.3%	3.8%	0.0%	0.0%	0.0%	0.0%	6.8%
	Unknown	Count	2	13	1	3	1	4	0	0	24
		% within Relationship with offender	8.3%	54.2%	4.2%	12.5%	4.2%	16.7%	0.0%	0.0%	100.0%
		% within Modus operandi	3.4%	15.3%	5.3%	11.5%	33.3%	66.7%	0.0%	0.0%	11.7%
	Self defence	Count	2	1	0	0	0	0	0	0	3
		% within Relationship with offender	66.7%	33.3%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%
		% within Modus operandi	3.4%	1.2%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	1.5%
	Terrorist / Political incident	Count	2	2	0	0	0	1	2	0	7
		% within Relationship with offender	28.6%	28.6%	0.0%	0.0%	0.0%	14.3%	28.6%	0.0%	100.0%
		% within Modus operandi	3.4%	2.4%	0.0%	0.0%	0.0%	16.7%	100.0%	0.0%	3.4%
Total		Count	58	85	19	26	3	6	2	7	206
		% within Relationship with offender	28.2%	41.3%	9.2%	12.6%	1.5%	2.9%	1.0%	3.4%	100.0%
		% within Modus operandi	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

$X^2(49) = 144.007$, $p = 0.001$

Table 9: Modus operandi vs Age of victim

			Age of victim									Total
			0-10 years	11-20 years	21-30 years	31-40 years	41-50 years	51-60 years	61-70 years	71-80 years	81-90 years	
Modus operandi	Stabbing	Count	1	6	21	11	8	5	7	2	0	61
		% within Modus operandi	1.6%	9.8%	34.4%	18.0%	13.1%	8.2%	11.5%	3.3%	0.0%	100.0%
	Shooting	Count	1	5	15	24	24	17	10	2	0	98
		% within Modus operandi	1.0%	5.1%	15.3%	24.5%	24.5%	17.3%	10.2%	2.0%	0.0%	100.0%
	Asphyxia/ Strangulation	Count	0	0	4	5	2	2	2	5	5	25
		% within Modus operandi	0.0%	0.0%	16.0%	20.0%	8.0%	8.0%	8.0%	20.0%	20.0%	100.0%
	Hit by blunt object / Blows / Fall	Count	2	1	8	9	1	1	2	2	1	27
		% within Modus operandi	7.4%	3.7%	29.6%	33.3%	3.7%	3.7%	7.4%	7.4%	3.7%	100.0%
	Run over by vehicle	Count	0	0	0	0	1	1	0	1	0	3
		% within Modus operandi	0.0%	0.0%	0.0%	0.0%	33.3%	33.3%	0.0%	33.3%	0.0%	100.0%
	Explosion	Count	1	1	1	4	2	2	2	0	1	14
		% within Modus operandi	7.1%	7.1%	7.1%	28.6%	14.3%	14.3%	14.3%	0.0%	7.1%	100.0%
	Hijack	Count	0	0	1	1	0	0	0	0	0	2
		% within Modus operandi	0.0%	0.0%	50.0%	50.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%
	Other / unknown	Count	0	3	1	1	1	1	1	2	0	10
		% within Modus operandi	0.0%	30.0%	10.0%	10.0%	10.0%	10.0%	10.0%	20.0%	0.0%	100.0%
Total		Count	5	16	51	55	39	29	24	14	7	240
		% within Modus operandi	2.1%	6.7%	21.3%	22.9%	16.3%	12.1%	10.0%	5.8%	2.9%	100.0%

$X^2(56) = 102.037$, $p = 0.001$

Since 15.7% of all murdered victims in the period under analysis are non-Maltese it was considered important identify whether there is a significant relation between the nationality of the victim and that of the offender. Table 10 indicates that there is a significant probability that Maltese victims are targeted mainly by Maltese offenders ((93%). Meanwhile non-Maltese offenders tend target non-Maltese victims (62.5%). This table is excluding those cases where the offender was never identified. In case where there were multiple offenders the nationality of the prime suspect was taken in consideration paper focuses mainly on victims (see Figure 6).

Table 10: Victim Maltese or Non-Maltese vs Offender Maltese or Non-Maltese

			Offender Maltese or Non-Maltese		Total
			Maltese	Non-Maltese	
Victim Maltese or Non-Maltese	Maltese	Count	146	11	157
		% within Victim Maltese or Non-Maltese	93.0%	7.0%	100.0%
	Non-Maltese	Count	12	20	32
		% within Victim Maltese or Non-Maltese	37.5%	62.5%	100.0%
Total		Count	158	31	189
		% within Victim Maltese or Non-Maltese	83.6%	16.4%	100.0%

$X^2(1) = 59.701$, $p = 0.001$

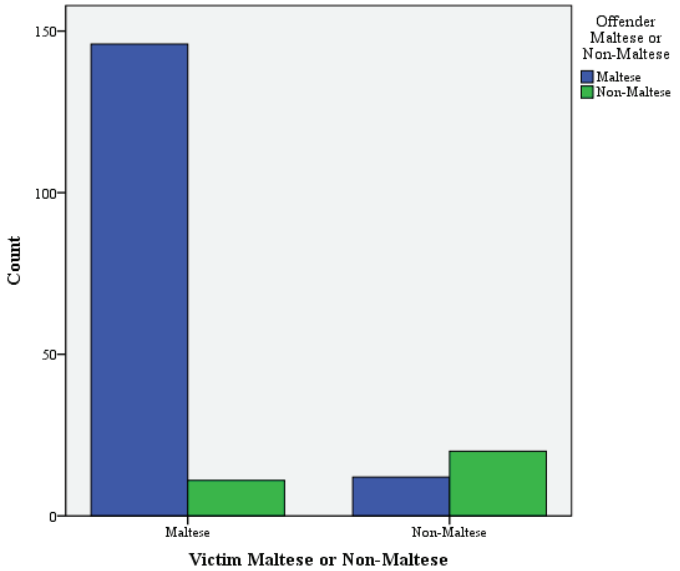


Figure 6: Victims' nationality vs Offenders' nationality

Homicide clearance in Malta is another aspect that should be explored in more depth. From the homicide cases of the last 48 years, 73.3% were solved. One of the first finding was the significant relation between homicide clearance and the modus operandi. The overall trend is that homicide cases are solved. The only evident exception are cases where explosions are involved. With a probability of 66.7%, cases were explosions were involved tend to remain unsolved. This links to Table 8 (above) where it could not be established some kind of relationship between the victims and the offenders, and the use of explosion. Thus, in 16.7% of those cases were the relationship was considered as 'unknown' explosions were used. This also reflects in the 66.7% of explosion could not be linked to a specific kind of relation between the offender/s if ever identified and the victim (see Table 8).

Table 11: Modus operandi vs Homicide clearance

			Homicide Clearance		Total
			Solved	Unsolved	
Modus operandi	Stabbing	Count	56	6	62
		% within Modus operandi	90.3%	9.7%	100.0%
	Shooting	Count	75	29	104
		% within Modus operandi	72.1%	27.9%	100.0%
	Asphyxia/Strangulation	Count	13	13	26
		% within Modus operandi	50.0%	50.0%	100.0%
	Hit by blunt object / Blows / Fall	Count	25	5	30
		% within Modus operandi	83.3%	16.7%	100.0%
	Run over by vehicle	Count	3	1	4
		% within Modus operandi	75.0%	25.0%	100.0%
	Explosion	Count	5	10	15
		% within Modus operandi	33.3%	66.7%	100.0%
	Hijack	Count	2	0	2
		% within Modus operandi	100.0%	0.0%	100.0%
	Other / unknown	Count	8	4	12
		% within Modus operandi	66.7%	33.3%	100.0%
Total		Count	158	68	255
		% within Modus operandi	83.6%	26.7%	100.0%

$X^2(7) = 31.281$, $p = 0.001$

DISCUSSION

Homicide trends began in 1970s mainly by social historians when examining judicial records and adopting social science methodologies (Eisner, 2017: 568). However, as Salafati (2001: 286) explicated while citing Cheatwood (in Smith, 2000: 9) "the field is weak in studies of international homicide, whether in stand-alone studies of specific countries or in comparative studies…". The epidemiology of homicide in Malta is no exception. This paper provides initial results which should create the foundations to increase and improve research on the phenomenon of homicide. Delineating the homicide trends in the last 48 years proved to be no easy task even though the number of homicides did not amount more than 237 cases with 255 victims.

Overall these years the number of male victim of homicide doubles that of female victims reflecting (Aebi & Linde, 2014). Additionally, the situation in Europe is more complex and the huge differences among and within countries make it more difficult compare a particular homicide trend in a country with another (Salafati, 2001). As Aebi and Linder (2014) examine the distribution of ages the most significant result is that victims belong mainly to the 30–44 age group. This is also reflected in the ages of the Maltese victims of homicide where the highest percentages, 44.2% of all homicide analysed in this paper (Table 2), ranged between 21and 40 years. This age range is exceptionally high when compared to international level where according to UNODC (2014), 43% of all victims of homicide are aged between15 and 29 years.

To provide a reliable incidence rate of homicides in Malta it had to be analysed per 100,000 to be comparable to the statistics produced by the World Health Organization (WHO). Aebi and Linder (2014: 555) cited various authors (LaFree, 2005; Kalish; 1988; Neapolitan, 1997; Messner and Rosenfeld, 1997), that show a general agreement in considering the WHO data compelling and trustworthy in cross-national comparisons of homicide. According to the UNODC (2014) the global average homicide rate stands at 6.2 per 100,000. As indicated in Figure 2 the overall incidence for homicide in Malta is of 1.4, which incidence decreases to 1.2 when not considering those homicides committed by non-Maltese nationals. The only instance where the homicide rates of males was significantly high was in 1981 with an incidence was of 5.2 (Figure 4).

The use of firearms is the most common in homicide in Malta as it appeared in almost 41% of the cases analysed. However, this does not seem to be always associated with intimate partner homicide as indicated in Sivaraman, Ranapurwala, Moracco and Marshall (2019). Table 6 indicates that shooting in Malta is mainly used against male [in 82.7% of the cases] and there were instances where stabbing and hitting with a blunt object followed the shooting (Table 4). In case of female homicide victims, death by asphyxia seems to be a more common trend in Malta. Yet looking for the incidence of the respective modus operandi in relation with age (Table 9) it was indicated that murder by asphyxia is more common in the ages 21 to 40 (36%) and even more among elderly age ranging 61 to 90, with 48% of the analysed cases. A similar trend is found in Dooley's (1995) report *Homicide in Ireland*. The trend in cases of intimate relationship in Malta is murder by stabbing (see Table 8 above).

Dooley (1995: 26) considers that homicide by strangulation or asphyxiation is associated with a sexual motive. On similar terms Radojevic et al (2013) associated multiple stabbing with the sexual motive of the murderer. In Malta, the majority (92.9%) of victims of homicide cases involving intimate relationships were female victims (Table 7). Stabbing was the method that led to the death of 45.2% of the 42 homicide cases with an intimate motive (Table 8). Other than intimate relationships, the other two predominant motives in the analysed cases are altercations and acquaintance. This also mirrored in the incidence found between the nationality of victims and that of offenders, where there tends to be a higher probability that an offender targets a victims of the same nationality (Table 10). While discussing a decline in killings, Birkel and Dern (2012) described this trend of killings among fellow-countrymen.

The final aspect explored in this paper deals with homicide clearance. The overall trend on homicide clearance is that the Malta Police Force solved 73.3% of all the of the respective victims. As indicated by Liem et al. (2018) this is slightly lower than Canada which has a clearance rate of 75% (Mahony and Turner, 2012) and marginally higher than the United States with 65%

clearance rate (Roberts, 2008). As Table 11 indicates homicide with the use of explosive results in the highest incidence of unsolved cases. Cases were explosions are involved will incur a high level of forensic evidence gathering which does not necessarily facilitate the identification of an offender and the eventual prosecution in comparison with other police investigative techniques (Baskin and Sommers, 2010)

CONCLUSIONS

Considering this is paper presents some of the first findings of the analyses of homicide cases in the last 48 years, it is possible to conclude by attesting that research on various aspects of homicide in Malta is possible because data is available and can be gathered from various sources. Results show how the homicide incidence rate is on the decline and pretty low but still there is room for improvement and bring the incidence level further down for both male and female. A more thorough analysis of what were the various motivation that led to the murder could provide potential indicator that could be addressed in prevention of potential killings.

Basic data on homicide cases rendered possible to outline a number of trends that reflect on modus operandi, gender, relationships, age and nationality and homicide clearance. It is evident that shooting and stabbing are the most common methods of killing in Malta. Yet this paper managed to associate the modus operandi with approximate time of reporting of the homicide case, with the gender of the victim, the relationship between the offender and victim and the age of the victim. The data collected also permitted the analysis of the trends of killings among genders and how this varies together the respective identified relationship. Furthermore, the relationship of the nationality of the both victims and the perpetrators proved to be a significant factor to be taken in consideration. The final point of this paper showed also a significant relation between homicide clearance and the method of killing, which identifies killing by explosion as being as weakness in solving the cases. As these first findings shall help in putting homicide research in Malta on the academic map as well as help the police department to understand better the homicide trends in Malta, it is hoped that the results inspire future research on the phenomenon of homicide on the Maltese islands.

REFERENCES

- Aebi, M., & Linde, A., (2014), The persistence of lifestyles: Rates and correlates of homicide in Western Europe from 1960 to 2010, *European Journal of Criminology,* (2014), Vol. 11(5) 552 –577, London: Sage.
- Attard, E., (2011), *Delitti F'Malta: 200 Sena ta' Omicidji 1800-2000*, Malta: BDL Publishing.
- Attard, E., (2012), *Delitti F'Malta: 200 Sena ta' Omicidji 2000-2012*, Malta: BDL Publishing.
- Baskin, D., and Sommer, I., (2010), The influence of forensic evidence on the case outcomes of homicide incidents, *Journal of Criminal Justice 38*, (2010) 1141-1149.
- Birkel, C., and Dern, H., (2012), Homicide in Germany, in Liem and Pridemore 2012, *Handbook of European Homicide Research Patterns, Explanations, and Country Studies*, London: Springer, p.313-328.

- Brookman, F., Maguire E. R., Maguire M., (Eds.) (2017) *The Handbook of Homicide,* UK: Wiley Blackwell.
- Camilleri, N, (2010), *The notion of intent in homicide: a comparative analysis*, University of Malta; Faculty of Laws.
- Camilleri, M., (2008), *Developing the criminal law on homicide: euthanasia and assisted suicide*, Faculty of Laws.
- *Criminal Code*, Chapter 9 of the Maltese Law, http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574, accessed December 2018.
- Cutajar, A. M., (2013), *An analysis of the concept of "duty in care" in Maltese criminal law in relation to the crimes of wilful homicide and involuntary homicide*, University of Malta: Faculty of Laws
- Demicoli, S., (1983), *The notion of excusability in homicide*, University of Malta: Faculty of Laws.
- Dooley, E., (1995), *Homicide in Ireland 1972-1991,* Dublin: The Stationery Office https://www.lenus.ie/bitstream/handle/10147/337753/homicideinireland1972-1991.pdf?sequence=1&isAllowed=y
- Eisner, M., (2017), Interepersonal violence on the British Isles, 1200-2016. In Liebling, Maruna, McAra, *The Oxford Hanbook of Criminology, 6th Ed,* UK: Oxford University Press.
- Kalish, C.B., (1988) *International Crime Rates*. Washington, DC: US Department of Justice, Bureau of Justice Statistics.
- Kivivuori, J., Suonpää, K., and Lehti, M. (2014) Patterns and theories of European homicide research. European Journal of Criminology, 11(5): 530–551.
- LaFree G., (2005) Evidence for elite convergence in cross-national homicide victimization trends, 1956 to 2000. *The Sociological Quarterly* 46(1): 191–211.
- Liem and Pridemore, (2012), *Handbook of European Homicide Research Patterns, Explanations, and Country Studies*, London: Springer.
- Liem, M., (2017), Homicide in Europe, In Brookman, F., Maguire E. R., Maguire M., (Eds.) (2017) *The Handbook of Homicide,* UK: Wiley Blackwell, p.291-307.
- Liem, M., Suonpää, K., Lehti, M. and Kivivuori, J., Granath, S., Walser, S., Killias, M., (2018), Homicide clearance in Western Europe, *European Journal of Criminology*, 2018, p.1-21
- Mahony, T.H. and Turner, J. (2012), Police reported clearance rates in Canada, (2010). *Juristat article*. Catalogue no 85-002-X. Ottawa: Statistics Canada. URL (accessed 5 March 2018): http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11647-eng.pdf.
- Marshall, I.H. and Summers, D.L., (2012), Contemporary Differences in Rates and Trends of Homicide Among European Nations. In Liem and Pridemore, (2012), *Handbook of European Homicide Research Patterns, Explanations, and Country Studies*, London: Springer, p.39-70.
- Messner, S.F. and Rosenfeld R. (1997) Political restraint of the market and levels of criminal homicide: A cross-national application of institutional-anomie theory. *Social Forces* 75(4): 1393–1416.

- Neapolitan, J.L., (1997) *Cross-national Crime: A Research Review and Sourcebook*. Westport, CT: Greenwood Publishing Group.
- Roberts, A., (2008) Explaining differences in homicide clearance rates between Japan and the United States. *Homicide Studies* 12: 136–145.
- Rogers, M.L., and Pridemore, W.L., (2012) Geographic and Temporal Variation in Cross-National Homicide Victimization Rates. In Brookman, F., Maguire E. R., Maguire M., (Eds.) (2017) *The Handbook of Homicide,* UK: Wiley Blackwell, p. 20-43.
- Salafati, C.G., (2001), A European perspective on the study of homicide, *Homicide Studies*, Vol. 5 No. 4, November 2001, 286-291, Sage Publications.
- Schröttle M. and Meshkova, K., (2018), Data collection: challenges and opportunities. In Weil, S., Corradi, C., and Naudi, M., (2018), *Femicide across Europe: Theory, research and prevention*, UK: Policy Press p.33-52.
- Sivaraman, J.J., Ranapurwala, S.I., Moracco K.E., Marshall S.W., (2019), Association of state firearm legislation with female intimate partner homicide*, American Journal of Preventive Medicine*.56(1):125−133, Published by Elsevier.
- Smit, P.R., de Jong, R.R. and Bijleveld C.C.J.H., (2012), Homicide Data in Europe: Definitions, Sources, and Statistics. In Liem and Pridemore, (2012), *Handbook of European Homicide Research Patterns, Explanations, and Country Studies*, London: Springer, p.5-25.
- Smith, M.D., (2000), A new era of homicide studies? Visions of a research agenda for the next decade, *Homicide Studies, 4,* 3-17.
- UNODC (United Nations Office on Drugs and Crime) (2014) Global Study on Homicide 2013: Trends, Context, Data. Vienna: United Nations Office on Drugs and Crime. https://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf
- Weil, S., Corradi, C. and Naudi, M., (2018), *Femicide across Europe: Theory, research and prevention*, UK: Policy Press.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 95-103
ISSN 1512-5505

CITES CRIMES IN POLAND – CAUSES, MANIFESTATIONS, PREVENTION

Maciej DUDA

Abstract

This study analyses the illegal trade in protected fauna and flora species from the perspective of green criminology. In the criminological part, the author diagnoses the causes of these phenomena (etiology), characterizes symptomatic forms of pathologies occurring in this area (phenomenology) and suggests methods for counteracting and combating undesirable phenomena (prevention). Additionally, statistical data concerning the examined phenomenon in Poland are presented. The relations between CITES crimes and other criminological categories are examined. In the legal part, the author refers to regulations of international law, the European Union law and Polish criminal law. The paper also presents principles concerning liability for CITES crimes in Polish criminal law.

INTRODUCTION

Natural heritage, next to cultural heritage, is an element of national heritage for individual states (on the local scale) and human heritage (on the global scale). Its protection and preservation for future generations has attracted the interest of researchers representing multiple academic fields, including criminologists.

In the general view of criminal offences, crimes involving trafficking protected species of fauna and flora are less significant and less harmful for the society than other forms of organized cross-border crimes, such as narcotics, human or arms trafficking. This paper attempts to demonstrate that the so-called CITES crimes, contrary to popular belief, pose an increasing serious criminal threat, bringing significant profits for criminals. Additionally, it presents a general description of the illegal market of protected flora and fauna species in Poland, from the green criminology perspective.

The author of the study sets the following research aims: diagnosing the cause of the illegal trade in protected wildlife species (etiology), describing symptomatic forms of pathologies in this area (phenomenology), formulating methods for efficient prevention and combating undesirable phenomena (counteracting) as well as presenting principles concerning legal liability for smuggling CITES species in the Polish law.

A complex analysis of the subject matter requires the application of various research methods. The author used a dogmatic analysis of international law regulations, European Union law and Polish criminal law, an analysis of criminal statistics and critical analysis of the literature.

Criminology, as science dealing with the issues of crime, delinquency, perpetrators, crime victims and crime control, is an appropriate tool for examining the problem of illegal market of protected wildlife species. In particular, this is an area investigated by experts in so-called "green criminology".

GENESIS, DEVELOPMENT AND SUBJECTS OF INTEREST IN GREEN CRIMINOLOGY

Eco-criminology/green criminology is one of pioneering unconventional multidisciplinary branches of criminology. The term was used for the first time in the 1990s by M.J. Lynch (Lynch, 1990). A broader interest in this subject matter arose after a publication devoted to green criminology in a special issue of the "Theoretical Criminology" journal in 1998 (South & Beirne, 1998). Other English terms with a similar meaning in the literature include: eco-global criminology (White, 2009, White, 2011, Ellefsen, Larsen, & Sollund, 2012), green-cultural criminology (Brisman & South, 2013) and conservation criminology (Gibbs, Gore, McGarell, & Rivers, 2010).

A controversial topic is whether green criminology should be described as a new paradigm/discipline within criminology. Opponents of this view emphasize that green criminology has not yet developed concise, uniform theoretical foundations. However, this research area, unquestionably drawing on the previous achievements in criminology (e.g. radical criminology, economic analysis of crime, crime opportunity theories) is creatively developing and enhancing this branch of studies. Green criminologists also emphasize that it is more important to solve practical criminological problems than to build theoretical justifications proving the academic independence of green criminology (Pływaczewski, 2013).

Experts in this research area have been studying ecological damage, crimes against the natural environment and environmental protection law. Over the last 20 years, green criminologists have carried out research covering an increasingly broader spectrum. The major areas include the following issues: deforestation, global warming, soil, water and air pollution, poaching, illegal trade in endangered species, cruelty to animals, illegal trade in waste, food fraud, genetically modified food, biodiversity loss, consequences of natural disasters and ecological wars.

Working groups gathering green criminologists have been established at the American Society of Criminology and European Society of Criminology. At present, this green criminological trend is represented in criminology e.g. by M.J Lynch, R. White, R. Walters, A. Brisman, N. South, T. Benton, R. Sollund, T. Spapens, D. van Uhm, T. Wyatt, J. Maher, G. Pink, D. Siegel and G. Meško.

In Poland, the first publications concerning green criminology emerged at the end of the first decade of the twenty-first century. An unquestionable pioneer in green criminological research in Polish criminology is W. Pływaczewski. Under his supervision, a team of criminologists of the Chair of Criminology and Criminal Policy of the Faculty of Law and Administration of the University of Warmia and Mazury in Olsztyn have been conducting research into general issues of crimes against natural heritage. The research group specialises, first of all, in crimes against the environment, and its achievements in this field have led it to be described (with some degree of caution and modesty), the Olsztyn School of Eco-criminology.

TRADE IN PROTECTED WILDLIFE SPECIES UNDER THE WASHINGTON CONVENTION AND EUROPEAN UNION AND POLISH LAW

A key act in international law regulating this subject matter is the Convention on International Trade in Endangered Species of Wild Fauna and Flora. It was adopted on 3 March 1973 in Washington, and is commonly referred to as the Washington Convention, or the CITES Convention. Currently, 183 countries from all over the world are party to the convention.

The aim of the Washington Convention is the protection of wild animals and plants against excessive exploitation caused by international trade. Three appendices to the Convention list different groups of species: Appendix I – species threatened with extinction, Appendix II – species which may become threatened with extinction in the future as a result of unsustainable trade in those species, and Appendix III – species reported by the parties to the Convention as currently requiring protection. At present, Appendix I lists 1,045 taxa, Appendix II - 34,608 taxa, and Appendix III lists 217 taxa. According to the provisions of the Convention, the trade in species listed in Appendices can only be conducted based on an export permit, a model of which is attached as Appendix IV to the Convention. Any trade in CITES species without a permit or violating the provisions of the permit is prohibited by the Convention. Pursuant to Art. 8 of the Convention, its parties are obliged to take relevant measures aimed at prohibiting trade in specimens of animals and plants that violates the provisions of the Convention. According to the Convention, such measures include penal sanctions for trading in or keeping such species and confiscation or sending back such specimens to the export state.

The European Union ratified the Washington Convention on 9 April 1995, and it became effective for the EU on 8 July 1995. Provisions of the Convention were implemented into European law by Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein. In practice, EU law regulations are even more restrictive than the regulations provided in the CITES convention.

Poland ratified the Washington Convention on 12 December 1989, and it became effective on 12 March 1990. Provisions of the Convention were implemented in Polish law through the Nature Conservation Act of 16 April 2004. Under its Art. 126, this act penalizes the cross-border transport of species covered by the protection without a permit or in violation of permits, and Art. 128a penalizes any trade in protected species. Both deeds are punishable by terms of imprisonment from 3 months to 5 years. Additionally, under Art. 129, the court can order the confiscation of plants and animals being the object of the crime.

CITES CRIMES AND OTHER CRIMINOLOGICAL CATEGORIES OF OFFENCES

With reference to criminal behaviours related to the species protected by the Washington Convention, the term of so-called ""CITES crimes" was formulated. Criminal behaviours related to operations in the illegal market of protected wildlife species belong to a broader criminological category of crimes against the environment.

The classification applied in Poland for the purpose of illustrating the structure of criminal activity follows the methods of presenting criminal statistics, with a division into criminal (common) offences and economic crimes. Crimes related to smuggling, including the smuggling of protected wildlife species, are classified as economic crimes. However, CITES

crimes can be committed by perpetrators described as both "white collar" and "blue collar" criminals.

The smuggling of CITES species as a cross-border crime demonstrates close relationships with organized crime. Although individual specimens of wild fauna and flora are smuggled by individual perpetrators (most often tourists unaware of the illegality of this practice), mass-scale smuggling requires the cooperation of trafficking gangs with a global network of links. Therefore, CITES crimes fit into the concept of "globalization of crime". For participation in an organized criminal group, Art 258 of the Polish Penal Code provides for a penalty of imprisonment from 3 months to 5 years.

In recent research, criminologists have emphasized the so-called "virtualization of crime". This phenomenon involves the use of modern technology tools, particularly the Internet, by criminals. An increasing number of crimes are being committed in the so-called illegal e-commerce markets. In view of the modus operandi of the perpetrators, crimes of this type are classified as a form of cybercrime. Traditionally, trade in wild flora and fauna species was conducted in animal markets or in pet shops. Currently, most transactions take place through online auction services, such as Allegro, eBay, Amazon, AliExpress or other Chinese-speaking auction websites. Trading activity also takes place on closed or open social media forums, chats and thematic websites intended for animal or plant collectors. The above-mentioned e-commerce tools make it possible for traders to advertise, communicate with clients and carry out transactions concerning wild animals and plants. Illegal CITES species' markets are also possible through auction websites operating on the Darknet, such as Silk Road. The anonymity of transaction participants is additionally facilitated through the use of cryptocurrencies, such as bitcoin (Pływaczewski & Duda, 2019b). On one hand, the Internet can facilitate illegal activity, but on the other, it also provides the authorities with the possibilities to monitor and respond to criminal activities related to trade in wild fauna and flora. Proof of the significance of the problem of illegal internet trade in CITES species is the establishment in 2009 of the "Working group on e-commerce of specimens of CITES-listed species" at the Regular Committee of the Washington Convention. A study carried out by the International Fund for Animal Welfare indicated that the United States is responsible for 70% of illegal online trade in CITES-protected species (Todd & Place, 2010).

Criminologists have also recorded cases of illegal trade in CITES-listed species providing a source of income used later to finance other serious criminal acts, such as terrorism, rebel groups and wars. A good example was the Liberian dictator, Charles Taylor, who sold exotic timber in exchange for weapons (Blundell, 2007), or the operation of "shifta" hit squads in Kenya and Tanzania, who engage in the illegal acquisition and sale of ivory for the same purpose (Pływaczewski, 2011b, Pływaczewski, 2011c).

ETIOLOGY OF CITES CRIMES

A criminological analysis of smuggling CITES-listed specimens should begin with a presentation of etiological factors determining this pathology. The literature of the subject indicates that the cause of the natural heritage smuggling is due to: the limited resources of wild fauna and flora species, higher prices in western countries than in eastern countries, increased cross-border traffic, relative inefficiency of customs control, the smugglers' feeling of impunity, relative ease

of hiding the smuggled CITES-listed species, the focus of the customs authorities on preventing the smuggling of high-excise goods (alcohol, cigarettes, fuel), lack of awareness of customs services as to the scale of the threat and the lack of social awareness of the illegality of the trade in CITES-listed species (Pływaczewski, 2016, Pływaczewski, Nowak, & Porwisz, 2017).

Discussion of criminological theories explaining the reasons of crimes related to smuggling exceeds the limits of this study, but the concepts that should be mentioned here include: routine activity theory (M. Felson), social learning theory (A. Bandura), differential association theory (E. Sutherland), anomie theory (R. Merton), subcultural theory (A. Cohen), neutralization theory (G. Sykes & D. Matza), theory of economic conflicts (J. Reiman) and the economic theory of crime (G. Becker) (Tibbets, 2019).

CITES crimes, as one of the manifestations of economic crimes, are characterized by the specific motivation of perpetrators, which is the desire for profit. The crimes of this category generate high profits with a relatively low risk of punishment. Additionally, penalties for smuggling CITES-listed species are much lower than penalties for other types of smuggling. For comparison, in the Polish criminal law, drug trafficking carries a prison sentence of up to 15 years, arms trafficking is penalized by up to 10 years of prison and human trafficking - up to 15 years of prison. The smuggling of wildlife species is therefore a profitable and less risky activity for the perpetrators.

PHENOMENOLOGY OF CITES CRIMES

In the area of smuggling crime phenomenology, the attention is primarily put on a very broad spectrum of smuggled objects, which include live animals, dead animals (bush meat), stuffed animals (taxidermy) and goods made from animal skin and bones (clothes, shoes).

Endangered fauna species are purchased by laboratories (e.g. buying monkeys, frogs and leeches), private collectors (e.g. buying snakes, parrots, spiders, turtles or tropical fish), zoological gardens (e.g. buying predatory birds, tigers), restaurant owners (e.g. buying shark fins and bush meat), manufacturers of natural medicine preparations (buying, among others, rhinoceros horns or elephant tusks).

As regards smuggled endangered flora species, they most frequently include: orchids, sundews, cacti and rare timber, e.g. ebony, mahogany or cedar (Wu, 2007). It must be also emphasized that the demand for smuggled CITES-listed species generates huge destruction in the natural environment and causes the extinction of endangered species.

A particularly interesting issue is the *modus operandi* of CITES-listed species smugglers. It is very highly differentiated and generally limited only by the creativity of the smugglers. In retail volumes, small specimens of plants and animals are hidden in hand luggage or in the clothes of passengers at airports. Larger specimens or higher amounts are transported in containers together with legal goods or using specially prepared double bottoms in trucks and cars crossing road border crossings. The largest specimens and the highest amounts are transported by sea in freight containers (e.g. ivory). At present, increasingly more often protected fauna and flora species are smuggled through postal and courier shipment, so crimes are increasingly frequently being detected in warehouses inside the country and not at the borders. It should be emphasized that, in Poland, cases of trafficking CITES-listed species over the so-called “green border” do not occur in practice.

Smugglers transport plants and animals without permits, transport species other than those declared in transport documents, transport a higher amount of species than declared in transport documents, declare a false country of origin, and even change the appearance of animals, e.g. by painting them (Chackiewicz, 2013).

In analysing the destination of trafficking in CITES-listed species, it should be noted that Poland is mainly a so-called transit country, and less often the final destination country. This results mainly from the relatively low purchasing capabilities of Polish society. The countries of origin, also referred to as source countries, are the countries of South and Central America, Africa, Asia and Eastern Europe (former Soviet republics). Destination countries, also referred to as market countries, are located in North America, Western Europe and in the Far East. One of the main smuggling routes runs through Poland, from eastern to western Europe.

The most frequently revealed cases of CITES-listed species smuggling at Polish borders include: black caviar, medical leeches, eels, parrots, turtles, snakes, corals, ivory, products of traditional Asian medicine (TAM/TCM), e.g. ginseng roots, musk, bear bile, powdered seahorses (Pływaczewski & Duda, 2019a). In Poland, the number of detected CITES-listed specimen trafficking cases a year amount to, on average, from 100 to 250 (Tusiński, 2016). This is only 0.025% of the total number of crimes detected in Poland. Of course, this is only the figure showing detected crimes, while the number of non-revealed crimes (dark figure) is difficult to estimate.

At the margin of the main discussion, some interesting and atypical cases of smuggling can be mentioned as a curiosity. One example is the smuggling of mammoth tusks by Russians, obtained during an illegal search in Siberia and sold further on as ivory. Legal qualification of the smuggling was a problem in this case, since mammoths, as extinct animals, are not subject to protection under the Washington Convention. Eventually, the mammoth tusks were defined as cultural objects.

Illegal transfer of raw amber is another typical form of smuggling at the Polish-Russian border. This particularly concerns the Kaliningrad District, where 90% of the total resources of this raw material are located. It is extracted by the Kaliningrad Amber Combine in the town of Jantarnyj (Янтарный), and according to the Russian law, the transport of raw amber across the board is illegal. At the same time, the Polish city of Gdańsk, situated 160 km from Kaliningrad, is the largest amber jewellery manufacturing centre in the world. Therefore, it is obvious that there is an illegal amber market in this region of Europe.

COUNTERACTING CITES CRIMES

CITES crimes are combated on three planes – legislative (penalisation of CITES crimes), institutional (operation of law enforcement authorities and services), and social (increasing legal awareness).

Under Polish criminal law, the provisions of the Washington Convention were implemented in the above-discussed provisions of the Natural Conservation Act. It is prohibited in Poland to transport abroad or to trade in CITES-listed species without a permit or in violation of the permit conditions. Additionally, the Penal Code provides for higher penalties for participation in an organized criminal group, for making crime a regular source of income and for recidivism.

There is no specialist service in Poland responsible for preventing the smuggling of CITES-listed species. These tasks are assigned to the Customs Service, the Border Guard and the Police. Designated officers, referred to as "CITES coordinators" operate within the police and customs structures. They have an appropriate educational background, are prepared and competent and are involved, first of all, in the training of other officers in CITES-related issues.

A significant question is also cross-border and international cooperation of law enforcement authorities (Interpol, Europol). This is a consequence of the fact that the illegal market of CITES species is controlled by international smuggling gangs. As criminologists observe, routes used for trafficking CITES-listed species are also used by organised crime groups to check the possibility of using a given smuggling route for future drug trafficking (Pływaczewski, 2010).

In view of crime virtualization, law enforcement authorities should pay particular attention to international auction websites, where the trade in smuggled specimens is carried on. One of the most important elements in counteracting the illegal online trade in CITES-listed species is, therefore, the cooperation of law enforcement authorities with owners and administrators of auction portals (Pływaczewski, 2017).

As regards social policy, it is necessary to increase legal awareness of the society as regards the penalties for purchasing and transporting CITES-listed species across borders. Media campaigns have been organized to make citizens aware that specific species of animals or plants are protected by law and keeping them is illegal. With this aim in view, exhibitions of CITES-listed specimens confiscated by officers are often placed at air border crossings. The intention is to show tourists that exotic plants or animals are not the best holiday souvenirs (Pływaczewski, 2011a).

CONCLUSIONS

To summarize, it should be emphasized that CITES crimes are an element of crime against global natural heritage, Examination of the causes, manifestations and methods to counteract this pathology is one of the research interest areas investigated by green criminologists. In Poland, this subject matter is explored, first of all, by the researchers at the Olsztyn School of Eco-Criminology. Fauna and flora species threatened with extinction are protected by international legal regulations (the Washington Convention), the European Union regulations (Council Regulation No. 338/97) and Polish law (Natural Conservation Act). CITES crimes are considered a separate criminological category, as part of a broader category of crimes against the environment. Consequently, those crimes are sometimes wrongly classified as so-called victimless crimes. Transnational crime against natural heritage is conservatively estimated at about 90% of crimes. The detection of such crimes is also low, as they remain outside the main focus of law enforcement authorities. Additionally, criminologists also note the phenomenon of the so-called "virtualization of crime" as the trade in smuggled goods is mostly conducted not through the traditional distribution channels, but through auction portals, both on the Internet and the Darknet. With the emergence of an illegal online market, a shift has been observed from traditional common crime to cybercrime and economic crime. In relation to the above, CITES offenders should be considered as being both white collar criminals (typically involving economic crimes) as well as blue collar criminals (responsible for common crimes). CITES crimes show close links with economic crimes, organized crimes and cybercrimes, and even with financing terrorism and armed conflicts. The fact that criminal networks engaged in CITES crimes operate globally confirms

the "crime globalisation" concept. Criminologists estimate that, at present, the illegal market in wildlife species brings profits only slightly lower than drugs, firearms or human trafficking. Thus, contrary to popular belief, the discussed category of crime poses a significant threat to both global and national security.

REFERENCES

- Blundell, A.G. (2007). Implementing CITES Regulations for Timber. *Ecological Applications 17(2)*, 324.
- Brisman, A., & South, N. (2013). A green-cultural criminology. An exploratory outline. *Crime, Media, Culture, 9(2)*, 115-135.
- Chackiewicz, M. (2013). *CITES a międzynarodowy obrót towarowy*, Warszawa: Wyższa Szkoła Logistyki i Cła.
- Ellefsen, R., Larsen, G., & Sollund, R. (Eds.). (2012). *Eco-global Crimes. Contemporary Problems and Future Challenges*. Burlington: Ashgate Publishing.
- Gibbs, C., Gore, M.L., McGarrell, E.F., & Rivers, L. (2010). Introducing conservation criminology towards interdisciplinary scholarship on environmental crimes and risks. *British Journal of Criminology, 50(1)*, 124-144.
- Lynch, J.M. (1990). The Greening of Criminology: a Perspective for the 1990's. *Critical Criminologist, 2(3)*, 1-4.
- Pływaczewski, W. (2010). Międzynarodowa współpraca policyjna w zakresie przeciwdziałania przestępczości związanej z nielegalnym handlem chronionymi gatunkami fauny i flory. *Przegląd Policyjny, 4(100)*, 71-94.
- Pływaczewski, W. (2011a). Organizacje pozarządowe na tle problematyki nielegalnego handlu chronionymi gatunkami dzikiej fauny i flory. *Studia Prawnoustrojowe, 13*, 265-288.
- Pływaczewski, W. (2011b). Combating organized poaching in Africa: activities of the Kenya Wildlife Service. In W. Pływaczewski (Ed.), *Organized Crime and Terrorism. Reasons. Manifestations. Counteractions* (pp. 49-64). Olsztyn: University of Warmia and Mazury.
- Pływaczewski, W. (2011c). Organised Trafficking in Protected Species of Wild Flora and Fauna as a Means of Supporting Armed Conflicts and Terrorism. *Białostockie Studia Prawnicze, 10*, 189-206.
- Pływaczewski, W. (2013). Zielona kryminologia – spór o zakres kryminalizacji. In S. Pikulski & M. Romańczuk-Grącka (Eds.), *Granice kryminalizacji i penalizacji* (pp. 568-579). Olsztyn: Elset.
- Pływaczewski, W. (2016). *Nielegalny rynek chronionych gatunków dzikiej fauny i flory. Geneza, przejawy, przeciwdziałanie*. Szczytno: Wydawnictwo WSPoL.
- Pływaczewski, W. (2017). Ekokryminologia wobec zjawiska nielegalnego handlu chronionymi gatunkami dzikich gatunków fauny i flory w Internecie. In E. W. Pływaczewski & J. Bryk (Eds.), *Meandry prawa – teoria i praktyka. Księga jubileuszowa prof. zw. dr. hab. Mieczysława Goettela* (pp. 403-420). Szczytno: Wydawnictwo WSPoL.

- Pływaczewski, W., & Duda, M. (2019a). Azjatycka medycyna ludowa i jej związki z nielegalnym rynkiem chronionych gatunków fauny i flory. In W. Pływaczewski, A., & Dobies (Eds.), *Przeciwdziałanie patologiom na rynku medycznym i farmaceutycznym* (pp. 120-125). Warszawa: CH Beck.
- Pływaczewski, W., & Duda, M. (2019b). Незаконная торговля видами животных и растений, подпадающих под действие CITES в сети «Интернет»: криминологические аспекты). In В.В. Зайцев & О.А. Серова (Eds.), *Цифровая экономика: проблемы правового регулирования. Монография* (pp. 180-189). Moskau, Knorus.
- Pływaczewski, W., Nowak, A., & Porwisz, M. (Eds.). (2017). *Przeciwdziałanie międzynarodowej przestępczości przeciwko środowisku naturalnemu z perspektywy organów ścigania*. Szczytno: WSPoL.
- South, N., & Beirne, P. (1998). Editors Introduction. *Theoretical Criminology, 2(2)*, 147-148.
- Tibbets, S. G. (2019). *Criminological Theory*. Thousand Oaks: SAGE Publications.
- Todd, P., & Place, J. (2010). Investigating the Internet Wildlife Trade. *CITES World, 19*. Retrieved from https://www.cites.org/eng/news/world/19/7.php.
- Tusiński, R. (2016). Statystyki, statystyki, statystyki... i jeszcze trochę statystyk. *Wiadomości Celne, 8*, 5-6.
- White, R. (2009). Researching Transnational Environmental Harm: Toward an Eco-Global Criminology. *International Journal of Comparative and Applied Criminal Justice 2009, 33(2)*, 229-248.
- White, R. (2011). *Transnational environmental crime. Toward an eco-global criminology*. London: Routledge.
- Wu, J. (2007). World Without Borders: Wildlife Trade on the Chinese-language Internet. *TRAFFIC Bulletin, 21(2)*, 75-84.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 105-122
ISSN 1512-5505

CRIMINAL LAW PROTECTION OF CULTURAL PROPERTY FROM A COMPARATIVE PERSPECTIVE: SOME ITALIAN LESSONS FOR THE HUNGARIAN LEGISLATION

Krisztina FARKAS

Abstract

The cultural properties are complex objects of cultural, economic and investment mechanism. The acts against them appear as an interdisciplinary problem, the combat against these diverse actions can be realized by the regulations of the various areas of law. However, the threatened values, the size of the damages and the related crimes with great weight make the intervention of criminal law necessary. Italy is characterized by one of the wealthiest cultural heritages of the world. For this reason, Italy takes a leading role in fighting against actions violating these values. This protection is realized at different levels and by several measures. In addition, the Italian system is characterized by special police forces dedicated to law enforcement in this field. The Italian and Hungarian system have been examined and compared them in the field of the criminal law protection of cultural property in order to give appropriate suggestions and to make the Hungarian protection system more effective. The paper will introduce the constitutional bases, the legislation, the organization system, and practical experience in both country and compare them. With the help of this comparative analysis, it will be possible to improve the protection of cultural properties in Hungary and hopefully it will give useful advice for other countries.

The cultural properties are complex objects of cultural, economic and investment mechanisms. The acts against them appear as an interdisciplinary problem, the combat against these diverse actions can be realized by the regulations of the various areas of law. The particularity of cultural properties lies in the fact that actions against them require a comprehensive, multi-disciplinary and interdisciplinary approach. Legislation on cultural properties is also multi-layered, with multiple jurisdictions, leading primarily going through administrative law, constitutional, civil, criminal, international and European law. The threatened values, the size of the damage and the related crimes with great weight makes the intervention of the criminal law necessary (Kármán, 2016)

In recent decades, not only the individual states, but also the international organizations and the European Union have been focusing on protecting these values, by means of international treaties and other state acts provide mutual assistance to each other primarily in the areas of theft, illegal trade and counterfeiting. One of the most recent results of this is the Council of Europe Convention on Offenses relating to Cultural Property adopted on 3 May 2017. This document can be considered a milestone, as it is the first international convention specifically to criminalize the destruction and illegal trafficking of cultural property. In spite of all this, the topic is still scarce and sporadic in everyday life.

Within the framework of the G7, culture ministers met for the first time on 30-31 March 2017, with the title "Culture as a Dialogue among People" to promote intercultural conversation and the shared responsibility of states to protect cultural values. At the meeting, the G7 acknowledged and strengthened Italy's cultural leadership, and issued a joint statement that is committed to the international community's commitment to preserving, restoring, and combating human trafficking.

Italy is characterized by one of the wealthiest cultural heritages of the world. According to the statistical data, on average, more than 33 cultural values per 100 square kilometers are found in the country, with a slightly increasing trend (Quelle: Rapporto Bes 2016: 129). In terms of the richness of archaeological finds including the already discovered and yet uncovered sites, literature compares Italy with an "open-air museum" (Proulx, 2013). Moreover it is also characterized by the plenty of the relevant legislation, which, on the one hand, appears in the specific provisions of the general codes and on the other hand in special legislations, whether for preventive or repressive purposes. It is not surprising, that Italy takes a leading role in fighting against actions violating these values and has created a special protection system that can be considered unique in the world. This protection is realised at different levels and by several measures. In addition, the Italian system is characterised by a special police force dedicated to law enforcement in this field. Thus, when a country seeks more effective solutions to protect its cultural values, whether organizational or legal, the examination of the Italian defence system cannot be ignored. The research was based on the assumption that Italian cultural heritage protection has a long tradition, so it can provide adaptable solutions for Hungarian legislation and law enforcement.

The paper will introduce the Hungarian and Italian criminal legislation, organisation system, practical experience and compare them. With the help of this comparative analysis, it will be possible to make the protection of cultural properties in Hungary more effective and hopefully it will give useful advice for other countries.

1. CONSTITUTIONAL BASIS FOR CULTURAL HERITAGE PROTECTION

The international cultural heritage protection law and its domestic legal component have proceeded in tandem with the development of international human rights laws and norms (Mackenzie – Yates, 2017: 220). Cultural rights are part of the second generation of human rights and they can be interpreted wider and narrower. In a broader sense, they also include the right to education. In the narrower sense cultural rights are the right to participate in the cultural life, to enjoy the benefits of the progress and application of science, and to protect the moral and material interests of the author of a scientific, literary or artistic work (Kardos, 2002: 29). The

criminal law protection of these rights is considered in narrow sense. Although, historically the formulation of cultural rights as human rights has begun in international law – notably during the preparation of the Universal Declaration of Human Rights – it appears in some states' constitution. The most important wording of cultural rights to date is Article 27 of the Universal Declaration and Article 15 of the UN International Covenant on Economic, Social and Cultural Rights (Kardos, 2002: 29).

The protection of cultural rights derives both in Italy and Hungary from the Constitution.

1.1 ITALY

"The consciousness and social development of the community and the individual create the need for a nation to create the possible strongest regulation concern the culture" (Orlando, 2008). This recognition shaped the Italian legislator when it recognized the protection of culture at the constitutional level. As a result of the constitutional declaration, Italy has become famous as a "country of the culture" (Orlando, 2008). The Italian Constitution[1] declares the protection of these values among the fundamental principles. The basic principles, first, lay down the core values that reveal the spirit of the constitution before the first part. The importance of these principles is illustrated by the fact that they cannot be the subject of any revision of the Constitution (Mezzeti, 2011: 89).

The in often quoted and referenced declaration is realised in two paragraphs: "The Republic promotes the development of culture and scientific and technical research" [Art. 9 (1)]; and "It safeguards the natural landscape and the historical and artistic heritage of the Nation" [Art. 9 (2)]. Based on the literal interpretation, the first paragraph refers to cultural activities and the second one to the protection of cultural heritage. These two paragraphs are the core of the principle (Ainis, 2009). However the term "republic" includes not only federal, but also provincial, county and local culture organizations related to the basic principle.

Two theories have unfolded during the interpretation of Art. 9 Constitution. The first years after the entry into force of the Constitution were characterized by a static-conservative approach and focused on conserving existing values. The interpretation is based on paragraph 2 Cost. (namely the protection). This theory has been replaced over time by a so-called dynamic approach, which recognized both of these paragraphs in a complex way to protect these values (Demuro, 2002: 30). Art. 9 par. 1 Cost. prescribes the promotion and development of culture and research, whereby the state undertakes to promote the cultural, scientific and technical development of the country by promoting culture (and research), competing with more developed countries, avoiding models and methods and objectives that limit the freedom of art and science. Art. 9 par. 2 Cost. "opens a wider door" than the cultural and natural heritage concept (Del Giudice, 2016). The feature of the declaration is that it defines the concept of cultural heritage and cultural property more broadly than general legislation, thus providing a basis for a broad protection (Rimoli, 2017: 104).

---

[1] Costituzione (Gazzetta Ufficiale 27 dicembre 1947, n. 298)

1.2 HUNGARY

The Fundamental Law of Hungary[2] declares that "Natural resources […] and cultural artifacts, shall form the common heritage of the nation, it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations" [Art. P (1)]. Furthermore, the Fundamental Law also disposes "the freedom of scientific research and the artistic creation" [Art. X (1)]; and "the right to public education" (Art. XI).

The right to public education as constitutional right involves the right to cultural heritage. The state committed itself to education at the earliest, but its role has been growing also in such fields of education that cannot be classified to the definition of the rights to education (Sári, 2005: 271). It includes – among others – the protection and preservation of cultural heritage for the after-world, the saving and securing of getting to know the movable cultural properties. To fulfill these constitutional obligations, the state has to create a modern legal background and legal institutions, furthermore based on laws; the state shall set up and maintain the organisation system needed to perform these tasks (Szabó, 2013: 66–67).

The right to cultural heritage protection is in connection with the freedom of scientific research and the artistic creation. The detection, assessment, conservation of the movable and immovable properties (archaeological findings, works of art, fine arts creations etc.) belonging to the protection of cultural heritage requires severe scientific and artistic work. The freedom of science and art – as cultural rights – forms also the part of rights to education declared in the Fundamental Law (Szabó, 2013: 67).

2. BASIC TERMS

There are several terms related to the protection of cultural property, which need to be defined and delimited. The term "cultural property", on the one hand, is of a summary nature and on the other hand contains different meanings; however, there is no independent definition in criminal law, so there is a need to use the concepts of other fields of law. However, it is not enough to collect the wide-ranging meanings and components of the term, but it is also used at international and European level (Cosi, 2008: 155). The plural of the term already indicates that it is not enough to collect its branch reports and components (Demuro, 2002: 17).

As a first thought, there is a definition of culture, which is already in difficulty. There are many interpretations of it; it does not exist in a unified position to define it. The reason for this is primarily due to the complexity of culture, but the different disciplines and researches start from different approaches, with different basic assumptions, thus defining different definitions. Therefore, in relation to this concept, it is necessary to state that, in a broad sense, a part of the concept of culture is the cultural heritage.

Which items qualify as property? In general terms, any object that has an extension, has a commercial, moral, or even spiritual value, can be either movable or immovable (Iannizzotto, 2006: 15–16). The use of the two words – "cultural property" – has been incorporated into the common language; it has several meanings, e.g.: artistic and historical values, works of

[2] The Fundamental Law of Hungary (25 April 2011) is the Hungarian Constitution

art, antique objects, natural beauties, without a precise definition of the content of the terms (Iannizzotto, 2006: 15–16).

In this paper, the definitions used in the relevant legislation are described as they are justified in the criminal assessment of the subject.

2.1 ITALY

The basic terms are defined by the administrative law, namely in the Code of Cultural Heritage and Landscape (Legislative Decree No. 42 dated 22 January 2004, hereinafter: L.D. 42/2004). The first term, which has to be determined, is the cultural heritage. This is an umbrella term, it contains different properties. According to the law "the cultural heritage constitutes cultural property and natural property" (Art. 1 par. 1) Cultural property are determined in two manners. In general term: "cultural properties are all movable and immovable things regulated in art. 10, 11, which based on a statute or other law carry artistically, historical, archaeological, etnoantropological, archival and other individual value" (Art. 2 par. 2). In addition, the law contains an enumerated, non closed list of these properties: e.g. museums/galleries collections, archives and documents carrying historical interests, frescos, guns, pictures, sculptures (Art. 10–11). The natural properties are "in art. 134 defined real estates, which express the historical, cultural, natural, morphological and aesthetic value of that real estate, and goods based on other laws" (Art. 2 par. 3). The research takes a look at just the protection of cultural property.

2.2 HUNGARY

The basic terms are defined by the administrative law, like the Italian regulation, namely they defined by the Act LXIV of 2001 on the Protection of Cultural Heritage (APCH). The law beyond the terms of cultural heritage and cultural property contains also the notion of art work. The cultural heritage has a broad meaning in the Hungarian law as well, it contains the following values: "archaeological heritage, military history researchable by archaeological methods, historic values, national memorial, priority national and their settlement-defence environment and cultural property" (11. explanatory point APCH). The next term is the cultural property. The properties classified in this term are hard to grasp: "the prominent and characteristic material, visual, recorded, written memories and other evidences of Hungary's history – except for real estate's – of the genesis and development of lifeless and living nature, of the humanity, of the Hungarian nation and artworks" (10. explanatory point APCH). According to the law a distinction can be made within the cultural property between the outstanding and characteristic memories and works of art. There is no definition of works of art in the APCH. However the original artwork is defined by the Act LXXVI on Intellectual Property: "works of the fine arts (e.g. picture, collage, painting, and sculpture), works of the applied art (e.g. tapestry, ceramics, glassware) and works of art of photography, if original made by the author or an original copy."

The notion of works of art is not included in the law, the professional language lists under this term works of fine arts, applied arts and folk art. However, the limitation of the "prominent and characteristic memories" is more difficult. Here they are objects (taking into account the case law of the EU Court of Justice) "which have the essential features of a collection debt: relatively rarely can be found; not normally used for their intended purpose; different from the normal

trade of items with similar value in use, exchange traders in the context of special transaction; and represent significant value" (Buzinkay, 2007: 13).

There is another distinction between archaeological heritage and archaeological finds. It is considered to be an archaeological heritage: "human existence was created before 1711, but is still present today trace, that can be found both on the surface of the earth and under the surface of the earth and waters, as well as in the cavities. An archaeological heritage becomes an archaeological finding if someone already has it detected, excavated, regardless of whether the movable item was moved from the place of finding or not" (34, 37 explanatory points APCH). It can be seen that the basis for the delimitation is the date of genesis: the item is before 1711 archaeological findings, after 1711 belongs to cultural property. Exceptions are the movable items that were before 1711 and have been preserved in an art collection; they are also cultural property.

3. ORGANISATION SYSTEMS

In both states the organisation system based on ministerial level and the criminal law protection is realised by special police forces. At first sight the basic institutions are similar, they have similar functions, but looking closer significant differences can be discovered in both areas.

3.1 ITALY

3.1.1 MINISTRY OF CULTURAL HERITAGE AND ACTIVITIES (MIBAC)

The protection of cultural property is basically realised by two organizations. The Ministry of Cultural Heritage and Activities is responsible for managing the whole organization system of cultural property protection. The creation of a specialised ministry can be considered as a milestone when its predecessor, Prime Minister Giovanni Padolini, was founded in 1974 by the Ministry of Culture and the Environment. The Ministry has undergone many changes since its establishment (Boldon Zanetti, 2017: 33). Its current structure and operation is determined by the 2014 Restructuring Act[3] and subsequent its 2018 amendment[4].

There is an important characteristic that the special police force to be discussed in the next subchapter is under direct supervision of the Minister, and it acts as a direct cooperative body with the Minister. The MiBAC is made up of different units: consisting of central bodies, central advisory bodies, central institutes, special institutes, and local bodies, which ensure the functioning of different subareas and levels of cultural management. In close cooperation with MiBAC, representatives of the Carabineri Command for the Protection of Cultural Heritage participate in the work of the various internal bodies of the Ministry, such as the Standing Special Committee on the Protection of National Cultural Heritage, the Crisis Management and National Coordination Unit, and the Restoration Committee. (Colasanti, 2017)

[3] Decreto del Presidente del Consiglio dei Ministri 29 agosto 2014, n.171

[4] Decreto-Legge 12 luglio 2018, n. 86

3.1.2 CARABINERI COMMAND FOR THE PROTECTION OF CULTURAL HERITAGE (TPC)

The most important body in the field of criminal protection of cultural properties is the special police force the Carabinieri Command for the Protection of Cultural Heritage [(Comando Carabinieri per la Tutela del Patrimonio Culturale (TPC)]. As a military entity, it is hierarchically subordinate to the General Command of the Carabinieri. However it takes not only military but also other activities, including police tasks, also the protection of cultural heritage.

The TPC has been in existence for nearly fifty years since May 3, 1969. Significant damage caused by crimes in archaeological, artistic, and historical heritage and in natural values has led to the urgent need to establish an organization (Iannizzotto, 2006: 279). It should be noted that the unit was established one year before the adoption of the UNESCO Convention from the year 1970 on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property. The Convention that even has proposed that States Parties establish one or more bodies in their territory for the purpose of protecting cultural property against illicit import, export, and transfer of ownership, if not already in place. Thus, Italy was the first in the world to introduce police protection specifically for this area, ahead of the Convention (Comando Carabinieri..., 2008).

At the time of its establishment, the TPC special investigative authority of 16 carabinieri has evolved into a broad, multi-level, nation-wide organisation system. The TPC consists of two central bodies, 15 territorial units, and an additional unit in Syracuse. The Central Office (Comando TPC Roma) is located in Rome, where the Secretariat and Personnel Department, the Operations and Data Processing Department, and the Services Department perform various management, personnel and administrative tasks. The central body is the Operative Department (Reparto Operativo), within there are also three separate departments: the Antiquities Department, the Archaeological Department and the Department of Counterfeiting and Modern Art. There are currently 278 units in the country, with over 300 carabinieri working (Fichera, 2017: 58).

The most typical tasks of the organization were summed up by Mossa as the commander of the TPC implicitly (Mossa, 2014): supervision of archaeological sites and commercial activities; special investigative activities to recover cultural properties; management the "illegally stolen cultural property database"; special advisory activities for MiBAC and its regional bodies. In this framework it performs the following most typical tasks: investigating crimes committed in the field of cultural goods (such as theft, theft, illegal excavation, counterfeiting); the recovery of lost or illegally exported cultural properties, including searches abroad, within the framework of international conventions and cooperation with the State; contribute to the detection of violations of the rules on natural resources; checks antique exhibitions, catalogues of auction houses (including on-line catalogues); performs preventive activities in archaeological areas with local military units. The TPC's special activities in the field of protection of cultural property were primarily developed in the course of the investigation, including its experience, often extending abroad.

Above these fields, the TPC has significant educational activities both in Rome and abroad. In addition to training and counseling, they held research workshops and seminars to exchange information with many countries around the world. The TPC is open to society. They hold regular press conferences that give the civilian population an idea of how effectively the organization works. Creating catalogues of discovered items to display alongside the exhibits with the images and data in the printed press.

3.1.3 FINANCE POLICE IN THE PROTECTION OF ART (GUARDIA DI FINANZA – GDF)

The other police body is the Finance Police, which is primarily responsible for the area of economic crime, but also plays a role in the protection of cultural heritage. As a result of its main activity, the organization is under the supervision of the Ministry of Economy and Finance. The GdF acts as a police officer (la polizia giudiziaria) as well as exercises public order and public security protection functions. It carries out cultural heritage protection activities in this area, primarily in view of the economic interests of illegal trade in the art market. Within the Finance Police, these tasks are coordinated and managed by the National Archaeological Heritage Group of the Rome Tax Police Unit (Gruppo Tutela Patrimonio Archeological del Nucleo di Polizia Tributaria di Roma) with national competence. The Archaeological Heritage Group has both a crime prevention and law enforcement function: conduct investigations; intervenes in checking the fulfillment of tax obligations imposed on antique shops, galleries and art dealers; verifies the legal transactions of art works that are necessary to identify possible tax evasion; supervise the fulfillment of the anti-money laundering obligations of auction houses, art galleries and antiques (Rotondo, 2010: 2).

3.2 HUNGARY

In Hungary the cultural management tasks are divided between two bodies. There is not a Ministry specialised in management of cultural heritage, but this task is integrated in two organisations.

3.2.1 MINISTRY OF HUMAN CAPACITIES

The central body of cultural management role in this field is integrated into the Ministry of Human Capacities [16/2018. (VII. 26.) Order of the Ministry of Human Capacities]. The State Secretary for Culture exercises professional and political governance. Performing his/her task the State Secretary responsible for the preparing, drafting laws; he or she is liable for saving, scientific detection and making cultural property a public treasure and for other relevant state tasks. The work of the Secretary of States has been helped since 8 October 2018 by the Under-Secretary of States. This is a new position to coordinate professional work in the different filed belonging to the Ministry.

3.2.2 PRIME MINISTER'S OFFICE

The other body responsible for cultural heritage management is integrated in the Prime Minister's Office. The organisation system changed in 2018, based on the new Organizational and Operational Rules [(14/2018. (VII. 3.)]. Order on the Organizational and Operational Rules of the Prime Minister's Office]. Within the office, four units are responsible for the cultural management subject being under governance of the Under-Secretary of States, namely the Assistant Secretary of State for Heritage Protection Affair, the Institution Coordination Department, the Department of Cultural Heritage Protection and Development and the Department of Heritage Protection. The last two units have a role in the cultural heritage management.

3.2.3 NATIONAL INVESTIGATIVE OFFICE SUBDIVISION FOR PROTECTION OF CULTURAL PROPERTY

In Hungary also a special police force has been operating to act against offenses against cultural property since 1998, namely the Subdivision for Protection of Cultural Properties of National Investigative Office. At the time its creation, it was a Subdivision for Protection of Property and Cultural Property, the unit attained its present form only in 2014, since that time it has focused only on the cultural property protection.

However, this unit has exclusive competence only in the most serious crimes, that is if the theft is committed in respect of a particularly considerable value (between fifty million plus one and five hundred million forints, approx. between 150 000 Euro and 300 000 Euro). The object of the theft is a library, archives, museum, build-and sound-archive in possession or maintenance of the state, the local government, the national minority self-government, the public body and the public foundation. In other crimes, the unit has competence only if the National Police Headquarter refers the case to its competence. In practice, referring to them occurs many times. In most cases – less serious cases – investigative authorities proceed with general competence, which do not have special knowledge.

The other problem is that in the unit work there are only ten police officers, which number cannot provide an effective activity.

The subdivision carries out the investigation of priority cases, the detection and they also have tasks related to searching for properties. In addition, it coordinates the police activities related to heritage protection. The unit is also involved in professional training of police officers; it plays a role in crime prevention, in elaborating methods and experiences to help art protection.

3.2.4 NATIONAL TAX AND CUSTOMS ADMINISTRATION

The National Tax and Customs Administration also plays an important role in the protection of cultural heritage. It conducts detection, investigative and crime prevention activities in the field of crimes and information technology as defined by the criminal procedure law. Its most important activity in the field of cultural property is the exploration at the external border of the European Union.

In order to protect cultural property, the National Tax and Customs Administration cooperates with the National Investigative Office and with the cultural administration. The predecessor of the Department of Heritage Protection of the Prime Minister's Office, the Cultural Heritage Office concluded in 2006 a cooperation agreement with the Hungarian National Police Headquarters and with the predecessor of the National Tax and Customs Administration, which agreement renewed in 2012.

Within the framework of cooperation, the cultural administration provides professional assistance, support to law enforcement agencies, participates in training, information and preventive activities.

4. DATABASES

4.1 ITALY

One of the cornerstones of the criminal protection of cultural property is the special electronic database created and further developed by TPC, which has operated under the name LEONARDO since 2015. The D.L 42/2004. states that the Ministry of Culture has established a database of data on stolen cultural goods (art.85). The TPC is the first to make the most effective use of detection by using this modern digitalised database.

Within the TPC, a separate department operates the database that is user-friendly and capable of handling a large amount of data. The shaping of the system can be divided into three phases. The first period was the cardboard archive that was created in 1969. Each object had a cardboard with known data and, in best cases a black and white image. However, this old method, also known in Hungary, was followed in 1980 by the first telematic implementation, and after several modifications, the last and the current status changes were made in 2006. In 2015, a new, improved version of the database, the LEONARDO, was launched. There is no limitation period in LEONARDO, so from the outset every item is included. Foreign affairs are only included in the database if they concern Italy or TPC. The system includes the following tools: data entry, information retrieval, and statistical analysis, automatic comparison of images, location and numerical placement of results. There are currently 1,239,953 hits in the database, of which 669,638 pictures, 64,815 stolen objects and 6,432,699 object descriptions (Comando Carabinieri…, 2017).

The civil version of the LEONARDO database is available as an iTPC application. It can be downloaded the world's unique application to smartphone, laptop, or tablet. Its main function is to be able to check the database for stealing before buying an art object.

4.2 HUNGARY

In Hungary a database exists concerning of stolen and missing artworks. The database is operated within the Prime Minister's Office by the Department of Heritage Protection. This database is partly public. On the one hand it is a public search tool to make available the details of any cultural object that may be subject to ownership, acquisition, special obligations and consequences to stakeholders (art owners, art dealers, collectors, buyers). In the search engine the data of the declared, stolen, missing objects, sets of objects, or collections with the descriptive data can be accessed; photos are needed to identify them. The Department of Heritage Protection reports significant successes, by means of this database notable amount of stolen, missing artwork was found (Buzinkay, 2018).

In Hungary has created a special organisation against counterfeiting since 2008, the National Board of Counterfeiting. The organisation is a common platform for all the authorities and stakeholders involved in the protection and enforcement of intellectual property rights in Hungary. It was established due to the regulation named Government Decree No. 287/2010 (XII. 16.) on the National Board Against Counterfeiting. The members of the Board are both Governmental institutions and Non-governmental organizations.

Based on the initiative and with the assistance the National Board of Counterfeiting, the Association of Hungarian Antique and Art Dealers set up the "database of works of art of doubtful origin" in 2014. This database can contribute to the success of the combat against counterfeiting of art of works (Kármán, 2014: 23).

5. LEGISLATION ON CRIMINAL LAW PROTECTION

5.1 ITALY

Since the early 1900s, Italy has introduced legal mechanisms to protect cultural values. These were primarily administrative procedures, the significance of which was in recognizing values, controlling their use, and balancing the various interests. These procedures had already attracted the attention of other countries and served as a model for protecting their own cultural values for a long time (e.g. Greece, Spain). This protection has been complemented since the 1960s by the function of the development of cultural heritage, which "based on the awareness that these values should be available to the public as widely as possible: cultural objects are tools for culture, knowledge, research and education" (Casini, 2017: 17).

There is no uniform typology of acts attacking cultural assets that require criminal protection (Demuro, 2002: 79–80). Criminal protection relies on a set of norms that differ in their origin, system placement, content, and purpose. Thus, it is no wonder that regulation is fragmented and not homogeneous (Mirri, 2017: 130–131).

The Italian regulation is extensive but fragmented. The norms are basically divided into two areas of law – administrative law and criminal law –and two codes – the "Legislative Decree 42 of 2004 on the Protection of Cultural and Natural Goods" and the Criminal Code. The criminal law is intended to provide a broad protection, since ranging from less serious crimes to serious offenses, ranging from distant threats to acts causing damages extends the scale.

5.1.1 CODE OF CULTURAL HERITAGE AND LANDSCAPE (LEGISLATIVE DECREE NO. 42, DATED 22 JANUARY 2004

Acts against cultural property are, on the one hand, misdemeanors, of which general feature is that they are less serious crimes and do not cause harm, but endanger the protected value (Art. 169-172 L.D. 42/2004). Felonies, however, are more serious acts that damage the protected value beyond the violation of administrative rules (Mirri, 2017: 130–131; Gambogi, 2013: 16).

Misdemeanors are:

a) unlawful actions (Art. 169 L.D. 42/2004);
b) unlawful use (Art. 170 L.D. 42/2004);
c) unlawful placement and removal (Art. 171 L.D. 42/2004);
d) breach of regulations on direct protection (Art. 172 L.D. 42/2004);
e) breach of regulations on archaeological researches (Art. 175 L.D. 42/2004).

Felonies are:

a) breach of regulations on alienation (Art. 173 L.D. 42/2004);
b) unlawful import or export (Art. 174 L.D. 42/2004);
c) unlawful possession of cultural property owned by the state (Art. 176 L.D. 42/2004);
d) cooperation in the recovery of cultural goods illegally exported (Art. 177 L.D. 42/2004); and
e) counterfeiting of art works (Art.178 L.D. 42/2004).

The counterfeiting of art works is one of the most legal facts. It is primarily aimed at protecting the integrity of cultural and artistic heritage, which can suffer damage as a result of the circulation of false art works. Similarly, the legal object to be protected is the protection of the interests and the trust of the order and integrity of trade flows. The facts contain three different types of acts.

5.1.2 CRIMINAL CODE

The most serious forms of attacking behaviour are the destruction and elimination of cultural property, against which the criminal code provide protection by property crimes primarily through of theft and vandalism (Demuro, 2006: 102).

Many of the crimes against property in criminal code (Royal Decree No. 1398 dated 19 October 2004, hereinafter: c.c.) belong to this field, which may be the subject of cultural property specified in article 10 L.D. 42/2004:

a) theft in private apartment by using actual force against a thing (Art. 624bis c.c.). The crime covers actually the crime against theft by using actual force against a thing; In addition, qualified and privileged cases of theft may also be considered.
b) vandalism (Art. 635 c.c.); the offense orders the destruction, causing damage, or rendering useless of movable or immovable property against a person by violence or threat (Demuro, 2002: 87).
c) disfeature and staining of things belonging others (Art. 639);
d) handling stolen goods (Art. 648 c.c.);
e) money laundering (Art. 648bis c.c.), and
f) utilization of money, goods or assets of unlawful origin (Art. 648ter c.c.).

Among the misdemeanors (misdemeanors against social activity of public administration) the vandalism of national archaeological, historical or artistic heritage (Art. 733) is the first crime aiming specifically at protection of cultural property. In practice, the provision applies to actions against cultural property with minor value. The introduction of these misdemeanors was considered a milestone, but it has little practical importance.

5.1 HUNGARY

In Hungary the criminal law protection of cultural property is realised by criminal code.[5] Part of the legal facts aims expressly at the protection of these objects, the other

5.1.1 CRIMINAL CODE –CRIMINAL OFFENCES AIMING ESPECIALLY PROTECTION OF CULTURAL PROPERTY

a) Assault on Protected Property (Art.153 c.c.). This crime is regulated in the chapter of war crimes. This felony provides protection for non-military and militarily unprotected facilities during the war time. The qualified case ensures protection if the assault is di-

[5] Act C of 2012 on Criminal Code

rected against cultural goods protected under international treaty. Furthermore, if the criminal offense is committed in connection with cultural goods placed under special or enhanced protection by international treaty, or the immediate surroundings thereof.

b) Vandalism of Historic Monuments or Protected Cultural Goods (Art. 357 c.c.). This crime aimed directly at protection of cultural property. The object of this felony is historic monuments or protected cultural goods which are defined in the administrative law, in APCH. Any person who vandalizes a historical monument or any object classified as protected cultural goods he owns, or an archaeological site located on his property is punishable. Qualified cases are the destroying, causing irreparable damage to a historical monument he owns, as a result of which it loses its character as a historic monument; or causing irreparable damage to any object classified as protected cultural goods or an archaeological site he owns. This is an open legal fact, namely the legislator defined only the result of crime, not the criminal behaviour, so it can be realised by any acts or omission (Sinku, 2018).

c) Criminal Offenses with Protected Cultural Goods (Art. 358.c.c.) This felony has the significance in the practice. This crime provides also direction at protection of cultural property. The object of this felony protected cultural goods which defined in the administrative law, in APCH. The felony has four criminal behaviours: 1) alienation without prior statutory consent; 2) failing to report changes in the ownership as prescribed in the relevant legislation; 3) exports without authorization, or exceeds the limits of the export permit; 4) without an export permit, exports objects which are considered cultural goods and for which an export permit is required, or who exceeds the limits of an export permit.

5.1.2 CRIMINAL CODE – OFFENCES AGAINST PROPERTY, AS QUALIFIED CASES

The Hungarian Criminal Code regulates qualified cases, if the object of crime involves objects classified as protected cultural goods or archaeological findings. The APCH defines the meaning of the protected cultural goods or archaeological findings. In the following felonies, cultural property and archaeological findings has been regulated as qualified cases:

a) theft (Art. 370 c.c.)
b) vandalism (Art. 371 c.c.)
c) embezzlement (Art. 372 c.c.)
d) fraud (Art. 373 c.c.)
e) unlawful appropriation (Art. 378. c.c.)
f) handling stolen goods (Art. 379.c.c.)

Within the National Institute of Criminology an empirical research has been conducted in 2018 about the criminal justice practice of the protection of cultural property, which introduced in detailed the main features of this issue in the Hungarian criminal law.[6]

[6] See in detailed in this collection of essays Kármán Gabriella: Experiences of the Hungarian Criminal Jurisdiction Concerning the Illicit Trafficking of Cultural Properties.

6. EFFORTS TO REFORM ON THE LEGISLATION IN ITALY

The importance of the issue is illustrated by that two bills are currently going to seek to eliminate the inconsistency and incoherence of the current system. Parulli is the current commander of the TPC and Coccoluto, the Deputy Head of Cabinet of the Ministry for Cultural Heritage and Tourism, at the G7 experts' meeting in 2017, explained that the legislation in force is neither in the structure of the offenses nor in terms of applicable sanctions are not adequate (Parrulli – Coccoluto, 2017: 65). Consequently, in December 2016, Dario Franceschini, Minister of Cultural Heritage and Andrea Orlando Minister of Justice, submitted a bill to the government entitled "Reforming the system of penalties for cultural offenses".

On 22 June 2017, the House of Representatives (C 4220) adopted the bill, which is under way C 2864 before the Senate since 6 November 2017. The draft would incorporate the Chapter VIII bis "Crimes against Cultural Heritage" into the Penal Code. The provisions would provide direct protection of cultural heritage through eleven criminal facts, which would include more serious forms of attacks on these values.

The essence of the initiative was clearly outlined by Demuro: "Now there is an opportunity for the Government and Parliament that should not be missed. The proposed innovations are essential both at the substantive level and during the investigation and trial, and cover all possible crimes." (Demuro, 2017: 194)

This proposal has been stucked. However, on March 23, 2018, a new legislative period (XVIII) began after the political elections. In this context, on 18 July 2018, the Justice Committee of the new Parliament submitted a bill to the Assembly, which was adopted by the Assembly on 18 October 2018. The new Proposal essentially renewed the bill pending on 6 November 2017 under the C 2864 Senate, similarly to the Criminal Code, which contains 14 crimes under the title "Crimes against Cultural Heritage", also intended to provide direct protection and contains more severe penalties. The 2018 proposal follows the same goal and punishes the same acts, contains more than three facts from the past bill.

7. COMPARISON AND CONCLUSION

The criminal law protection of cultural properties can be realised by a complex system, starting from the constitutional declaration, through the organisations system till the legal regulations. Italy and Hungary have created this regime, in which significant differences can be observed. Based on the study, it can be stated that the Italian organisation system, especially the special police force – the TPC – contains a number of solutions to follow that can provide us with useful experience.

Italy has more tradition and experience in the field of protection of cultural property, which appears firstly in the constitutional declaration, and in the organisation system, especially in the activity of the special police force, the TPC.

The protection of cultural property derives both in Italy and Hungary from the Constitution. The Italian one provides an exact declaration of cultural heritage and cultural property, making a broad meaning of them possible. The Hungarian Constitution declares these rights in the framework of the freedom of scientific research and the artistic creation, further in the right to public education.

The basic terms which have to be clarified are regulated in Italy and Hungary in administrative law. The regulations of both countries give a broad definition to make a broad protection possible. It is difficult to determine in the practice in Hungary whether an object is classified under one of the definitions.

Both organisation systems are divided in administrative institutions and police forces, but they are very different. The Italian ministry specialized for the cultural heritage and activities is responsible for managing the whole organization system of cultural property protection. However, in Hungary these functions are integrated in the framework of two administrative bodies.

The biggest difference between the two protection systems is the special police force acting against offenses against cultural property. In both countries these authorities exist. The special Italian police force, the TPC has worked since 1969, and it is figured as a broad, multi-level, nation-wide organisation system. In Hungarian also a police force specialized in this field exists since 1989, Hungary has built this authority based on the Italian pattern. The Hungarian National Investigative Office Subdivision for Protection of Cultural Property doesn't have a general competence on investigation of crimes related to cultural property, but it can act only in more serious cases. In the Subdivision for Protection of Cultural Property maximum ten police officers work, also there is a need to extend its competence in also the number of personnel.

In most countries, the problem is caused by the fact that the public does not know about the police body that protects cultural property. As a result, they are not aware of their activities and this also promotes illegal excavations and trade, as if they find an object they do not know where to turn. However, Italy has solved this problem perfectly.

The other distinction of the activity of the Italian and Hungarian police force is the special electronic database of illegally removed cultural artefacts. One of the cornerstones of the criminal protection of cultural property is the special electronic database created and further developed by TPC, which has operated under the name LEONARDO since 2015. Hungary has created a similar database, but it is managed in the framework of administrative organisation system, operated by the Prime Minister's Office by the Department of Heritage Protection. The Hungarian investigative authorities do not have a direct access to this database; they have to ask information for the Department of Heritage Protection. This is a problem to be solved in the future. Beyond the above, the present Hungarian database has to be developed, by which the Italian database can serve useful experience.

The norms of the protection of cultural property are regulated in two areas of law – administrative law and criminal law – and two codes – in both countries. The basic definitions are found in the administrative codes.

The Italian regulation is extensive but fragmented. The Italian criminal law is intended to provide a broad protection, ranging from less serious crimes to serious offenses, ranging from distant threats to acts causing damages extends the scale. The administrative code provides beyond administrative sanctions also penal sanctions, namely criminal facts, misdemeanours and felonies. The criminal code contains one misdemeanour especially for the protection of cultural values, the other offenses are regulated as crimes against property in criminal code, which object may be the subject of cultural property specified in the administrative law.

The Italian legislation in force is neither in the structure of the offenses nor in terms of applicable sanctions is not adequate. For that reasons two bills are currently going to seek to eliminate

these problems. The draft would incorporate a separate chapter "Crimes against Cultural Heritage" into the Penal Code, which would provide direct protection of cultural heritage.

In Hungary the criminal law protection of cultural property is realised by criminal code. Three felonies provide a direct protection, the other felonies have been regulated in the framework of the offenses against property as qualified cases, if the object of the crime is cultural property and archaeological findings.

Based on the results of the research of the activity of the special police force, namely the TPC – including their organisational system and the operation – gives useful experience for the Hungarian legislation and the law enforcement bodies.

REFERENCES:

- Ainis, Michele (2009): Beni culturali in „XXI" Secolo. http://www.treccani.it/enciclopedia/beni-culturali_(XXI-Secolo)/
- Boldon Zanetti, Giovanni (2017): Il nuovo diritto dei beni culturali. Venezia: Libreria Editrice Cafoscarina.
- Buzinkay Péter (2007): A kulturális javak fogalomhasználata. Örökség, Vol. 11, No. 2. p. 13
- Buzinkay, Péter (2018): The successes by the help of the Prime Minister's Office, the National Investigative Office and the National Tax and Customs Administration in the protection of cultural property by the police. Presentation on the Final Conference of the project of Protection of Cultural Property by the Police. National University of Public Service, Budapest, 20 November 2018.
- Casini, Lorenzo (2017): Challenges and Opportunities of International Regulation. In: G7 Meeting of Experts. "The protection of cultural heritage: Rules, practices, and education". Florence: March 30, 2017.
- Colasanti, Roberto (2017): Peculiaritá delle attivitá di tutela del Comando CC TPC. In: Battelli, Barbara – Cortese, Barbara – Gemma, Andrea – Massaro, Antonella (a cura di): Patrimonio culturale. Profili giuridici e tecniche di tutela. Roma: Roma TrE-PRESS.
- Comando Carabinieri per la Tutela del Patrimonio Culturale Attivitá Opertiva 2017. http://www.culturalheritagecrime.it/wp-content/uploads/2018/05/attivitacc80-operativa-2017-cc-tpc.pdf
- Comando Carabinieri per la Tutela del Patrimonio Culturale. Origini, funzione e articolazione – Legislazione di Tutela, 2008. http://www.carabinieri.it/internet/imagestore/cittadino/informazioni/tutela/culturale/raccolta-normativa.pdf
- Cosi, Dante (2008): Diritto dei beni e delle attività culturali. Roma: Arcane Editore.
- Del Giudice, Frederico (2016): Maunale di Diritto Costituzionale. Napoli: Edizioni Simone. https://www.laleggepertutti.it/140232_larticolo-9-costituzione-principio-culturale-e-ambientale
- Demuro, Gian Paolo (2002): Beni culturali e tecniche penale. Milano: Giuffré Editore.

- Demuro, Gian Paolo (2006): Le tutele penale dei beni culturali, anche alla luce del codice dei beni culturali e del paesaggio. Archivio Giuridico, No. 10. pp. 101–159. http://www.archiviogiuridico.it/Archivio_10/Demuro.pdf
- Demuro, Gianpaolo (2017): Verso la riforma dei reati contro i beni culturali: approvato dal Consiglio dei Ministri un disegno di legge delega di aggressione al patrimonio culturaleper l'introduzione nel codice penale delle più gravi forme. Diritto Penale Contemporaneo, No. 1. pp. 193-194
- Fichera, Ada (2017): I Carabinieri a Tutela del Patrimonio Culturale. Informazioni della Difesa, No. 3. pp. 57–62. https://www.difesa.it/InformazioniDellaDifesa/periodico/Periodico_2017/Documents/Numero3/ID_3_2017_patrimonio_culturale.pdf
- Gambogi, Gianluca (2013): Le protezione penale del patrimonio culturale nell'ordinamento giuridico italiano. Interventoal V Seminario International de Arte y Derecho, Barcelona, 17 maggio 2013. https://www.bing.com/search?q=http%3A%2F%2Fwww.ordineavvocatifirenze.eu%2Fwp-content%2Fuploads%2F2013%2F12%2F17.05.2013-La-protezione-penale-del-patrimonio-culturale-Gianluca-Gambogi.docx.+&form=EDNTHT&mkt=en-
- Iannizzotto, Vito A. (2006): Beni culturali nell'ottica criminale. Roma: Europolis Editore.
- Kardos Gábor: A kultúrához való jog védelme a nemzetközi jogban. Fundamentum, Vol. 6, No. 2. pp. 29–38.
- Kármán Gabriella (2016): Műtárgyhamisítás Magyarországon a büntető igazságszolgáltatásban. Egy empirikus kutatás tapasztalatai. In: Vókó, György (szerk.): Kriminológiai Tanulmányok 53. Budapest: Országos Kriminológiai Intézet. pp. 118–141.
- KÁRMÁN Gabriella (2014): Új eszköz a műtárgyhamisítás ellen Magyarországon: a Kétséges eredetiségű művészeti alkotások adatbázisa. Ügyészek Lapja, No. 5.
- Mackenzie, Simon – Yates, Donna (2017): Trafficking cultural objects and human rights. In: Weber, Leanne – Fishwick, Elaine – Marmo, Marinella (eds.): Routledge International Handbook of Criminology and Human Rights. London–New York: Routledge.
- Manacorda, Stefano (2015): La circolazione illecita dei beni culturali nella prospettiva penalistica: problemi e prospettive di riforma. In: Manacorda, Stefano (a cura di): Circolazione dei beni culturali mobili e tutela penale: un' analisi di diritto interno, comparato e internazionale. Milano: Giuffré Editore.
- Mezzeti, Luca (2011): Manuale breve diritto costituzionale. Milano: Giuffré Editore.
- Mirri, Maria B. (2017): Codide dei beni culturali e paesaggio. Viterbo: Edizione Sette Città.
- Mossa, Mariano (2014): Comando Carabinieri Tutela Patrimonio Culturale. Struttura Ordinativa, Attività e compiti. Presentazione mostra „La memoria Ritrovata. Tesori recuperati dall' Arma dei Carabinieri." Roma, Palazzo del Quirinale 23 gennaio–16 marzo 2014. http://palazzo.quirinale.it/mostre/2014_memrit/doc/Gen._Mossa.pdf
- Orlando, Eleonora (2008): Cultura e costituzione. InStoria. Rivista online di storia & innovazione, Vol. 33, No. 2. http://www.instoria.it/home/cultura_costituzione.htm
- Parrulli, Fabrizio – Coccoluto, Tiziana (2017): Protection "Procedures": Strengths and Weaknesses. In: G7 Meeting of Experts. "The protection of cultural heritage: Rules, prac-

tices, and education." Florence: March 30. http://www.beniculturali.it/mibac/multimedia/MiBAC/G7_atti.pdf

- Proulx, Blythe B. (2013): Archaeological Site Looting in "Glocal" Perspective: Nature, Scope, and Frequency. American Journal of Archeology, Vol. 117. p. 111–125.
- Quelle: Rapporto Bes 2016: il benessere equo e sostenibile in Italia, 09 Paesaggio e patrimonio culturale. https://www.istat.it/it/files/2016/12/BES-2016.pdf
- Rimoli, Franceso (2017): Profili costituzionali della tutela del patrimonio culturale. In: Battelli, Barbara – Cortese, Barbara – Gemma, Andrea – Massaro, Antonella (a cura di): Patrimonio culturale. Profili giuridici e tecniche di tutela. Roma: Roma TrE-PRESS.
- Rotondo, Alessandro (2010): Servizi a tutela del patrimonio artistico es archeologico. Guardia di Finanza Scuola ispettori a sovrintendenti. 80 Corso „S.Brig. M.O.V.M. Amedeo De Ianni" https://digilander.libero.it/corso80/spef/lez09.pdf
- Sári János (2005): Alapjogok. Alkotmánytan II. Budapest: Osiris Kiadó.
- Sinku Pál (2018): A közigazgatás rendje elleni bűncselekmények. In: Belovics Ervin – Molnár Gábor Miklós – Sinku Pál: Büntetőjog II. Különös rész. Budapest: HVG-ORAC.
- Szabó Annamária E. (2013): A kulturális örökség joga. Miskolc: Bíbor Kiadó.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 123-135
ISSN 1512-5505

CRIMINAL PROPERTY FORFEITURE IN BOSNIA AND HERZEGOVINA: LEGAL OVERVIEW

Haris HALILOVIĆ
Muhamed BUDIMLIĆ
Elmedin MURATBEGOVIĆ

Summary

Forfeiture of property obtained through the criminal act is an inescapable segment of modern legal systems and its answer to criminality. This is especially common in cases of organized and other serious forms of crime. Not only that forfeiture exercises one of the fundamental postulates of every criminal justice system, that no one can keep property acquired by criminal offense, but is the most effective way to fight organized crime with the main purpose of gaining property benefits. Undoubtedly, therefore, without the adequate system of criminal property forfeiture there is no adequate mean to fight this type of crime. This article deals with legal provisions implemented in Bosnia and Herzegovina, when it comes to this institute of criminal justice. The subject of the analysis are the provisions of the substantive and procedural criminal laws, but also the lex specialis regulations related to this field and applied in Bosnia and Herzegovina at the entity level, and in Brčko District of Bosnia and Herzegovina. A special focus has been placed on the problems Bosnia and Herzegovina faces today in the implementation of this institute. These are the complexity of the legal system, issues related to interpretation of property forfeiture legal provisions and new forms of forfeiture that are not known to earlier jurisprudence such as extended confiscation of property gain.

Key words

criminal offense, criminal procedure, criminal property forfeiture, extended forfeiture

1. INTRODUCTION

The forfeiture of the proceeds of crime is one of the most effective forms of the fight against organized and other most serious forms of crime aimed to asset acquisition. The list is long: economy related crime, different forms of trafficking in person and smuggling crimes, drug related crime and other. Namely, the fundamental characteristic of organized crime is precisely the acquisition of assets and in that sense asset forfeiture presents an effective instrument in

the hands of the state to fight this form of crime. Members of organized crime, whose goal is the acquisition of assets, do not seem to be much afraid of the severe punishments they have been threatened with by criminal codes. However, where severe punishment has been combined with the possibility of asset forfeiture that is completely another perspective. For this very reason, asset forfeiture is of great importance for all modern criminal justice systems, both, on the field of its repressive function and the field of crime prevention. This way, modern societies can accomplish three very important postulates: no one can retain the property acquired through a criminal offense; seized property cannot be used for the perpetration of future criminal offenses; and finally, the potential perpetrator is discouraged in his intention to commit the crimes for the purpose of gaining assets.

In Bosnia and Herzegovina, based on the experiences of other countries, in the past 20 years, much has been done to accept this philosophy. This is particularly noticeable in the field of the acceptance of practically all international treaties aimed to fight organized crime, terrorism, human trafficking, money laundering and other serious crimes, also in the improvement of already existing criminal law provisions, as well as the adoption of completely new laws aimed exclusively on financial investigations, the establishment of institutions for the management of forfeited property and the overall improvement of this field of fight against crime. It should be noted that the seizure of the property gain obtained by a criminal offense is not an unknown legal institute to the Bosnian criminal justice system. It has been in use for almost sixty years since the ex-Yugoslavia era.

This paper presents an overview of the legal framework for regulating the forfeiture of crime proceeds in all jurisdictions in Bosnia and Herzegovina, the state, entities and Brčko District. Methodology that was used is content analysis of relevant literature and normative analysis of legal provisions on the field of asset forfeiture in Bosnia and Herzegovina. Accordingly, the paper presents and discusses some theoretical views and data from recent research. Normative analysis comprised of legal documents related to asset forfeiture and comparison of provisions in different jurisdictions in Bosnia and Herzegovina. In this regard, the paper discusses problems faced by criminal justice professionals in the framework of implementation of those provisions. In the first place, those are issues relating to certain provisions on the property forfeiture, which leave much space for their misinterpretation. Furthermore, there is the issue of complexity of property forfeiture provisions provided by many laws in different jurisdictions. Those provisions are not fully harmonized. Legal jurisdictions in different legal areas in Bosnia and Herzegovina including criminal law, according to Dayton Peace Agreement and subsequent laws are divided on the four different legal authorities. The state level or Bosnia and Herzegovina, two entity levels, Federation of Bosnia and Herzegovina and Republic of Srpska, and finally Brčko district of Bosnia and Herzegovina. Every jurisdiction has its own laws which are not always unified despite establishing provisions regarding identical law matter. Therefore, it is to expect a non-unified judicial and prosecutorial practice. Additionally, some of issues regarding certain forms of forfeiture were also considered, what, in the first place, refers to the so-called extended forfeiture that was not known to the judiciary system of Bosnia and Herzegovina until the last few years, and it has not yet been implemented in practice in its full capacity. Finally, there is an issue of civil forfeiture for which state law provisions establish a legal base, but there is still not a single registered case where this form of forfeiture has been exercised.

2. SHORT HISTORICAL OVERVIEW

The purpose of organized crime and lot of other serious forms of crime with or without relation to it is gain of some form of property. Therefore, today every national system of criminal justice and practically all international treaties related to combating those forms of crime are focused on the creation and implementation of the most effective ways for forfeiture of property gained through perpetration of these crimes. There is some pretty simple logic beside it, if the crime is focused on the property gain and the system has effective way of seizing it, the perpetrators will "think twice" before deciding to commit the crime. So, asset forfeiture nowadays is not only the part of criminal sentences and a repressive function of criminal justice, but one of the most effective ways of crime prevention, specifically in relation to the crimes with the property gain goals. As some authors remarks examples of forfeiture can be traced to Biblical times like the one regarding the bull which gores and kills people and consequently must be stoned irrespective of its owner negligence (Cassella, 2009; Fourie & Pienaar 2017). Derry (2012) in his brief review of the history of this institute states that it was used in the old Admiralty law for the seizure of ships involved in piracy and smuggling of goods. Namely, in the circumstances in which the crew would be deprived of liberty for the mentioned offences, the shipowner would be able, in short term, to engage a new crew that would continue the same activities. By seizing the ship, however, this would no longer be possible. It was a very effective way to counter this kind of criminal behavior. In his detailed analysis, Nelson (2016) also states that long before the American Revolution, the English Parliament and legislatures used threat of forfeiture to encourage compliance with statutes, taking for example the Navigation Act from 1660. In US, according to Doyle (2015), the Congress and state legislators are authorizing forfeiture for more than 200 years.

In the area of former Yugoslavia, property forfeiture has been known for more than fifty years and was a part of the criminal justice systems, but, as Lajić (2012) claims, it never showed its full capacity and effectiveness in the contexts of ordinary criminal offences intended to property gain, not to mention contemporary organized crime. Today, the mechanism of criminal property forfeiture in Bosnia and Herzegovina has been significantly improved, at least at the legislation level, especially by passing lex specialis laws, which will be discussed later. It is necessary to specify that criminal property forfeiture, nowadays in Bosnia and Herzegovina, represents a form of specific criminal law measure and it is not considered a form of sanction in the criminal law framework (Ferhatović & Boban, 2017). It is not about the application of the legal principle – restitution or the establishment of an earlier legal and factual state, which acts, at the same time, as a psychological coercion on the perpetrator, that obtaining benefits cannot be a motive for taking criminal activity (Petrović et al, 2016).

Although, forfeiture of assets is one of the most important preconditions for successful fight against crime, regarding the application of this institute in Bosnia and Herzegovina nowadays, it is possible to highlight several issues. Among others: the complexity of legal provisions; issues related to its interpretation; non-application of provisions, insufficient education of judicial actors; the slowness of the judiciary. As Mujanović (2011) emphasizes, in order to be effective, the system of forfeiture of unlawfully acquired property, should make relevant regulations and institutional capacities that will enable effective detection, temporary confiscation and management of seized property, its permanent, complete, seizure with the full guarantee of the protection of human rights and fundamental freedoms (particularly, property rights and

fair trial). The significance of quality normative solutions, in the context of the overall factors affecting the seizure of illegally acquired property, has been emphasized by Kruisbergen et al. (2016) as well. These authors emphasize the importance of four relevant groups of these factors: behavior of perpetrators and witnesses, logistics and the scope of criminal operations, the use of legal and economic infrastructure, and the operational work by which perpetrators can prophesy to exhibit.

3. DEFINITION OF „CRIMINAL PROPERTY" AND FORMS OF FORFEITURE

What represents the property gained by criminal offense? What kind of assets it comprises of? There is not an easy answer to it, especially when we bring it to court proceedings. As Kruisbergen et al. (2016) noted, determination of the profits of crime is more complex than what "follow the money" rhetoric implies. In general, it encompasses every aspect of the property of a material nature resulting from the perpetration of a crime, and it is completely irrelevant whether it has been acquired by a criminal offense, or is in a direct or indirect connection with its perpetration as well as what it consists of. Several international documents have been adopted during the last several decades with the aim to point out to the importance of this mechanism and provide specific instruments and measures for criminal property forfeiture. As Mujanović & Datzer (2016) point out, the main motive of (transnational) organized crime is the acquisition of property from criminal offenses, what is particularly emphasized there. From a legal point of view, of our primary interest is the definition contained in the provisions of Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198, 2005). The Conventions "unlawful income" determines as any property gain that has arisen directly or indirectly or is acquired by a criminal offense and may consist of any property (Art. 1. (a)). The Convention also defines the term "property" as any type of property, material and immaterial, movable and immovable, as well as legal documents or documents proving the right or interest in such property (Art. 1. (b)). The Convention, with its definitions was a main precursor for the determination and implementation of similar definitions in the Criminal Code, as well as other laws in Bosnia and Herzegovina.

However, other international documents that are of great importance for criminal property forfeiture should not be forgotten. Those, beside others, are: United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UN, 1988); United Nations Convention Against Transnational Organized Crime (UN 55/25, 2000); United Nations Convention Against Corruption (UN 58/4, 2003); European Union Council Framework Decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (2005/212/JHA); Directive on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union (2014/42/EU). In principle, all these documents provide provisions regarding the definition of crime proceeds, obligation to implement national provisions and insist on implementation of an effective criminal property forfeiture system.

There are two main forms of criminal property forfeiture today, in personam and in rem. Forfeiture of property gained through criminal offences is known as in personam, where action is claimed against the perpetrator. It is also known as criminal forfeiture. On the other side, in rem forfeiture is claimed against property, so there is no action against the perpetrator or against any other person. Both forms of forfeiture are recognized in the frame of legal pro-

visions in Bosnia and Herzegovina, at least on the state level, but only one is implemented, the in personam or criminal forfeiture. In the Bosnia and Herzegovina law related to criminal property forfeiture, there are two main forms of forfeiture. The first, so called, regular forfeiture or seizure where forfeiture represents a specific criminal law measure that the court has to pronounce whenever it was found that the criminal act has also resulted in property gain, and the second, extended forfeiture or seizure, which permits the forfeiture of property gained through perpetration of particularly serious criminal offenses or criminal offenses specifically aimed at obtaining such benefits by providing the prosecutor with sufficient evidence that it can be justified to believe that the property was obtained through the perpetration of these criminal offenses, and the perpetrator alone is unable to provide evidence that the property was obtained legally. The fundamental difference between the extended seizure and the regular confiscation of property gained by the criminal offense is that the extended seizure is carried out not only in relation to the proceeds of the criminal offense in respect of which criminal proceedings have been initiated and conducted but also in respect of each other property gains assumed to have been obtained from some other criminal offenses, but which are not the subject to the current proceedings. We have to emphasize that extended forfeiture is not allowed for all criminal offences provided by criminal law provisions in Bosnia and Herzegovina, what will later be discussed in more detail.

It is important to notice, for example, that in the American Federal Law, as it was emphasized in legal theory, three possible forms of property forfeiture exist. Cassella (2007) points out to the, so called, administrative, criminal and civil forfeiture. According to the same author, administrative forfeiture comprises of all uncontested forfeiture proceedings and represents the vast majority of all federal forfeitures – it is also known as „nonjudicial", as there is no involvement of the prosecutor or court; criminal forfeiture represents just a part of the sentence in a criminal case, and only property that belongs to the defendant can be seized; finally, civil forfeiture represents the kind of property forfeiture where government files a separate civil action against the property itself and proves that the property was derived from, or was used to commit a crime – this form of forfeiture does not require criminal conviction so it can be performed before or after indictment or in the absence of indictment at all. Making the comparison between civil and criminal forfeiture Cassella (2007) also points out that, for a variety of reasons, in certain cases civil forfeiture can be a much more powerful tool for law enforcement than criminal forfeiture. In addition, it is worth to mention that, according to Bridy (2013), the government retains the title to civilly forfeited property whether or not prosecutors ever file criminal charges against the property owner, which they fail to do in as many as in 90% cases.

Of course, in Bosnia and Herzegovina, there is still not such a complex, yet quite efficient, system of property forfeiture, as is the case in American law, but as we shall see, at least at the legislative level, some of it has been done.

4. PROPERTY FORFEITURE UNDER BOSNIA AND HERZEGOVINA LAW(S)

Criminal property forfeiture in Bosnia and Herzegovina has been regulated on the four levels of jurisdictions. National, or state level, two entities and one district level. So, there are four criminal codes to regulate this legal area in a sense of substantive criminal law. In addition to substantive criminal provisions, there are also four legislative levels governing the forfeiture procedure, as well as some of the safety measures directed to the property that should

be eventually seized, what is regulated by procedural criminal laws. So, four criminal procedure codes as well. Finally, there are also lex specialis laws on the forfeiture of assets acquired through a criminal offense that exist on three levels or jurisdictions, two on entities and one on a district level. A rather complex legal system for a small country like Bosnia and Herzegovina.

4.1. PROPERTY FORFEITURE IN CRIMINAL SUBSTANTIVE LAW PROVISIONS

On the national or state level, the Criminal Code of Bosnia and Herzegovina (CC BiH) prescribes the forfeiture of property gained through criminal offences under its jurisdiction. The code contains provisions regarding the definition of criminal property, obligation to forfeit it for every criminal offence resulted with illegal property gain and under what conditions the forfeiture can be performed.

The definition of property gained through perpetration of criminal offences or illegal property has been established in Art. 1. sub. art. 24. of CC BiH as a property that was directly or indirectly derived from the criminal offense and consists of any property. Under property CC BH in its Art. 25. establishes that it covers property of any kind, whether it consists of things or rights, material or immaterial, movable or immovable, and legal documents or instruments proving the right to property or interest in relation to such property. The obligation on forfeiture of illegal property in criminal cases has been established in Art. 110. of CC BiH with stipulation that no one can retain any property gain, income, profit or other benefit from the proceeds of the criminal offense, and it will be taken by a court decision after finding that the criminal offense was committed.

As a specific form of criminal property forfeiture in Art. 110a for some particularly serious criminal offenses, CC BiH establishes an extended confiscation of property gain by giving power to the court to confiscate the property benefit for which the prosecutor provides sufficient evidence that it is reasonably believed that such proceeds have been obtained through the perpetration of these criminal offenses, and the perpetrator did not provide evidence that the benefit was obtained legally. Extended forfeiture of property is possible only for some specific serious crimes, such us: (1) Crimes against humanity and values protected by international law; (2) Criminal offenses against the economy and market unity and crimes in the field of customs; (3) Criminal offenses of corruption and criminal offenses against official and other responsible duties; (4) Criminal offenses of copyright infringement; (5) Criminal offenses against the armed forces of Bosnia and Herzegovina and (6) Criminal offences regarding arrangement, preparation, association and for Organized crime. Extended forfeiture is a powerful tool in the hands of the Bosnia and Herzegovina criminal justice system, but judging by the data, it has not come to life in practice. One of the authors had the opportunity to perform research in this field and to find out that untill 2017 only in two criminal cases, counting all jurisdictions in Bosnia and Herzegovina, property was seized by means of extended forfeiture (Halilović, 2017). Extended property forfeiture has been associated with many issues. In the first place, in relation to the traditional form of forfeiture of assets acquired through a criminal offense, extended seizure, as Ivičević-Karas (2010) claims, represents a wider interference in the property of the perpetrator. It is for this reason that this kind of forfeiture can pose a higher level of jeopardy for the right on property and peaceful enjoyment of it guaranteed by international treaties and national laws. Furthermore, there is an issue with the legal definition of extended seizure, as it leaves plenty of room for speculation whether the burden of proof is only on the accused's side

or is shared between him and the prosecutor. This in the process leads to a series of dilemmas especially on the side of the prosecutor. It should also be added to the fact that the prosecutor is at the same time burdened by proving the perpetrator's guiltiness in connection with another criminal offense, which in this case serves as the legal basis for extended forfeiture.

Provision of Art. 110a sub. art. 2. establishes that in cases where the conditions for seizure of property gain, income, profit or other benefit from property gain acquired through a criminal offense in criminal proceedings are not met, the request for its seizure of power will be filed in civil procedure. However, it is not clear what the provision refers to. It could be some form of civil forfeiture but still there is no jurisprudence related to it.

Finally, CC BiH in Art 112. provides the protection of the victim of criminal offence, in circumstances where the victim put a compensation claim during criminal proceedings, on the way that the court shall impose a forfeiture of property only if it exceeds the awarded compensation claim of the victim. The victim, also has the right to request compensation from the amount of the seized property, through civil proceedings.

Beside the CC BiH, criminal property forfeiture has been a part of the provisions of Criminal Code of Federation of Bosnia and Herzegovina (CC FBiH), Criminal Code of Republic of Srpska (CC RS) and Criminal Code of Brčko District of Bosnia and Herzegovina (CC BD BiH) as well. The obligation on criminal property forfeiture has been established in art. 114. of CC FBiH. According to the provisions of Art. 114a extended forfeiture can be initiated related to (1) criminal offenses against the economy, operations and security of payment transactions; (2) criminal offenses against the judiciary; and (3) criminal offenses of bribery and criminal offenses against official and other responsible functions. Within the lex specialis provisions in FBiH, the scope of the extended forfeiture has been extended to all criminal offenses for which imprisonment of three years or more can be imposed. CC FBiH, in the same way as the state code, regulates the issues of the manner of taking away property gain and protection of the victim of criminal offence (Art. 115 and 116). However, CC FBiH does not provide the definition of crime proceeds, which was done by a lex specialis provision, nor provide the possibility for civil forfeiture. Regarding the CC RS the provisions on extended forfeiture have not been implemented in its frameworks, but was regulated by a lex specialis provision. The principle of forfeiture of property has been regulated in the provisions of Art. 83. whereas the manner of forfeiture and protection of interests of victim has been regulated by the provisions of Art. 84 and 85. CC RS provides a definition of property gain in Art. 123. sub. Art. 24. where property acquired through perpetration of criminal offense has been defined as the immediate material gain of the criminal offense consisting of any increase or reduction of the property as a result of criminal offence, as well as the property in which the property gain of the crime was converted or altered, as well as any other property which is obtained from the immediate property gain acquired through criminal offense or property in which the property acquired through the criminal offense has been changed or converted, irrespective of whether it is located in or outside the territory of Republic of Srpska. The definition of property has been given in the same article where property has been defined as a property of any kind, irrespective of whether it is material or immaterial, movable or immovable, or legal documents or instruments proving the right to such property (Art. 123. sub. art. 25). It needs to be said that the provisions of the CC RS only in the basic form define the confiscation of the property gain obtained by a criminal act, but this is mainly the consequence of the existence of a lex specialis provision on the property

forfeiture that will be the subject of our subsequent analysis. The substantive provisions on forfeiture of property obtained by the criminal offense are also contained in CC BD BiH. The provisions of this law on forfeiture of property acquired by the criminal offense mostly correspond to the provisions of the state law, which is the basis for the regular property forfeiture and the extended forfeiture and are contained in Art. 114 and 114a, again with no provision related to civil forfeiture, while the manner of forfeiture and protection of an injured person, or his property claim, is regulated by the provisions of Art. 115 and 116. Neither the CC BD BiH contains definitions of crime proceeds and property, however the same has been regulated by Brčko District lex specialis provisions on criminal property forfeiture.

4.2. PROPERTY FORFEITURE UNDER CRIMINAL PROCEDURE PROVISIONS

Unlike the provisions of a substantive criminal law which determine the concept of property gain that is seized, obligation to forfeit, forms of forfeiture and other relevant questions, the provisions of the procedural criminal legislation regulate the procedure of forfeiture and measures to secure the availability of property for eventual forfeiture. It is also of great importance to say that, unlike the criminal substantive, and lex specialis provisions, there are no significant differences between different jurisdictions in Bosnia and Herzegovina related to the forfeiting procedure and securing the availability of property that are regulated by codes of criminal procedure at all levels. So for our analysis we will use only the provisions of the Code of Criminal Procedure of Bosnia and Herzegovina (CPC BiH), but it is important to note that the Code of Criminal Procedure of the Federation of Bosnia and Herzegovina (CPC FBiH); Code of Criminal Procedure of Republic of Srpska (CPC RS); and the Code of Criminal Procedure of Brčko District of Bosnia and Herzegovina (CPC BD BiH) are also in effect in Bosnia and Herzegovina.

Relating to specific forfeiting procedure, the Art. 392. sub. art. 1. to 3. of the CPC BiH. establishes that: (1) property acquired through a criminal offense in criminal proceedings has to be established ex officio, (2) furthermore, the prosecutor has been obliged to collect evidence during the course of the proceedings and to examine the circumstances that are of importance for the determination of the illegal property acquired through the criminal offense; and (3) if the victim filed a property claim in respect of the return of property acquired by a criminal offense, that is, in respect of a monetary amount corresponding to the value of the property, then the property benefit will be determined only in that part which is not covered by the property claim. While the other provisions are rather procedural and not of our main interest in this work, in relation with forfeiture proceeding we will mention Art. 394. Under this article the CPC BiH establishes that if the determination of the property gain was linked to disproportionate difficulties or with considerable delay of the proceedings, then the court may determine the amount of the property gain obtained by a criminal offense based on free assessment. It appears that the above-mentioned provisions with the greatest capacity are intended to ensure that in each criminal case where the proceeds of the criminal act have been realized, the proceeds of the criminal offense come to the detriment of such benefits. It is precisely the fact that subjects in proceedings are obliged to determine the property gain and that in particular is the obligation of prosecutors to pay maximum attention in collecting and providing evidences in favor of property forfeiture.

Regarding the measures targeted to secure property for eventual forfeiture under the provisions of the CPC BiH it should be noted that there are several of them and that the CPC BiH

pays special attention to the same. Otherwise, the issue of securing assets that may be subject to seizure is an area of particular interest for the criminal property forfeiture issue, in general. As Gaumer (2007) notes, the most important part of the forfeiture is the ability to secure the availability of property for confiscation before the trial. If the property is not secured there is a great probability it will be not available after the conviction and the end of the criminal procedure.

According to the provisions of the CPC BiH, measures for securing the availability of property for eventual forfeiture after conviction are: (1) An order to a bank or other legal entity (Art. 72); (2) Temporary seizure of property for security purposes (Art. 73); and (3) Temporary insurance measures (Art. 395).

The measure referred to in Art. 72. applies if there are grounds for suspicion that a person has committed a criminal offense related to the acquisition of material gain. In such circumstances, the court may, on the basis of a prosecutor's motion, order the bank or other legal entity, to provide information on bank deposits and other financial transactions and the affairs of that person as well as persons for whom it is believed to be involved in such financial transactions or suspect affairs, if such information could be used as evidence in criminal proceedings. The prosecutor, in case of an emergency, is also authorized to undertake the same actions. In order to allow the detection, and detection of illegally acquired property and the collection of evidence, the court may, at the motion of the prosecutor, order the undertaking of special investigative actions. Finally, the court may order a legal or natural person to temporarily suspend the execution of a financial transaction suspected of constituting a criminal offense, or intended to commit a criminal offense, to serve as a cover for criminal offense or concealment of profits made by a criminal offense.

The measure referred to in Art. 73. allows the court, that at any time during the proceedings, on the motion of the prosecutor, to impose a temporary measure of seizure of property that has to be seized pursuant to the provisions of the CC BiH; the seizure measure or any other necessary provisional measure in order to prevent the use, alienation or disposal of such property. Police officials are authorized to undertake this measure if there is a risk of delay.

Finally, the measure referred to in Art. 395. provides the court with the possibility, when conditions for the forfeiture have been fulfilled, that ex officio, in accordance with the provisions applicable to the distraint laws, determines the temporary measures for securing a civil claim of a victim arising from the perpetration of a criminal offense. Temporary measures above are aimed to protect the victims request for compensation and encompasses measures related to secure property and to provide unhindered distraint procedure. Those measures are part of distraint laws.

4.3. LEX SPECIALIS LAWS

As an addition to provisions of criminal substantive and procedure codes in Bosnia and Herzegovina there are also three lex specialis codes on two entity levels and one district level aimed to strengthen the effectiveness of the criminal justice system on the field of criminal property forfeiture. Those codes are: Criminal property forfeiture Code of Republic of Srpska (CPFC RS), Criminal property forfeiture Code of Federation of Bosnia and Herzegovina (CPFC FBiH) and Criminal property forfeiture Code of Brčko District Bosnia and Herzegovina (CPFC BD BiH). The

said laws provide provisions related to conditions and procedures of forfeiture and authorities responsible for the detection, confiscation and management of property acquired through the perpetration of a criminal offense. Furthermore, all three codes establish provisions for the conduct of financial investigations in order to collect evidence indicating the amount, type, real value as well as other circumstances related to the property for which there are grounds for suspicion that it was obtained by a criminal offense. Also, all three laws provide provisions regarding appropriate measures to ensure the seizure of illegally acquired property as well as enforcement orders in order to seize unlawfully acquired property. Finally, all laws envisage an extended forfeiture of property acquired through the perpetration of a criminal offense, however, without any special provisions on how this extended forfeiture need to be exercised. All the above is of utmost importance for the fight against organized and other serious forms of crime, especially the implementation of financial investigations as a specialized form of criminal investigation that are completely new legal instruments in the criminal justice system of Bosnia and Herzegovina. In that sense, from the standpoint of the entire legal system in Bosnia and Herzegovina, promulgation of those laws was certainly a necessary move that will, in the near or further time, result in improving this area of the fight against crime.

Still, it needs to be emphasized, generally speaking, that if there are differences between the jurisdictions in Bosnia and Hercegovina regarding criminal property forfeiture, they are the most obvious in the lex specialis area. We will list some of them. The CPFC FBiH and CPFC BD BiH provide provisions for establishing of a special procedure for the criminal property forfeiture in circumstances where there is a reasonable suspicion that the proceeds are obtained through the perpetration of a criminal offense, and the conditions for conducting the criminal proceedings due to the death of the suspect or the accused or his escape are not met, and threaten the occurrence of the statute of limitation (Art. 5. of CPFC FBiH and CPFC BD BiH). There is no such provision in CPFC RS. Furthermore, some of the provisions of the CPFC RS represent a specific addition to the Criminal Code of Republic of Srpska because the CC RS did not regulate these issues, which was done, on the other side, by the state CC, CC FBiH and CC BD BiH. Good examples are criminal offenses to which the provisions of CPFC RS apply including the possibility to initiate extended forfeiture. Those are criminal offences: (a) against sexual integrity: trafficking in human beings for the purpose of prostitution; exploitation of children and juveniles for pornography; production and display of child pornography; (b) against human health: unauthorized production and trafficking of narcotic drugs; (c) against economy and payment transactions: falsification and use of securities; falsification of credit cards and non-cash payment cards; falsification of signs for value; money laundering; unauthorized trade; tax evasion and contributions; (d) against official duty: misuse of official position or authority; embezzlement; fraud in service; receiving a bribe; giving a bribe; unlawful mediation; (e) organized crime; (f) against public order and peace: creation and acquisition of weapons and means intended for the perpetration of criminal offenses; unauthorized production and trafficking of weapons or explosives; and (g) against humanity and values protected by international law. In addition to the aforementioned, the law also applies to other criminal offenses by provisions of CC RS if the property gains or value of the objects used or intended to commit or resulting from the perpetration of the criminal offense exceeds 50.000,00 KM (circa 25.000,00 EUR). Finally, unlike two other lex specialis laws, the CPFC RS provide provisions for the establishment of special organizational unit within the Ministry of the Interior whose competence is to investigate and disclose the property acquired by committing the criminal offense.

CONCLUSION

As we had the opportunity to notice, criminal property forfeiture in Bosnia and Herzegovina has been regulated by 11 laws in four legal jurisdictions which themself certainly present a problem in the realization of uniform prosecution and court practice, as well as the practices of other subjects involved in this process. In addition, there are certain differences between provisions of these laws and that could further contribute to criminal property forfeiture inefficiency, and therefore the inadequate fight against crime in general. However, it is not just the complexity of the legal system in Bosnia and Herzegovina that contributes to the inefficiency. We also have seen that many provisions of the laws in different jurisdictions in Bosnia and Herzegovina are quite complementary. Furthermore, even though we have seen that the provisions of the substantive criminal law, at least at state level, recognizes civil forfeiture, still there is no single registered case in which the prosecutor in civil proceedings, as foreseen in the provisions of the state law, has filed a suit for property forfeiture. The experience of other countries, especially those belonging to common law, tells us that civil forfeiture can be a very powerful tool of the legal system in the fight against crime. So, there are also other problems and those problems are not in direct connection with the complexity of Bosnia and Herzegovina legal system. On one hand, we can understand these problems as justified, such is, for example, a civil forfeiture, which is a completely unknown legal instrument to our judicial professionals, and that itself represents a difficulty in the preparing and conduct of legal proceedings of that nature for the prosecutors. On the other hand, we cannot consider it justified that there is no attempt on the field of education of our judges, prosecutors and other law enforcement professionals on this particular issue. Extended forfeiture as an extremely powerful and effective tool in the fight against organized and other serious forms of crime, which has been implemented in the Bosnia and Herzegovina legal system for several years, in practice, has been reduced to only a few successfully achieved forfeitures. The main problem, regarding the extended forfeiture has been issue with a burden of proof. Unfortunately, legal provisions are not completely clear is it on the side of the prosecutor or defendant which can produce lot of uncertainties in proceedings. True, a multitude of issues stems from very inadequate legal formulations, especially in the part concerning the burden of proof, but that problem can be overcome by equating judicial practice and with continuous education of judicial actors. Generally speaking, despite the possibly invested efforts at the legislature level to adequately regulate the criminal property forfeiture legal area in Bosnia and Herzegovina, in practice, still there is no significant progress specifically on the field of extended forfeiture.

REFERENCES

- Cassella, S.D. (2007). An Overview of Asset Forfeiture Law in the United States, *United States Attorney Bulletin*, Vol. 55. No 6., pp. 8-21
- Casella, S.D. (2009). An overview of asset forfeiture law in the United States, in Young, S.N.M. (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, Cheltenham, pp. 23-51
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 2005, CETS No. 198.
- Dery, A. (2012). Overview of Asset Forfeiture. *Business Law Today,* pp. 1-5
- Directive on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union 2014/42/EU (Offical Journal of the European Union, 127/39)
- Gaumer, C. (2007). Criminal Forfeiture, *United States Attorney Bulletin*, Vol. 55. No 6., pp. 21-30
- European Union Council Framework Decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property 2005/212/JHA (Offical Journal of the European Union, 68/49)
- Fourie, M. & Pienaar G.J. (2017). Tracing the Roots of Forfeiture and the Loss of Property in English and American law, *Fundamina*, Vol. 23. No 1., pp. 20-38
- Ferhatović, A. & Boban, H. (2017). Oduzimanje imovinske koristi pribavljene krivičnim djelom u Federaciji Bosne i Hercegovine, *Godišnjak Pravnog fakulteta u Sarajevu*, LX – 2017., pp. 153-179
- Halilović, H. (2017). Proširenо oduzimanje imovinske koristi pribavljene krivičnim djelom u Bosni i Hercegovini u Mujanović, E. i Datzer, D. (eds) *Proširenо oduzimanje imovinske koristi pribavljene krivičnim djelima: Teorijski, međunarodno-pravni i komparativno-pravni aspekti, Sarajevo*, CPRC & CEST FBIH, pp. 70-83
- Ivičević-Karas, E. (2010). Utvrđivanje imovinske koristi stečene kaznenim djelom, Reforma hrvatskog gospodarskog kaznenog prava, *Hrvatski ljetopis za kazneno pravo i praksu*, Vol. 17, No 1/2010, pp. 191-210
- Krivični zakon BiH (Službeni glasnik Bosne i Hercegovine br. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14 i 35/18)
- Krivični zakon BD (Službeni glasnik Brčko Distrikta BiH br. 10/03, 45/04, 05/05, 21/10, 52/11, 9/13, i 50/18)
- Krivični zakon FBiH (Službene novine FBiH 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16 i 75/17)
- Krivični zakonik RS (Službeni glasnik RS br. 64/17)
- Kruisbergen, E.W., Kleemans, E.R., Kouwenberg, R.F. (2016) Explaining attrition: Investigating and confiscating the profits of organized crime, *European Journal of Criminology*, Vol. 13, No 6, Sage, London
- Lajić, O. (2012). *Finansijske istrage: Krivično-pravni i kriminalistički pogled na istraživanje imovine stečene kriminalom i privremene mjere obezbeđenja*, "Poslovni biro" d.o.o. Beograd

- Mujanović, E. (2011) *Oduzimanje imovinske koristi pribavljene počinjenjem koruptivnih krivičnih djela (analiza pravnog okvira u Bosni i Hercegovini)*, Transparency International.
- Mujanović, E., Datzer, D (urednici) (2016). *Oduzimanje imovinske koristi pribavljene krivičnim djelima: priručnik za praktičare*, Centar za istraživanje politike suprotstavljanja kriminalitetu, Sarajevo
- Nelson, C. The Constitutionality of Civil Forfeiture, *Yale Law Journal*, Vol. 125, No 8. pp. 2446-2518
- Petrović, B., Jovašević, D. & Ferhatović, A. (2016). *Krivično pravo II:Saučesništvo, krivične sankcije i posebni dio*, Sarajevo, Pravni fakultet
- United Nations Convention Against Corruption (UN 58/4, 2003)
- United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UN, 1988);
- United Nations Convention Against Transnational Organized Crime (UN 55/25, 2000);
- Zakon o krivičnom postupku BD (Službeni glasnik Brčko Distrikta BiH br. 10/03, 48/04, 06/05, 12/07, 14/07, 21/07 i 27/14)
- Zakon o krivičnom postupku BiH, (Službeni glasnik Bosne i Hercegovine, br. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13 i 65/18);
- Zakon o krivičnom postupku FBiH (Službene novine FBiH br. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 09/09, 12/10, 08/13 i 59/14)
- Zakon o krivičnom postupku RS (Službeni glasnik RS br. 53/12, 91/17 i 66/18)
- Zakon o oduzimanju imovine stečene izvršenjem krivičnog djela Republike Srpske (Službeni glasnik Republike Srpske, br. 12/10)
- Zakon o oduzimanju nezakonito stečene imovine Brčko Distrikta BiH (Službeni glasnik Brčko Distrikta BiH, br. 29/16)
- Zakon o oduzimanju nezakonito stečene imovine krivičnim djelom FBIH (Službene novine Federacije Bosne i Hercegovine, br. 71/14)

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 137-152
ISSN 1512-5505

POLICING REPEAT AND HIGH-RISK FAMILY VIOLENCE: A COORDINATED MODEL IN VICTORIA, AUSTRALIA

Gemma HAMILTON

Summary

This study qualitatively evaluated 'Alexis – Family Violence Response Model'— a joint police-social services approach to family violence in the State of Victoria (Australia). Interviews were conducted with 17 stakeholders (7 police members and 10 community service providers) to examine how the model reduced recidivist family violence and how it differed from other policing approaches to family violence. Five key themes were extracted from the data via thematic analysis: (i) collaboration between police, an embedded family violence worker and other agencies; (ii) increased police accountability; (iii) the adoption of a proactive major crime approach; (iv) emphasis on professional development; and (v) the allocation of dedicated time and resources. Implications for future policy development are discussed, with the findings highlighting promising practices for policing high-risk and recidivist family violence.

Key words

family violence; domestic violence; intimate partner violence; specialist taskforce

It is now well established that family violence[1] is a prevalent issue across the globe, with significant consequences for both victims and states. Recent Australian statistics have noted that reports of family violence to police have increased over the past 10 years, with a record-breaking 74,385 incidents occurring in the state of Victoria in 2015 (Millsteed, 2016). Statistics also revealed that recorded recidivist family violence has increased over time, and that repeat offenders were responsible for almost 75 per cent of all recorded incidents between 2006 and 2015 (Millsteed, 2016). The following paper discusses how police have traditionally responded to cases of family violence, as well as current and future directions in policing repeat and high-

[1] Throughout the following article, the term family violence is used to respect the preferences of Australian Aboriginal and Torres Strait Islander peoples, and to reflect Victorian legislation (*Family Violence Protection Act* s 5).

risk family violence. Drawing on a pilot of a coordinated approach to family violence in the State of Victoria (Australia), known as 'Alexis – Family Violence Response Model', this paper explores one evolving police model that successfully applies a 'major crime' focus in responding to family violence.

There is consensus in much of the international literature regarding historical and indeed continuing inadequacies of police responses to family violence across many jurisdictional settings. It is well documented in Western democracies that police have routinely treated family violence as a *private matter* between family members rather than a *criminal justice matter* (Berk, Loseke, Berk, & Rauma, 1980; Segrave, Wilson, & Fitz-Gibbon, 2016; Whetstone, 2001). In the United States (U.S.), for instance, family violence was not often regarded as a serious crime and arrest rates were typically low compared to other crimes (Blackwell & Vaughn, 2003). A general reluctance to approach family violence seriously or effectively was thought to be due to several reasons: low prosecution and conviction rates that decreased police motivation to investigate such matters; police attitudes that mimicked broader patriarchal attitudes about women and the preservation of families; as well as the dangerousness of the work where officers were at risk of assault and injury when attending family violence callouts (Balenovich, Grossi, & Hughes, 2008; Berk et al., 1980).

Around the 1970's and 80's a change in the police response to family violence in many Western democracies began to occur. The women's movement drew attention to limited criminal justice responses and called for more active legal responses to family violence (Melton, 1999). Different jurisdictions adopted different approaches to this call for greater state intervention into the family home. In Australia, for example, several government enquiries into 'criminal assault in the home' recommended that civil options such as protection, intervention and/or restraining orders were preferred over criminal responses in light of the 'special' features of family violence which might make women victims reluctant to seek police assistance if they knew criminal charges against their partner or ex-partner would result (see Murray & Powell, 2011). Meanwhile, in the U.S., the widely cited 'Minneapolis Experiment' revealed results that arrest was more effective than other measures to deter future family violence (Sherman & Berk, 1984). Subsequently, many police departments in the U.S. and abroad adopted mandatory or pro-arrest policies as core features of their legal response to family violence. Such policies either mandate or strongly encourage police to arrest the perpetrator where family violence is suspected. These reactive approaches are still prevalent in many Western police forces, and are most relevant to frontline police officers who attend the majority of domestic violence call outs.

While such police responses continue today, the past few decades have also seen a rise in more *proactive* approaches to policing family violence. One notable method is a coordinated multi-agency response, where (in general) different service providers (e.g., police, child protection, housing support) work together to intervene and prevent violence against women (DePrince, Belknap, Labus, Buckingham, & Gover, 2012). The first version of a coordinated community response to family violence was established in Duluth, Minnesota in 1980: The Domestic Abuse Intervention Project (DAIP), or commonly referred to as the "Duluth Model" (Shepard & Pence, 1999). Subsequently, there has been an influx of coordinated responses to family violence across the U.S. (Salzmann, 1994; Whetstone, 2001), the United Kingdom (U.K.) (Robinson, 2006; Robinson & Payton, 2016), New Zealand (Balzer, 1999), and Australia

(ANROWS, 2016; Meyer, 2014). In the U.K., for example, a best-practice coordinated model to family violence now involves 'MARACS': Multi-Agency Risk Assessment Conferences. A MARAC is a fortnightly meeting where multiple agencies (e.g., police, health, housing, children's services) discuss and share information relating to individual and high-risk cases of family violence (Robbins, McLaughlin, Banks, Bellamy, & Thackray, 2014). In other words, independent agencies come together to gain a comprehensive picture of a case in order to decide on the best action forward.

Other popular coordinated models include specialist police family violence units and joint police-social services teams (Klein, 2009; Segrave et al., 2016). Such programs typically involve the coordination and/or co-location of police and other professionals (e.g., counsellors, social workers, family violence workers, victim's advocates) to target family violence hotspots, and provide joint services to victims and perpetrators. Officers are often responsible for perpetrator intervention and the criminal justice response, while social workers provide victim support, education, and referrals to relevant services (Corcoran & Allen, 2005; Exum, Hartman, Friday, & Lord, 2014; Meyer, 2014; Whetstone, 2001; Willson, McFarlane, Malecha, & Lemmey, 2001). These units tend to be staffed with specially trained officers and typically support investigations of family violence that are complex and high-risk.

Evaluation studies of specialist family violence units and coordinated teams have delivered some mixed results. In the U.S., Hovell and colleagues (2006) found that repeat incidents of violence actually increased in families who received intervention from a police-social services team compared to a control group. The authors suggested that results may be due to increased reporting rates, but also raised concern about the overall intervention model and victim's safety. Other studies have found benefits of dedicated family violence and coordinated teams: higher arrest, prosecution, and conviction rates of perpetrators in the U.S. and Australia (Corcoran & Allen, 2005; Klein, 2009; Phillips & Vandenbroek, 2014; Whetstone, 2001); high victim and police satisfaction in the U.S. (Corcoran, Stephenson, Perryman, & Allen, 2001, Whetsone, 2001; Willson et al., 2001); significantly lower repeat calls of family violence in the U.K. (Farrell & Buckley, 1999); and significantly lower reoffending rates in the U.S. (Exum et al., 2014; White, Goldkamp, & Campbell, 2005). Overall, while indicating varied results, the literature points to a pattern that coordinated approaches to family violence have benefits over traditional policing approaches to family violence.

Evaluation studies have shed light on the outcomes of coordinated family violence models, however, given the variation in the structure and function of teams and units, it is difficult to understand what components lead to the success or failure of models. Some studies have speculated about the mechanisms underlying the success of particular family violence units. For example, Exum and colleagues (2014) suggest that lower rates of family violence recidivism in North Carolina were due to more intensive police investigations conducted by the unit, greater levels of victim assistance, and the fact that the unit targeted perpetrators who committed more severe acts of family violence. Likewise, Farrell and Buckley (1999) speculate that dedicated staff, interagency cooperation, up-to-date records, as well as proactive engagement and support for victims of family violence were all factors in a special unit that contributed to a decline in repeat calls to family violence incidents in North West England. More research is needed to directly understand the components, and particularly the *policing* components, that contribute positively to police models of family violence prevention.

The current research sought to qualitatively evaluate a pilot of a coordinated police-social services approach to repeat family violence in Victoria, Australia: 'Alexis – Family Violence Response Model' (A-FVRM). The pilot, which commenced in December 2014, operated in three local government areas and focused on high-risk recidivist households, where police attended three or more times regarding incidents of family violence in the previous 12 months, or where an attending police member believed that future significant incidents of family violence were likely. The pilot's ultimate objective was to reduce recidivist family violence for women and children in the household, and to hold recidivist offenders accountable through the enhancement of interagency cooperation and collaboration. A quantitative evaluation of the pilot indicated that the pilot successfully achieved such an objective, with data revealing an 85% reduction in family violence recidivism for clients managed by the A-FVRM taskforce. As of April 2017, 75 out of 111 clients of A-FVRM had their cases closed for 12 months or more, and the average number of call outs per client decreased from 5.5 to 0.8 after A-FVRM intervention ([Removed for Review]).

While quantitative data is a promising indicator of the model's success, it is unable to explain what exact mechanisms or components of the model have contributed to reductions in recidivist family violence. A qualitative analysis was a vital supplement to such findings to explore *why* the A-FVRM was working, as well as what components of the model could be improved. Such questions are important when considering the future rollout of similar models to other communities. In particular, the current component of the evaluation aimed to understand how police and other agencies perceived the A-FVRM, and how it differed from other policing approaches to family violence. What was it about the *policing* approach that was important to understanding the success of A-FVRM?

ALEXIS – FAMILY VIOLENCE RESPONSE MODEL BACKGROUND

A-FVRM was developed as a partnership between Victoria Police and The Salvation Army in Victoria, Australia. The pilot was designed following data that indicated many families (especially recidivist households), were not successfully engaged with family violence specialist services. The pilot was also situated in a context that involved increasing change and attention to the issue of family violence in Australia. Indeed, in 2015, a Royal Commission into Family Violence occurred in Victoria, resulting in 227 recommendations to improve the response to and prevention of family violence–many of which were directed at police and social services (State of Victoria, 2016).

The A-FVRM is based on similar principles to international coordinated responses to family violence, such as the Duluth Domestic Abuse Intervention Project (Shepard & Pence, 1999), and is similar in structure to joint police-social services responses in the U.S. (see Whetstone, 2001; White et al., 2005). Specifically, it comprises three main components: (i) a family violence specialist (key) worker who is embedded within a police unit (ii) a coordination team, and (iii) an executive group. The family violence key worker is responsible for supporting women, children and offenders, and their engagement with relevant services, while police are responsible for case management and the criminal justice response. The coordination team is convened by Victoria Police and comprises key agencies (e.g., child protection, corrections, allied social services) that meet on a monthly basis to discuss families (e.g., new families, or families

where there is concern that community service engagement is not occurring as planned). Their main goals are to ensure stronger integration of services, provide a streamlined interface for clients working with multiple agencies, promote re-engagement of clients where disengagement occurs, and share information amongst agencies. The executive group comprises senior representation from all agencies on the coordination team. Their objectives are to ensure the sustainability of the model, deal with systematic issues that might arise in the coordination meetings, and identify areas for further improvement.

METHODOLOGY

A-FVRM is a new approach to family violence in Victoria, therefore, a qualitative interview research design was deemed most appropriate and fruitful for exploring stakeholder's perceptions regarding the model. Stakeholders were invited to take part in an individual interview if they had professional experience responding to family violence either within or in collaboration with the A-FVRM. They were identified and contacted through their organisation, resulting in a final sample of 17 stakeholders: 7 past and present Victoria Police members, and 10 community service providers including A-FVRM key workers and members from child protection, justice and allied social services. Following police and university ethics approval, interviews were conducted in-person by one or two of the lead researchers between 2015 and 2017.

Interviews were semi-structured and ranged from 45 minutes to 2 hours in duration. The main areas of inquiry related to the stakeholder's professional background and experience dealing with family violence matters; stakeholder's involvement with and knowledge of A-FVRM (e.g., key features, intended outcomes); a reflection on the day-to-day operation of A-FVRM; the strengths of the model in responding to family violence; and any challenges or suggestions for improvement of the model. Stakeholders presented their personal views and experiences. With individual consent, interviews were audio-recorded and transcribed verbatim. Interviews were read and thematically analysed by the authors using a web-based analysis application called Dedoose. Key themes were coded and subsequently discussed, reviewed and refined by the researchers. The coding process was deductive in nature, and themes were latent, analyst-driven, and demarcated by their relevance to the research questions (i.e., how A-FVRM differs from other policing approaches and how this may help to reduce recidivist family violence).

RESULTS AND DISCUSSION

Overall, stakeholders' perceptions regarding A-FVRM were overwhelmingly positive. Some acknowledged that family violence could be challenging work, but that the Alexis model was largely operating successfully to integrate services, increase reporting, engage victims in services, manage and police high-risk offenders, and reduce recidivism. While stakeholders working within or in collaboration with A-FVRM held positive views of the model, they also expressed that it had gained a positive reputation with the police force more broadly, particularly because of its role in reducing workloads for other police units responding to family violence. When concentrating on the policing approach in A-FVRM, and how it might differ from other policing approaches to family violence in Victoria, five key themes were extracted from the interviews and will be discussed in turn under the following headings: (i) collaboration; (ii) accountability;

(iii) proactive major crime approach; (iv) professional development; and (v) dedicated resources. Suggestions for the refinement of the Alexis model will be weaved throughout.

COLLABORATION

Traditionally, police and welfare agencies have worked separately, and there has been a lack of understanding of each other's roles, as well as a lack of communication regarding incidents of family violence (Stanley, Miller, Foster, & Thomson, 2011). Stakeholders in our study voiced that a unique component of the A-FVRM was its emphasis on timely collaboration between police, the key family violence worker and other relevant agencies (e.g., child protection). In particular, three elements of A-FVRM were thought to facilitate collaboration: the embedded key social worker in the police team, co-location of the police and key social worker, and the coordination meetings between different agencies managing family violence cases. Each element will be discussed in turn.

Embedded Key Worker

Previous research has indicated that core structural and ideological differences between police and social workers can make collaborating on family violence cases a challenging task (Buchbinder & Eisikovits, 2008). Indeed, the majority of police in a recent study in the U.S. held the view that social workers would not be beneficial at the scene of a family violence incident (Ward-Lasher, Messing, & Hart, 2017). Conversely, stakeholders in the present study spoke very positively about the embedding of a key social worker into the police team, and identified a number of benefits to their role. Firstly, police members stated that the key worker was an important bridge to contacting and communicating with welfare agencies because they possessed the relevant language and knowledge. As one member articulated:

> 'With the support agencies, we really struggle as police. Our jargon isn't understood by other people and we don't understand the jargon of welfare agencies and the key worker spoke that language and learnt how to translate for us. So when there was something that needed to be done, they knew not only who to call, but how to talk to them as well.' [Interview 6]

Secondly, police members appreciated that the key worker could focus on the social work elements of family violence cases (e.g., mental health, substance abuse issues) so that they could concentrate on what they perceived to be the more pressing policing aspects of the job (e.g., holding offenders accountable). One interviewee explained that police often feel they do not have the time, expertise or passion to deal with the support needs of victims of family violence. As one member put it, 'police cannot fix family violence on their own–they have to use other agencies' [Interview 15], and another, 'people do not join the police-force wanting to become social workers' [Interview 5]. Nevertheless, they viewed this work as important and highlighted the benefit of having the key worker to get families engaged with services and reporting criminal matters to police–something that police alone had trouble with previously. Key workers were thought to provide a more approachable avenue for victims to disclose family violence, particularly for those that held negative perceptions of police.

Overall, both police and key workers reported being able to work well together, and that the embedding of the key worker into the police team was a vital component of the A-FVRM's success in

reducing recidivist family violence. Other studies have also identified the role of a family violence worker as a significant contributor to the success of their programs in the response to family violence (Barton, 2015; Meyer, 2014; Robinson & Payton, 2016). One noteworthy point that was raised by stakeholders, however, was that the individual characteristics of the key worker were integral to collaborative success. Police members commented that the key worker would need to be able to 'gel well' and get along with others in the police team. This is an important factor to consider when planning the replication and rollout of the A-FVRM in other communities.

Co-Location

Stakeholders also identified the co-location of police and the key social worker as an important mechanism that helped to facilitate collaboration and in turn work successfully on family violence cases. The co-located setting enabled members to draw on each other's expertise in order to actively reflect on cases and problem solve. The office setup where all members of A-FVRM were located in the same physical space was also thought to make the information sharing process quicker, easier, and more efficient. According to one child protection worker:

> 'I think sometimes there are just delays in not being together and just trying to find each other. There's an ease of conversation and the ease of exchange of information if you actually work together all the time. Because again, that's relationship-based too. To be able to sit around the table and say, "hey, this has just come in, let's have a chat about it," is a bit different to, "I'll read it and then you read it and then we'll ring each other".' [Interview 7]

The proximity of members not only helped to break down the physical barriers to communication, it also helped to break down social barriers. Participants expressed feeling more comfortable sharing information when police members and the key social worker were co-located because trusting relationships had been built up through regular contact over time. Merkes (2004) also found that mutual trust, frequent communication, and established informal relationships between services were central factors to successful collaboration in a local council group working to help families experiencing violence in Victoria, Australia.

It should be made clear, however, that members emphasised that co-location was most effective when social workers were embedded within a police team (as opposed to a multidisciplinary hub model). One member articulated how a multidisciplinary centre could possibly impede collaboration because different agencies have distinctive identities, cultures, and focuses [Interview 8]. It may be difficult for agencies to build trust if they are constantly cautious about what information they can share or what language they can use around each other. Conversely, a social worker that is embedded into a police team can integrate into the police culture while simultaneously working towards a shared goal of reducing family violence. This is an important point to consider given the Victorian Government's plans to roll out a network of Support and Safety Hubs (coordinating Child Protection, Victoria Police, the courts, and the Victims Support Agency) to end family violence (Victoria State Government, 2017).

Coordination Meetings

It was clear from the interviews that the monthly coordination team meetings helped to facilitate inter-agency work on family violence cases, and that they were critical in developing coherent case plans for complex families (e.g., victims or perpetrators with complex needs,

families with children involved). These meetings brought together social service partners and police for a detailed discussion on what was known about a family; who was working with the family; whether individuals within a family were engaging with services; and whether services were delivering on their commitments with a family. In each meeting, various agencies shared relevant information which resulted in a more holistic understanding of the family, with a clearer picture of the risk to the victim, and a greater sense of what needed to happen to hold the perpetrator accountable and prevent further violence (i.e., the best possible response for that particular family). One police member emphasised the importance of information sharing between agencies in the meetings:

> 'I think the information sharing was pivotal in making sure that everyone knew what was going on… it gives everybody a good overview of what's happening—a full picture.' [Interview 5]

Information sharing amongst agencies and the ability to collectively identify problems and discuss solutions has been noted as key successful aspects of family violence coordination committees in prior research (Clark, Burt, Schulte, & Maguire, 1996; Robinson, 2006). Information from the coordination meetings came together in the form of new referrals to partner services, ensuring that victims and perpetrators were connected to necessary services. Previous research has found that efforts to coordinate services are associated with higher rates of contact with family violence services (Klevens, Baker, Shelley, & Ingram, 2008). Overall, this may suggest that the coordination team meetings and subsequent engagement of families in coordinated services are playing an integral role in A-FVRM's success in reducing recidivist family violence, although future research could examine this link in greater depth.

ACCOUNTABILITY

Another key way that A-FVRM is different to other policing approaches to family violence is its emphasis on accountability, both for members within A-FVRM as well as wider police members dealing with family violence incidents. Stakeholders spoke about how the A-FVRM appeared to increase police responsibility for family violence cases, largely through three mechanisms: clear and consistent procedure, case management of families, and overall monitoring of family violence cases.

Clear and Consistent Procedure

Police members explained that the policies of A-FVRM reinforced to members that they needed to follow procedure, regardless of verbal advice by others. In other police units, a culture might develop where people are advised not to progress with a family violence application because there is an assumption that evidence is lacking and it will get rejected. Other Australian research has indicated that officers frequently failed to follow current procedures in family cases, commonly due to a misunderstanding of family violence laws; for example, some police did not take action because the victim had no visible physical injuries (Goodman-Delahunty & Crehan, 2016). Conversely, the A-FVRM emphasised strictly adhering to procedure and completing an application for remand, even if the evidence appeared to be weak. This mentality was thought to have benefits at both a personal and broader level: formally documenting and lodging applications would help to 'cover yourself if something else happened' [Interview 5],

but it would also result in greater numbers of remands because applications would often be approved, sometimes to the surprise of the officers. It appeared the clear and consistent procedural guidelines of A-FVRM helped to increase police answerability and in turn police action in cases of family violence.

Case Management

Police members of A-FVRM are allocated a specific number of families to case manage. This ensures there is active ownership of matters relating to a specific family over time. For many of the police members, this was significantly different to their experience of general policing. In general policing, members talked about how their responsibility in family violence cases often concluded when they had confirmed the wellbeing of the parties present and general public, ensured charges or breaches of orders were followed through, and completed the required paperwork. Alternatively, in A-FVRM, members felt they had an ongoing responsibility for an address. The importance of an 'address' is worth noting. The physical address a family resides at is the point of reference for a call out—police are called to an address, with the nature of the incident, and they engage with the people they find there. In A-FVRM the police member's involvement continues beyond that initial engagement. As one police member described:

> 'I guess the focus for us was to reduce the recidivism, keep those recidivists off our list. So whatever we could do or ideas we had to try and make that happen, and whether it be around rehabilitation, engagement with [the key worker], that sort of thing, then that's something that we would put forward and try to get it done.' [Interview 5]

Many police members also described being in the office and constantly having an ear open for one of 'their' addresses coming over the internal police radio (which is constantly broadcast through the station). For individual police members, this was characterised as listening for one of 'my' addresses; for senior police members of the team it was characterised as listening out for 'one of our addresses.' Members had a sense of the history with a family, and described developing a 'vested interest' and 'emotional investment' in the cases that they personally managed. Overall, it appears that case management may be a key contributing factor to A-FVRM's success in reducing recidivist family violence. Although we did not measure victim's experiences of A-FVRM, previous research has found that end-to-end case management was associated with better police practices involving victims of rape and domestic violence (e.g., keeping victim's informed and supported throughout entire criminal justice process: Madoc-Jones, Hughes, & Humphries, 2015). Future research on A-FVRM could perhaps investigate the impact of police case management on victims' satisfaction rates.

Overall Monitoring

Part of the role description of A-FVRM police members is to hold the rest of the family violence unit and police members to account, ensuring recorded data following family violence incidents has been completed to an adequate standard and that all follow-up work has been completed as per the Victoria Police Code of Practice for the Investigation of Family Violence ([Removed for Review]). Such a role appears to be effective, as police members in our interviews reported an increased compliance with family violence procedures with the knowledge that their reports and cases were being monitored by an A-FVRM member. A-FVRM members gave direct constructive feedback to other police members following review of their reports,

however, the knowledge alone that police members were being monitored appeared to lift their standards, as there was now an 'understanding or expectation that [the family violence job] was done properly' [Interview 5]. For example, one police member reported how the extra supervision encouraged members to 'do the right things', follow-up and take action where appropriate, making sure statements were comprehensive and future risk to victims had been more fully assessed [Interview 5]. The overall gaze of A-FVRM members, therefore, appears to be important in increasing accountability and improving the policing response to family violence.

PROACTIVE MAJOR CRIME APPROACH

Traditional police approaches to family violence have typically been reactive in nature, whereby police have randomly patrolled and responded to particular incidents of violence (Melton, 1999; Sarre & Prenzler, 2018). Several of the police managers interviewed in the present study articulated a shift to thinking about family violence as a *major crime*, which required a proactive 'intelligence-led policing' model, rather than a 'keeping of the peace' and an immediate risk diffusion model. An intelligence-led policing model seeks to proactively ascertain information relating to a circumstance (in this context a family) or a perpetrator in such a way as to support an effective intervention over time (Ratcliffe, 2016). This includes applying investigative techniques that are beyond the resourcing capacity of day-to-day divisional police. One senior member talked in detail about working with new members of A-FVRM to get them to realise their job was now to 'take the time' to investigate and to think through the collection of evidence beyond 'he said, she said statements' [Interview 15]. An example was provided of accessing mobile phone tower location systems and canvassing neighbours to identify inconsistencies in a respondent's statement. Another example is described by one police member as follows:

> 'I started looking at jobs a little differently. Do we start using some covert investigation techniques like cameras at a house? Say we've got a victim that's constantly reporting breaches from the perpetrator attending her address at all hours in the morning. It's his word against hers. He gets picked up a couple of days later, interviewed and he goes, "No, I was over here in [location] with my brother." Okay, what if we get some covert cameras into that address because it's constantly happening and we've now got CCTV footage of him breaching. Now we put him in a show cause situation, have him remanded, and that previously might not have been considered because that's more a crime-orientated investigation tool.' [Interview 4]

Stakeholders discussed how the application of investigative techniques (like the use of data recording systems and cameras) had led to stronger briefs of evidence and consequently, better accountability of family violence perpetrators. As one police member put it, using a 'major crime' lens was important in the development of A-FVRM practice and process [Interview 3]. In a major crime investigation, officers are uncertain of the perpetrator but gather evidence with a view that evidence will be important in the development of a brief for prosecution. While the perpetrator is known in a family violence matter, the nature of the crime (which can relate to patterns of behaviour) requires the same strong development of an evidentiary base if a case is to be successfully prosecuted. This proactive approach is also likely to be a key reason for A-

FVRM's success in reducing recidivist family violence. Indeed, one study in the U.S. found that a specialist police unit that involved more intensive investigations into family violence resulted in lower rates of reoffending compared to cases dealt with by a standard patrol (Exum et al., 2014). Together, these points highlight the strengths of treating family violence incidents as serious crimes to investigate, solve and prosecute rather than isolated incidents to respond to.

PROFESSIONAL DEVELOPMENT

A fourth overarching theme in the interviews relates to the professional growth that A-FVRM presents to police, and how this has a positive impact on their work on family violence cases. Stakeholders in our interviews noted that family violence has traditionally been perceived as unattractive and dead-end police work, something that has also been echoed in other Australian research (Segrave et al., 2016). A-FVRM, however, has provided police with specialist knowledge and skills that help to advance their policing careers. For example, police members talked about the enormous value of learning specific investigative techniques that would ensure they had the evidence required to hold perpetrators accountable for specific breaches of intervention orders and for their violence more broadly. These techniques involved evidence gathering (e.g., using CCTV and mobile phone towers to confirm or contradict respondent's statements) and new evidence and case recording software normally used within detective roles. While they all understood the broad idea of gathering evidence that could be relied upon for a conviction theoretically, their experiences in A-FVRM developed their actual skills and provided them with a supportive environment where these skills would be successfully put into application.

Working in A-FVRM also equipped members with specialist knowledge about the nature of family violence and the most appropriate responses to family violence—something that was perceived positively by police members outside of A-FVRM. Once members had worked for a period in A-FVRM, there was a sense amongst the broader police force that A-FVRM members were experts in family violence matters. According to one police member:

> 'I think they become go-to people for family violence for the first instance, even the family violence liaison sergeants would probably seek them out at station level for advice and opinion, which is an incredible mark of respect from them… I believe that once they've come to A-FVRM, they go back to their stations with a wealth of knowledge and probably a newfound sense of responsibility when it comes to managing family violence incidences and in some cases newfound respect from supervisors and peers. There's no doubt that family violence is still a bit of a grey area when it comes to responding on the van. To have that assurance of someone that's been at a specialist unit for six months or 12 months, it's a huge benefit.' [Interview 4]

The above quote also illustrates how the professional development of A-FVRM members has positive flow-on effects to other police members, as they are subsequently exposed to A-FVRM member's knowledge, experience, and methods. Moreover, positive perceptions of A-FVRM members appears to create a positive cycle: members are developing specialist knowledge and investigative skills, this provides opportunities for career progression, and then this attracts more quality members to A-FVRM who can in turn strengthen the investigative work in family violence cases.

Dedicated Resources

The final theme surrounding the success of A-FVRM and how it differs to other policing approaches to family violence is the focused allocation of time and resources. Stakeholders commented that A-FVRM was well-resourced and that members had reasonable access to practical support items such as cars and phones. Resourcing appeared to be particularly important for the family violence key workers interviewed; they could confidently support a victim in the knowledge that police resources would be allocated to pursue and prosecute a perpetrator. If they were working with a perpetrator, they could confidently provide them with the choice: engage with services to stop using violence or you will be charged and held accountable. Sufficient resourcing has been identified in other research as a key facilitator in collaborative work to reduce family violence (Merkes, 2004).

Stakeholders also emphasised the importance of having ample time to properly investigate family violence cases, complete paperwork and support victims—something that was perceived to be lacking in other police units responding to family violence. Police members acknowledged the value of having extra time to adequately follow-up and spend time with families to figure out a suitable management plan. They also commented on the personal bonus of having the temporal space to regularly meet deadlines, which relieved a sense of pressure and enabled feelings of workplace satisfaction. One police manager explained A-FVRM's distinctive approach to time resourcing in the following quote:

> 'I guarantee you that the divvy van guy that rocks up to a domestic violence incident two hours before the end of his shift is either thinking about the next job he's got to get to and clear before he goes home, all the paperwork he's got to do when he gets back to the office, how can he do that as quickly and easily as possible. It's not a matter of not doing his job properly, it's a matter of his mindset is to get through this job "as quick as I can to get to the next one, to the next one, to the next on." A-FVRM members, I don't care if they're entire shift is one job. As a manager, I'm not relying on them to get to the next job, to the next job, to the next job. They come in the next morning and go, "We spent six hours with John and Betty Smith and we did X, Y and Z and put this intervention order in place and these management issues are dealt with." I'm rapt. They've done their job.' [Interview 4]

CONCLUSION

A-FVRM is a model of policing that has shown success in reducing recidivist family violence (an 85% reduction for clients 12 months post exit from A-FVRM: see [Removed for Review]). The current study aimed to understand which components of A-FVRM contributed to its success, and how the policing approach in A-FVRM differs to other policing approaches to family violence. From the perspective of stakeholders involved in the execution of A-FVRM, the qualitative components of the evaluation revealed five key themes: (i) collaboration between police and other agencies reinforced by an embedded family violence worker and monthly coordination meetings; (ii) increased police accountability reinforced by clear and consistent procedures, the case management of families, and an overall monitoring process; (iii) the adoption of a proactive 'intelligence-led' major crime approach; (iv) emphasis on professional development; and (v) the allocation of dedicated time and resources.

Together, the extant literature and stakeholder interviews highlight how police have traditionally perceived and treated family violence as unappealing work that requires a fast-paced reactive response, resulting in an uncoordinated approach and limited justice outcomes. A-FVRM, on the other hand, demonstrates the effectiveness of a coordinated police-social services approach, and points to the strengths of treating family violence as a major crime that requires in-depth investigations and intelligence-led proactive problem-solving. It was also evident that the allocation of time and resources to the taskforce facilitated strong investigations and management plans. Although it is understood that budgets in police forces will always be limited, A-FVRM's success in reducing recidivist family violence indicates it is one area of policing that seems to deliver on the investment.

Our findings appear to support the idea of using specialist police units with dedicated training to address recidivist family violence. There is still debate in the literature regarding whether police should engage in a generalist or specialist approach to family violence cases. Advocates of a specialist approach believe that pervasive negative police attitudes towards domestic violence and dissatisfaction with domestic violence work are significant barriers to force-wide initiatives (Segrave et al., 2016). Alternatively, many police forces have moved away from specialist models due to their narrow focus, possible marginalisation of domestic violence work, and low impact on frontline officer's abilities to respond effectively to domestic violence incidents (Burton, 2008, 2016). Our study indicated that the overall monitoring process inherent in A-FVRM helped to improve police accountability and performance at the frontline. Moreover, the model's emphasis on professional development appeared to strengthen the perception of family violence as core police work rather than a low-priority duty. A-FVRM equipped members with specialist knowledge and skills about family violence investigations which helped to inform their responses to family violence and attract further members to the taskforce. The case management structure within the taskforce also appeared to increase members' enthusiasm, dedication and ongoing skill in responding to family violence jobs. There are features of the A-FVRM which therefore seem to distinguish it from past specialist police units, and suggest that there is value in including specialist police approaches as part of a wider coordinated community response to family violence.

While our study helped to clarify which components of policing in A-FVRM contributed to its success, some caveats should be made. Interviews were not conducted with clients of A-FVRM (i.e., victims and perpetrators) because the size and geographical location of the pilot meant that the confidentiality of clients could not be guaranteed. The lack of client interviewees poses a significant limitation in trying to understand why the pilot was successful because it was not possible to definitively establish why perpetrators reduced their use of violence or how the interventions provided by partner services supported a victim and family members. The absence of client interviews has also hampered an understanding of family circumstances after the closure of their contact with A-FVRM.

Despite this limitation, the current study has highlighted some promising practices for the policing of recidivist and high-risk family violence. Other studies have noted the success of coordinated police taskforces in reducing family violence, but have largely provided speculative and theoretical explanations for their success (Exum et al., 2014; Farrell & Buckley, 1999). Our qualitative evaluation with stakeholders provides a more in-depth exploration of which aspects of a policing model contribute towards its success in reducing family violence. Police forces

across the globe may look to all or some of the components in their efforts to improve the response to and prevention of family violence.

REFERENCES

- ANROWS. (2016). *Meta-evaluation of existing interagency partnerships, collaboration, coordination and/or integrated interventions and service responses to violence against women.* New South Wales: Australia's National Research Organisation for Women's Safety.
- Balenovich, J., Grossi, E., & Hughes, T. (2008). Toward a balanced approach: Defining police roles in responding to domestic violence. *American Journal of Criminal Justice*, *33*(1), 19–31.
- Balzer, R. (1999). *Hamilton Abuse Intervention Project: The Aotearoa experience. Coordinating community responses to domestic violence: Lessons from Duluth and beyond*. Thousand Oaks, CA: Sage Publications, Inc.
- Barton, A. (2015). An integrated response to preventing homelessness for women and children affected by family violence. *Parity*, *28*(7), 21–22.
- Berk, R. A., Loseke, D. R., Berk, S. F., & Rauma, D. (1980). Bringing the cops back in: A study of efforts to make the criminal justice system more responsive to incidents of family violence. *Social Science Research*, *9*(3), 193–215.
- Blackwell, B. S., & Vaughn, M. S. (2003). Police civil liability for inappropriate response to domestic assault victims. *Journal of Criminal Justice*, *31*(2), 129–146.
- Buchbinder, E., & Eisikovits, Z. (2008). Collaborative discourse: The case of police and social work relationships in intimate violence intervention in Israel. *Journal of Social Service Research*, *34*(4), 1–13.
- Burton, M. (2008). *Legal responses to domestic violence*. New York: Routledge.
- Burton, M. (2016). A fresh approach to policing domestic violence. In S. Hilder and V. Bettinson (Eds.), *Domestic Violence* (pp. 37–57). London: Palgrave Macmillan.
- Clark, S. J., Burt, M. R., Schulte, M. M., & Maguire, K. E. (1996). *Coordinated community responses to domestic violence in six communities: Beyond the Justice System.* Washington DC: The Urban Institute.
- Corcoran, J., & Allen, S. (2005). The effects of a police/victim assistance crisis team approach to domestic violence. *Journal of Family Violence*, *20*(1), 39–45.
- Corcoran, J., Stephenson, M., Perryman, D., & Allen, S. (2001). Perceptions and utilization of a police-social work crisis intervention approach to domestic violence. *Families in Society*, *82*(4), 393–398.
- DePrince, A. P., Belknap, J., Labus, J. S., Buckingham, S. E., & Gover, A. R. (2012). The impact of victim-focused outreach on criminal legal system outcomes following police-reported intimate partner abuse. *Violence Against Women*, *18*(8), 861–881.

- Exum, M. L., Hartman, J. L., Friday, P. C., & Lord, V. B. (2014). Policing domestic violence in the post-SARP era: The impact of a domestic violence police unit. *Crime & Delinquency*, *60*(7), 999–1032.
- Farrell, G., & Buckley, A. (1999). Evaluation of a UK police domestic violence unit using repeat victimisation as a performance indicator. *The Howard Journal of Criminal Justice*, *38*(1), 42–53.
- Goodman-Delahunty, J., & Crehan, A. C. (2016). Enhancing police responses to domestic violence incidents: Reports from client advocates in New South Wales. *Violence Against Women*, *22*(8), 1007–1026.
- HMIC. (2014). *Everyone's business: Improving the police response to domestic abuse*. London, UK. Retrieved from https://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/2014/04/improving-the-police-response-to-domestic-abuse.pdf
- Hovell, M. F., Seid, A. G., & Liles, S. (2006). Evaluation of a police and social services domestic violence program: Empirical evidence needed to inform public health policies. *Violence Against Women*, *12*(2), 137–159.
- Klein, A. R. (2009). *Practical implications of current domestic violence research: For law enforcement, prosecutors and judges*. Washington DC: National Institute of Justice.
- Klevens, J., Baker, C. K., Shelley, G. A., & Ingram, E. M. (2008). Exploring the links between components of coordinated community responses and their impact on contact with intimate partner violence services. *Violence Against Women*, *14*(3), 346–358.
- Madoc-Jones, I., Hughes, C., & Humphries, K. (2015). Where next for victim services in England and Wales? *The Journal of Adult Protection*, *17*(4), 245–257.
- Melton, H. C. (1999). Police response to domestic violence. *Journal of Offender Rehabilitation*, *29*(1–2), 1–21.
- Merkes, M. (2004). The Darebin Family Violence Working Group: a partnership approach. *Australian Journal of Primary Health, Australian Journal of Primary Health*, *10*(2), 104–111.
- Meyer, S. (2014). *Victims' experiences of short-and long-term safety and wellbeing: Findings from an examination of an integrated response to domestic violence.* Canberra: Australian Institute of Criminology.
- Milsteed, M. (2016). *How many repeat family violence perpetrators were there in Victoria over the past 10 years?* Victoria: Crime Statistics Agency.
- Murray, S., & Powell, A. (2011). *Domestic Violence: Australian Public Policy.* Melbourne: Australian Scholarly Publishing.
- Phillips, J., & Vandenbroek, P. (2014). *Domestic, family and sexual violence in Australia: an overview of the issues*. Canberra: Parliament of Australia.
- Ratcliffe, J.H. (2016). *Intelligence-Led Policing*. New York: Routledge.
- Robbins, R., McLaughlin, H., Banks, C., Bellamy, C., & Thackray, D. (2014). Domestic violence and multi-agency risk assessment conferences (MARACs): a scoping review. *The Journal of Adult Protection*, *16*(6), 389–398.

- Robinson, A. L. (2006). Reducing Repeat Victimization Among High-Risk Victims of Domestic Violence The Benefits of a Coordinated Community Response in Cardiff, Wales. *Violence against Women*, *12*(8), 761–788.
- Robinson, A., & Payton, J. (2016). Independent advocacy and multi-agency responses to domestic violence. In Hilder, S. and V. Bettinson (Eds.), *Domestic Violence* (pp. 249–271). London: Palgrave Macmillan.
- Salzman, E. (1994). Quincy District Court Domestic Violence Prevention Program: A model legal framework for domestic violence intervention. *The Boston University Law Review*, *74*, 329–364.
- Sarre, R., & Prenzler, T. (2018). Ten key developments in modern policing: an Australian perspective. *Police Practice and Research*, *19*(1), 3–16.
- Segrave, M., Wilson, D., & Fitz-Gibbon, K. (2016). Policing intimate partner violence in Victoria (Australia): Examining police attitudes and the potential of specialisation. *Australian & New Zealand Journal of Criminology*, *51*(1), 99–116.
- Shepard, M., & Pence, E. L. (1999). *Coordinating community responses to domestic violence: Lessons from Duluth and beyond.* California: Sage Publications, Inc.
- Sherman, W., & Berk, R. A. (1984). *The Minneapolis domestic violence experiment.* Washington DC: Police Foundation.
- Stanley, N., Miller, P., Foster, H. R., & Thomson, G. (2011). A stop–start response: Social services' interventions with children and families notified following domestic violence incidents. *British Journal of Social Work*, *41*(2), 296–313.
- State of Victoria. (2016). *Royal Commission into Family Violence: Summary and Recommendations*. Victoria: Victorian Government Printer.
- Victoria State Government. (2017). *Support and Safety Hubs: Statewide Concept*. Melbourne: State Government of Victoria.
- Ward-Lasher, A., Messing, J. T., & Hart, B. (2017). Policing intimate partner violence: attitudes toward risk assessment and collaboration with social workers. *Social Work, 62*(3), 1–8.
- Whetstone, T. S. (2001). Measuring the impact of a domestic violence coordinated response team. *Policing*, *24*(3), 371–398.
- White, M. D., Goldkamp, J. S., & Campbell, S. P. (2005). Beyond mandatory arrest: Developing a comprehensive response to domestic violence. *Police Practice and Research*, *6*(3), 261–278.
- Willson, P., McFarlane, J., Malecha, A., & Lemmey, D. (2001). A special police unit: Intimate partner violence and perceived helpfulness of services received. *Journal of Police and Criminal Psychology*, *16*(1), 40–50.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVII, Issue 5-6, 2018. p. 153-157
ISSN 1512-5505

META-ANALYSIS ON THE PREVENTION OF SEXUAL ABUSE OF MINORS IN THE CATHOLIC CHURCH AND IN OTHER INSTITUTIONS

Barbara HORTEN
Dieter DÖLLING

Abstract

The aim of the meta-analysis was to find evaluation studies on prevention programs on sexual abuse in institutions. Further, the meta-analysis asked for an effect of the prevention programs on the knowledge transfer on sexual abuse, the knowledge maintenance and anxiety and fear of sexual abuse. The meta-analysis included 39 evaluations of programs in the descriptive analysis. The analysis was based on studies with a pre-post comparison and an intervention group as well as a control group. Most of the studies used controlled assignment strategies for the intervention and control group. The analysis showed an effect of participating in a program on the knowledge transfer (0.61 (95 % CI = [0.45, 0.77]), and a long-term effect on the knowledge (0.58 (95 % CI = [0.09, 1.06]). Furthermore, the anxiety and fear to become a victim of sexual abuse was lower in the intervention groups than in the control groups (-0.23 (95 % CI = [-0.37, -0.08]). Therefore, the knowledge on sexual abuse could be increased by participation in a prevention program.

1. INTRODUCTION

Sexual violence against children and juveniles in familiar or institutional contexts is a worldwide problem. Numerous cases of abuse within the framework of the Catholic Church became apparent in Germany in 2010. More and more programs were established aiming at the prevention of sexual abuse of minors. The effects of these programs can be examined by evaluation studies. The aim of the meta-analysis presented in this paper is to analyse whether the programs are effective.

The authors of this paper belong to a research consortium examining the sexual abuse of minors in the Catholic Church on behalf of the German Bishops' Conference. The results were published in September 2018 (Dreßing et al. 2018). The meta-analysis presented here was part of this project and examined the effect of prevention programs in institutions on the knowledge on sexual abuse of children and juveniles and on the anxiety and fear of children and juveniles of sexual abuse.

2. METHODICAL APPROACH

The aim of the meta-analysis was at first to find evaluation studies on prevention projects on sexual abuse in the institutional context. Exclusively evaluations in German and English language were taken into consideration. A further focus was put on the question how effective the prevention programs are. Object of the analysis are prevention programs of the Catholic Church as well as programs outside the Catholic Church (e.g. programs in state schools).

The included evaluation studies should correspond to the following inclusion criteria:

- The program is exclusively focused on the prevention of sexual abuse of minors and it is addressed only to children and juveniles.
- It is a study with a pre-post-comparison and a control group.
- The study measures the transfer of knowledge by the participation in the prevention program, the maintenance of the knowledge and/or the effect of the participation on the anxiety and fear of the children and juveniles.
- Due to the documentation of the study results, the calculation of effects is possible.

The primary search of prevention evaluations was made in relevant data bases. With the help of 23 keywords in German and English, ten national and international criminological, sociological, psychological and medical data bases were scanned. In addition, evaluations were identified by the snowball procedure and by analyzing conference programs and conference reports. Until the end of 2017, 39 evaluations were identified and could be included in the descriptive analysis. Due to insufficient presentation of the study results in some evaluations, only 25 of the 39 evaluations could be included in the quantitative meta-analysis. A list of the studies included in the meta-analysis can be requested from the authors of this paper.

A quantitative questionnaire on methods and results of the primary studies was created. Since the outcomes are continuous variables, the total results are recorded as weighted standardized mean value differences with a confidence interval of 95 %. The calculation of the total effects was made with the help of the Program Review Manager 5.3.

3. RESULTS

Descriptive Analysis

The evaluation studies were published between 1986 and 2017 whereas the number of evaluations has increased since 2012. Mostly prevention programs implemented in the USA were evaluated. Further programs realized in Germany, Canada, China, Nigeria, Malaysia, Korea, Turkey and the Netherlands were included. In the programs, the knowledge on sexual abuse was transferred among others by naming 'good' and 'bad' touches. In most cases, controlled assignment strategies were chosen for the intervention and the control group. In the majority of the studies, the control group was a waiting group (n=27), that means the participants of the group visited the prevention program at a later point in time. In 12 studies, the control group was defined as a group with alternative intervention, for example fire protection training.

The effect of the prevention program was measured with the variables knowledge transfer (Outcome 1) and maintenance of knowledge in the follow-up (Outcome 2). At first, the state of

knowledge was recorded in a pre-interview before the program start. Outcome 1 refers to the study results of the post-interview which were measured immediately after the participation in the program. The results of the measurement of Outcome 2 refer to a third interview (follow-up). 15 studies used a self-created survey instrument, 20 studies took already published survey instruments, for example the Personal Safety Questionnaire (PSQ). In addition, four studies treated the question whether the participation in a prevention program has an effect on the anxiety and fear of the children and juveniles (Outcome 3). For measuring the anxiety, each study used a different survey instrument, for example the Fear Questionnaire for Pupils. The references of the instruments can be requested from the authors of this article.

Effects

Due to incomplete presentation of the results in a number of evaluation studies, only 25 out of 39 evaluations found could be included in the quantitative meta-analysis. The results of these 25 studies show, according to the I^2-values, a high heterogeneity concerning the outcomes. Thus, for the overall study evaluation, the Random-Effects Model was used (Borenstein et al. 2009, 63 ff.). The studies were weighted according to the number of cases and the size of the confidence intervals.

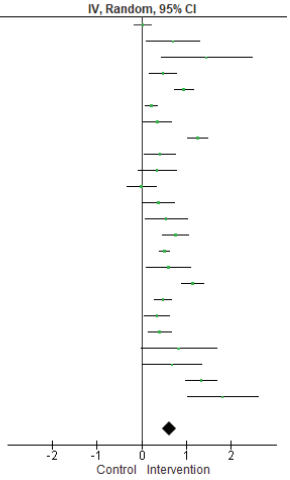
Knowledge Transfer

The knowledge on sexual abuse immediately after the participation in the prevention program was measured in 25 studies by questionnaires. The analysis of Outcome1 is based on the data of a total of 6.247 study participants. The high Chi^2 (173.16, df = 23) with a high significance level ($p < 0.00001$) illustrates the stochastic independence of the two groups. The analysis resulted in a moderate total effect of 0.61 (95 % CI = [0.45, 0.77], see figure 1). The result shows that – after the participation in the prevention program – the intervention group has a significantly higher knowledge of sexual abuse than the control group. The effect of knowledge transfer is not connected to the age of the participating children and juveniles.

Figure 1: Effects of the prevention programs on knowledge transfer (k=25)

Study or Subgroup	Intervention group Mean	SD	Total	Control group Mean	SD	Total	Weight	Std. Mean Difference IV, Random, 95% CI
Blumberg et al. 1991	18.25	3.67	322	18.15	3.26	164	5.1%	0.03 [-0.16, 0.22]
Chen, Fortson u. Tseng 2012	4.35	1.071	23	3.52	1.238	23	3.1%	0.70 [0.11, 1.30]
Conte et al. 1985	21.4	3.95	10	14.4	5.2	10	1.7%	1.45 [0.44, 2.46]
Crowley 1989	12.366	1.17	82	11.609	1.889	87	4.6%	0.48 [0.17, 0.78]
Dake, Price u. Murnan 2003	12.3	2	166	10.2	2.4	175	5.0%	0.95 [0.72, 1.17]
de Lijster et al. 2016	9.87	2.52	431	9.31	2.67	384	5.3%	0.22 [0.08, 0.35]
Deutsche Gesetzliche Unfallversicherung 2016	2.71	1.86	93	2.14	1.14	65	4.5%	0.35 [0.03, 0.67]
Hazzard et al. 1991	20.6	3.67	286	15.4	5.18	113	4.9%	1.25 [1.02, 1.48]
Hébert et al. 2001	8.54	2.02	59	7.68	2.15	74	4.4%	0.41 [0.06, 0.75]
Kim u. Kang 2017	13.46	1.5	39	12.82	2.05	50	4.0%	0.35 [-0.08, 0.77]
Kolko et al. 1987	3.1	1.3	298	3.1	1.3	41	4.5%	0.00 [-0.33, 0.33]
Kolko, Moser u. Hughes 1989	12.4	2.4	213	11.5	2.5	35	4.3%	0.37 [0.01, 0.73]
Lee u. Tang 1998	8.97	1.82	38	7.97	1.77	34	3.7%	0.55 [0.08, 1.02]
Ogunfowokan u. Fajemilehin 2012	28.59	6.12	91	24.03	5.86	109	4.7%	0.76 [0.47, 1.05]
Oldfield, Hays u. Megel 1996	26.69	4.95	658	24.08	5.3	611	5.4%	0.51 [0.40, 0.62]
Saslawsky u. Wurtele 1986	11.24	2.38	33	9.79	2.38	34	3.6%	0.60 [0.11, 1.09]
Taal u. Edelaar 1997	29.77	2.11	161	27.1	2.56	131	4.9%	1.15 [0.90, 1.40]
Telljohann, Everett u. Price 1997	13.5	2.3	236	12.4	2.3	195	5.1%	0.48 [0.29, 0.67]
Tutty 1992	78.2	16.8	98	72.1	18.7	97	4.7%	0.34 [0.06, 0.62]
Tutty 1997	8.5	0.9	117	8.1	1.1	114	4.8%	0.40 [0.14, 0.66]
Wurtele 1990	9.92	1.62	12	8.5	1.68	12	2.2%	0.83 [-0.01, 1.67]
Wurtele et al. 1986	11.42	2.09	19	9.72	2.76	18	2.8%	0.68 [0.02, 1.35]
Zhang et al. 2014	3.5	0.72	78	2.31	1.04	72	4.3%	1.33 [0.98, 1.69]
Çençen-Eroğul u. Hasirci 2013	8.66	1.28	18	6.16	1.42	18	2.4%	1.81 [1.02, 2.60]
Total (95% CI)			**3581**			**2666**	**100.0%**	**0.61 [0.45, 0.77]**

Heterogeneity: $Tau^2 = 0.12$; $Chi^2 = 173.16$, df = 23 ($P < 0.00001$); $I^2 = 87\%$
Test for overall effect: $Z = 7.50$ ($P < 0.00001$)

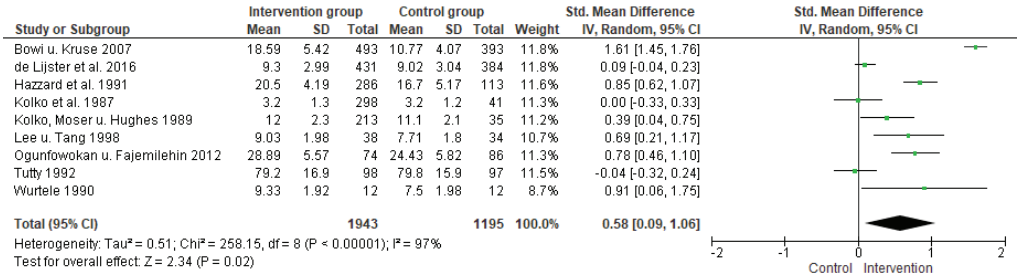


Knowledge Maintenance

The question concerning a long-term effect of the prevention program was measured by means of the state of knowledge. While the post-interview records the state of knowledge immediately after the participation in the program (Outcome 1), the follow-up measures the state of knowledge after a certain time subsequent to the post-interview. The period between the post-interview and the follow-up varied within the studies from six weeks to six months after the post-interview.

Nine studies carried out a measurement of the knowledge in a follow-up survey in the intervention group and the control group (Outcome 2). The analysis is based on data of 3.138 persons, 1.943 participated in the program and 1.195 belonged to the control group. There is a moderate total effect of 0.58 (95 % CI = [0.09, 1.06], see figure 2). The results therefore indicate a long-term effect of the programs, but the effect is lower in comparison to the effect of the knowledge level at the end of the program.

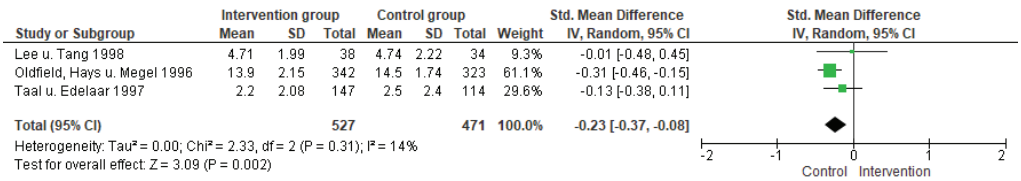
Figure 2: Effects of the prevention programs on knowledge maintenance (k=9)



Anxiety and Fear

Four studies dealt with the relation between the participation in a school-based prevention program and anxiety or fear of a sexual assault. Due to missing data concerning the sample size in one study, only three studies could be included in the meta-analysis. The total effect reported in the following is based on data of 998 persons (intervention group 527, control group 471). The standardized mean difference shows greater anxiety and fear with the children of the control group. The total effect is -0.23 (95 % CI = [-0.37, -0.08], see figure 3) with a low heterogeneity within the study findings (I^2 = 14 %; Tau^2 = 0.00).

Figure 3: Effects of the prevention programs on anxiety and fear (k=3)



4. DISCUSSION

39 evaluation studies on prevention programs to avoid sexual abuse of children and juveniles in institutions were identified and could be included into the meta-analysis. There is an increasing number of published evaluations since 2012, but the number is still low compared to the numerous prevention programs for the prevention of sexual abuse of children which are established.

The meta-analytical results show effects of the prevention measures. In particular, there were effects in the knowledge transfer whereas the maintenance of knowledge is slightly decreasing over time. In the intervention groups, anxiety and fear to become a victim of sexual abuse were lower than in the control groups. The high heterogeneity in the study findings illustrates differences in the study designs and in the study results. The findings are consistent with the results of a meta-analysis of school-based education programs for the prevention of child sexual abuse (Walsh et al. 2015).

LITERATURE

- Borenstein, M./Hedges, L./Higgins, J../Rothstein, H. (2009): Introduction to Meta-Analysis. Hoboken: John Wiley & Sons.
- Dreßing, H./ Salize, H. J./Dölling, D./Hermann, D./Kruse, A./Schmitt, E./Bannenberg, B. (2018): Forschungsprojekt Sexueller Missbrauch an Minderjährigen durch katholische Priester, Diakone und männliche Ordensangehörige im Bereich der Deutschen Bischofskonferenz. Projektbericht. Mannheim, Heidelberg, Gießen. https://www.dbk.de/fileadmin/redaktion/diverse_downloads/dossiers_2018/MHG-Studie-gesamt.pdf.
- Walsh, K./Zwi, K./Woolfenden, S./Shlonsky, A. (2015): School-based education programs for the prevention of child sexual abuse: A Cochrane systematic review and meta-analysis. Research on Social Work Practice, 28 (1), 1-23.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 159-167
ISSN 1512-5505

EXPERIENCES OF THE HUNGARIAN CRIMINAL JURISDICTION CONCERNING THE ILLICIT TRAFFICKING OF CULTURAL PROPERTY

Gabriella KÁRMÁN

Abstract

The aim of the present research is to explore the measures of the Hungarian law enforcement for the protection of cultural property. Provisions, civil and criminal wrongs in this field are regulated by public administrative and criminal law. In this project the issue is examined from an international prespective with special emphasis on the Italian solutions. The main purpose of this research is the analysis of the criminal justice practice. One of the most serious cases among the offenses against cultural properties are referred to in literature as the illicit trading of cultural property. However, illicit trading of cultural properties is an ambiguous expression; the literature usually means transnational crime against cultural properties (antiquities) under this term. There are no specific provisions for illicit trading of cultural properties in the Hungarian Criminal Code. The literature uses it as a collective term for different criminal offences. In 2018, an empirical research on crimes committed against cultural properties between 2012 and 2016 has been conducted. The offenses examined were theft, robbery, dealing in stolen goods, criminal offenses with protected cultural goods and budget fraud. In addition, the personal and organisational requirements to combat the illicit trading of cultural properties has been studied, and recommendations based on the results were outlined.

I. CRIMINAL LAW APPROACH IN THE PROTECTION OF CULTURAL GOODS

In the field of the protection of cultural goods an integrated approach involving the criminal law approach has spread worldwide. Therefore, it is important to examine first the process which led to the criminal law regulation of the protection of cultural goods.

In Hungary, constitutional principles lay down the protection of cultural values, it is reflected in administrative law and then in criminal law as *ultima ratio*. On the other hand, according to the literature, the punitive dimension obtained a specific focus in international law.

According to the former approach, it is important to explore how the constitutional principles are reflected in the domestic administrative regulations. There are several provisions in the

Hungarian Fundamental Law which have effect on the protection of cultural goods, but the most powerful one is Article P, paragraph 1:

"All natural resources, especially agricultural land, forest and drinking water supplies biodiversity – in particular native plant and animal species – and cultural assets shall from part of the nation's common heritage, and the State and every person shall be obliged to protect, sustain and preserve them for future generations."

These principles are codified in Act LXIV of 2001 about the protection of cultural heritage. These administrative regulations provide a background to the civil and criminal law regulations. The ultima ratio role of criminal law is usually referred to on the part of the legislation: it is articulated, that the administrative provisions and sanctions have primary role among legal rules. What makes criminal law provisions necessary?

There are three factors: first, the types and values of the damage caused; second, the level of risk posed to society; finally, the links with organised crime. However, another approach, which is closely related to this issue is the international law provided solutions to the protection of cultural propertises according to the following factors (based on Manacorda's approach: Manacorda, 2011: 19–23)

- art crime is frequently transnational crime: cultural goods are part of cultural heritage, the various crimes are committed against the property of nations, also a mankind
- the most serious crimes are characterized by transnational dimension: namely the illicit trade of cultural goods
- There is a correlation with the organized crime (dealing in stolen goods, money laundering, financial and tax offences)

Cultural assets are the subjects of the sovereignity of states. The UNESCO Convention in 1970 laid down the need of the self limitation of national sovereignity over the common value of mankind.

UNESCO and UNIDROITS conventions contain provisions on illicit trade of cultural goods:

In accordance with Article 2 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970, Paris):

1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting there from.

2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.

By means of the Article 8: The States Parties to this Convention undertake to impose penalties or administrative sanctions on any person responsible for infringing the prohibitions referred to under Articles 6(b) and 7(b) above.[1]

---

[1] Article 6 The States Parties to this Convention undertake:
"(a) To introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995, Rome) regulates the most dangerous acts against cultural property, it aims to "contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States, with the objective of improving the preservation and protection of cultural heritage in the interest of all".

In 2003 at the General Conference of UNESCO it was declared, that: "States should take all apropriate measures in accordance with international law, to establish jurisdiction over, and provide effective criminal sanctions against those person who commit or order to be committed, acts of international destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organisation"[2].

II. EMPIRICAL RESEARCH ABOUT ILLICIT TRAFFICKING OF CULTURAL PROPERTY

Our research focused on illicit trade of cultural property, because this act creates significant risk of damage to cultural property, and has a strong relationship with organised crime. By examining the illicit trafficking of cultural goods – analysing more offences at the same time – a more detailed overview about the acts against cultural property can be obtained.

The first question that need to be clarified is the definition of „illicit trade of cultural property". Literature doesn't deal with this conceptual question. The "nordic research" says "cultural heritage crime" includes the theft of cultural objects, illegal excavations, illicit removal of cultural objects and trade with stolen or illicit removed cultural objects. (Korsell et al., 2006: 14)

On the grounds of the Conventions above it is about illicit transfer of ownership, theft (unlawfull excavation) and thereafter illicit import or export. Although the term "illicit trade" word for word does not contain fraudulent transactions abroad; in my opinion illicit trade means illicit transfer of ownership of cultural goods within its own country and abroad. The present article is based on the research conducted in this latter sense.

The phenomenon of "illicit trade of cultural goods" in Hungary is studied from the perspective of criminal law and criminology to identify the current features of illicit trade through a research with a questionnaire. In order to get a complete picture of the Hungarian situation, an empirical research of criminal records by means of questionnaires was conducted in 2018. The empirical way was chosen because only few such researches can be found (e.g. Italy, US, Norway and Australia) as opposed to the high number of theoretical works.

---

cultural property exported in accordance with the regulations;
(b) to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned export certificate;
(c) to publicize this prohibition by appropriate means, particularly among persons likely to export or import cultural property.
Article 7 The States Parties to this Convention undertake:
(b) (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution."

[2] UNESCO Declaration concerning the International Destruction of Cultural Heritage, 17 October 2003

There are several difficulties with empirical research due to some special features of illicit trade of cultural goods, such as the lack of clear definition of it, or the lack of precise statitics. For example, Manacorda (Italy) also writes about the latter problem:

> "Crimes variously related to artistic, cultural and archeological assets present a very diffuse phenomenon, nationally as well as internationally and little is known about theire nature and extent." (Cited Manacorda: Polk, 1999: 20) „Today, we still do not have a systematic approach tot he gatheting of criminal statistics which would permit an accurate analysis of such crimes, most of which are likely to be unreported or »hidden statistics« (chiffre noir)" (Cited Manacorda: Brodie et al., 2000: 20)

The above mentioned problems of definition and statistics are solved in this article by selecting the following crimes: theft, dealing in stolen goods, robbery, budget fraud, criminal offenses with protected cultural goods (see definitions below), since there is no offence of illicit trade of cultural goods in the Hungarian Criminal Code. In order to examine current cases with final and binding decisions, cases between 2012 and 2016 were selected, and out of these cases the ones which had cultural goods as the subject of the crime were collected.

Theft *(Section 370 of the Hungarian Criminal Code) shall mean when a person takes away a thing to which he is not entitled to from somebody else in order to unlawfully appropriate it. According to Paragrapy (3) the penalty for a felony shall be imprisonment not exceeding three years if: a) the theft is committed in respect of a considerable value; b) the theft involves a minor value and: ba) it is committed by either of the means referred to in Subparagraphs ba)-be), bb) it involves objects classified as protected cultural goods or archeological findings, bc) it involves religious objects, bd) it involves objects placed in memory of or with, the dead, in cemeteries and other burial sites, be) it involves precious metal; or c) it involves petty offense value or less, and it is committed at a place of emergency.*

Dealing in stolen goods *is regulated in Section 379 (1) of the Hungarian Criminal Code. Any person who – for financial gain or advantage – obtains, conceals or collaborates in the selling of: a) any non-Community goods obtained through budget fraud and withheld from customs inspection; b) excise goods under tax evasion; or c) any property that originates from theft, embezzlement, fraud, misappropriation of funds, robbery, plundering, extortion, unlawful appropriation, or from another receiver of stolen goods; is guilty of dealing in stolen goods.*

Robbery *according to Section 365 (1) of the Hungarian Criminal Code: Any person who takes away a thing to which he is not entitled from the person of another, against his will: a) by force or threat against life or bodily integrity of such person; or b) by disabling such person by rendering him unconscious or incapable of self-defense; is guilty of a felony punishable by imprisonment between two to eight years. (2) Where a thief caught in the act applies force or threat against life or bodily integrity in order to keep the thing, it shall be construed as robbery as well.*

Budget fraud *in Section 396 of the Hungarian Criminal Code is committed by any person who:*

a) induces a person to hold or continue to hold a false belief, or suppresses known facts in connection with any budget payment obligation or with any funds paid or payable from the budget, or makes a false statement to this extent; b) unlawfully claims any

advantage made available in connection with budget payment obligations; or c) uses funds paid or payable from the budget for purposes other than those authorized; and thereby causes financial loss to one or more budgets, is guilty of misdemeanor punishable by imprisonment not exceeding two years.

***Criminal offenses with protected cultural goods** is according to Section: 358 (1) of the Hungarian Criminal Code Any person who: a) alienates collector's items or any part of a protected collection without prior statutory consent; b) fails to report changes in the ownership of protected cultural goods, collector's items or protected collections as prescribed in the relevant legislation; c) exports protected cultural goods, collector's items or protected collections without authorization, or exceeds the limits of the export permit; is guilty of a felony punishable by imprisonment not exceeding three years. (2) Any person who, without an export permit, exports objects which are considered cultural goods and for which an export permit is required, or who exceeds the limits of an export permit shall be punishable in accordance with Subsection (1).*

III. EXPERIENCES OF THE EMPIRICAL STUDY

The experiences of the empirical study have to be explained in a more detailed way by using 273 cases for the purpose of this research.

The illicit trafficking of cultural goods consists of two separate types of acts: the unlawful acquisition of ownership of cultural goods, and thereafter the unlawful transfer of ownership. To examine this phenomenon, it was advisable to draw up a list of indicators. According to the definition as starting point, the research was based on the following factors:

1. Were the acts intentionally committed to obtain the cultural goods?
2. Which were the typical conducts of the criminal offences with protected cultural goods?
3. Was there an intention to sell the cultural goods?
4. Was there a transnational feature of the case?
5. Was there other data about the committment of similar crimes?
6. Was a professional (e.g. art historian, art dealer or appraiser) involved?
7. What was the value of the stolen goods?

1. Acts committed to obtain cultural goods

According to the statistics, the following crimes were committed against cultural goods: theft, criminal offences with protected cultural goods, dealing in stolen goods, robbery, budget fraud. (See Figure 1)

Types of crimes against cultural goods

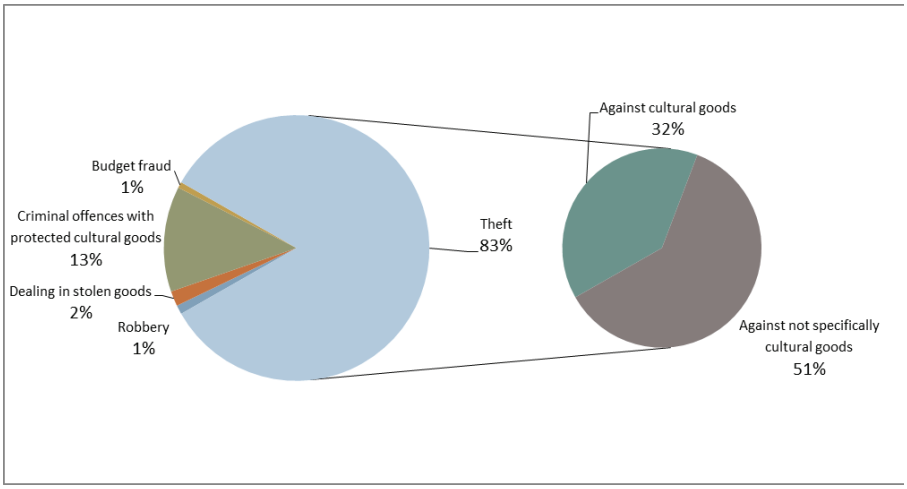


Figure 1

The highest number of cases are connected to theft. However, these cases can be further categorised based on the intention of the perpetrator:

1) whether the acts were committed to obtain the cultural goods;
2) or, the purpose of the criminal act was only to steal something valuable, as it can be detected in most of the cases; in a certain part of these cases the perpetrator accidentally found cultural goods on the scene of the crime, and in other cases the stolen objects are not at all cultural goods (in the statistics these crimes appear as such due to the ambiguos definition of the term „against cultural goods")

It is also necessary to deal with some special features of the thefts which were committed with the intent to obtain cultural goods. Altough it is rather impossible to draw far-reaching conclusions from the *modus operandi* of the crimes, it is advisable to highlight the most intersting cases:

Special features of some cases (thefts) against cultural goods)	Number of cases
From a collector	3
From an art shop	1
From a museum	6
Within the family	6
From a church	3
From a library	2
From a sculpture	5
From premises used or handled by perpetrator	3
As a tenant	5
As an antique dealer	3
With metal detector	5
Through deceiving the owner	2

When the purpose of the criminal act was not specifically to steal cultural goods, it has to be emphasized that rather frequently the burglar finds valuable objects or even cultural goods during committing the burglary.

Objects against which the criminal acts are committed

Besides examining the *modus operandi* of these crimes another important research issue was to identify the different types of cultural goods against which the criminal acts were committed. (See Figure 2)

Types of cultural goods in offences

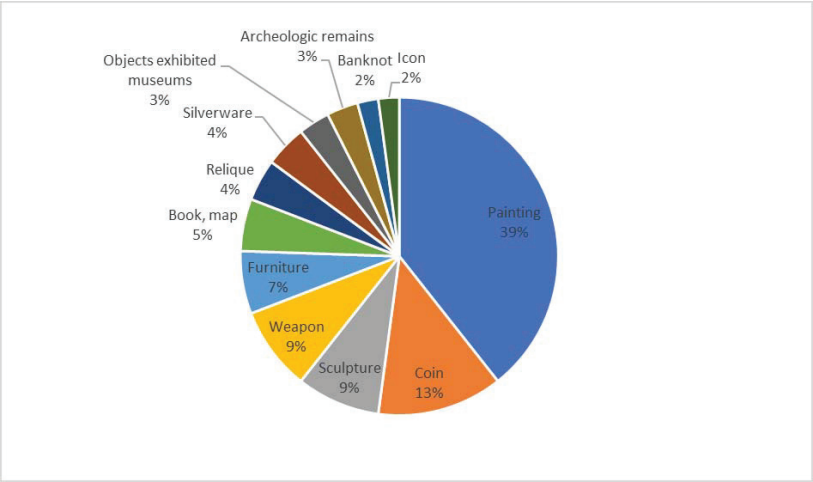


Figure 2

2. Typical conduct element of criminal offences with protected cultural goods

The criminal offences with protected cultural goods were committed by the following conduct: a person exports objects which are considered cultural goods and for which an export permit is required. [Criminal Code Section 358, article (2)].

The investigation of these offences need specific knowledge from the investigating authorities in the course of the identification of cultural goods. It makes the training in these fields reasonable.

3-4. Was there an intention to sell the cultural goods? Was there a transnational feature of the case?

It can be concluded only in a small proportion of the cases that the perpetrator had a serious intent to sell the stolen cultural goods. In other words, the perpetrator wanted to sell the stolen goods to a professional (e.g. an art trader) at its real value. There were only 19 cases when this intent was proven and in only 7 cases the stolen goods were sold to an antiquity shop abroad. However, it is more typical that the perpetrator sold the stolen cultural goods way below its real price.

5. Was there other data about the commitment of similar crimes?

There was only two series of offenses during the examination period.

6. Was a professional involved?

There was no involvement of professionals in the cases. In some cases the perpetrator of the tricky theft or a fraud was an antique dealer; he went into flats, viewed paintings, and diverted attention of the owner to be able to steal it.

7. The value of the stolen goods

Out of the several topics of the research, the value of the stolen goods is a relevant aspect that needs to be presented. The amount of value – in the examined cases against cultural goods distributed as follows:

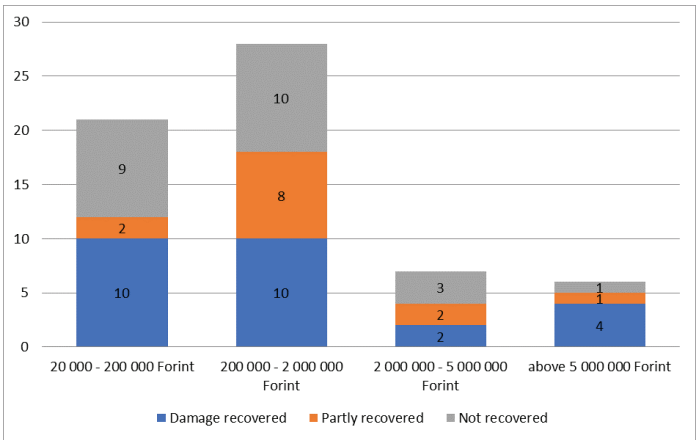


Figure 3

The value of the stolen goods was in most cases:

HUF 20.000 – 200.000 (EUR 60 – 600) or

HUF 200.0000 – 2.000.000 (EUR 600– 6000).

Only six out of the examined cases were beyond the value of HUF 5 million.

The bar chart shows, that in the majority of these cases the losses were recovered.

IV. The main conlusions of the research

- The illicit trade of cultural goods is a serious problem. The number of the cases is low, but the specific chracteristics of the phenomenon is the high latency. It did not enable reliable overall conclusions to be drawn. Yet, perhaps it is possible to summarize the main findings in line with the illicit trade of cultural property.
- Paintings, coins, sculptures, weapons, furnitures, maps and books belong to the category of stolen cultural goods.

- The perpetrator of the theft does not have intent or expressed plan to sell the cultural goods in most cases, or it was not proven. The small minority of the cases is characterized by transnational relations.
- Criminal offences with protected cultural goods are committed often out of neglect, with an intent to export without licence.
- It cannot be concluded that the illicit trafficking of cultural goods occurs only rarely.
- The relevance of cultural goods for the investigation officiers is not very well known. There is a special unit at the Police: National Office of Investigation – Art Treasure Unit, but it proceeds only in the most serious cases. The other investigators are not specialized in this field. Although a specific training was held within the framework of an EU funded project in 2010, it is not part of the regular education system.

It seems to be necessary to raise awareness and to gain real knowledge of the problem. The aim of this project is to provide school-work for trainings. The role of the experts is outstanding in these cases, the clear definition of their tasks and competence is very important. Information to all "actors of this scene" (from the collector to the art dealers) can contribute to the prevention, too.

REFERENCES

- Brodie, Neil – Doole, Jenny – Watson, Peter (2000): *Stealing History: The Illicit Trade in Cultural Objects.* Cambridge, UK: McDonald Institute for Archeological Research.
- Korsell, Lars – Hedlund, Göran – Elwér, Sofia – Vesterhav, Daniel – Heber, Anita (2006): *Cultural Heritage Crime – the Nordic Dimension.* Stockholm: Swedish National Council for Crime Prevention, Information and Publication. https://www.bra.se/download/18.cba82f7130f475a2f1800024778/1371914734096/2006_2_cultural_heritage_crime_nordic_dimension.pdf
- Manacorda, Stefano (2011): Criminal Law Protection of Cultural Heritage: An International Perspective. In: Manacorda, Stefano – Chappell, Duncan (eds.): *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property.* Spinger, p. 17–48.
- Polk, Kenneth (1999): *Illegal Property Markets.* Paper given at the 3rd National Outlook Symposium on Crime. Canberra: Australian Institute of Criminology.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 169-188
ISSN 1512-5505

CANNABIS POLICY REFORM IN GERMANY: CONSTITUTIONAL AND POLITICAL DISCOURSES ON DECRIMINALIZATION AND REGULATION STRATEGIES

Stefanie KEMME
Kristin PFEFFER
Luise von RODBERTUS

Abstract

There is relentless discussion in Germany about the right manner to deal with cannabis and its users. In 1994 and 2004, the Federal Constitutional Court reaffirmed the legal appropriateness of prohibition. However, since then, data about the dangers and effects of cannabis use have quieted alarm, and Europe, alongside the once-prohibitive United States, has had its initial experiences with liberalized use of cannabis. Since the founding of the *Schildower Kreis*, a network of experts from science and practice, 122 criminal law professors have petitioned the Bundestag for an Enquête Commission. The basis of the Federal Constitutional Court's decision no longer exists. The Narcotics Act and constitutional discourse on cannabis prohibition need to be reviewed, as do political arguments about wasted resources and high costs, led by empirical examinations from Hamburg University of Applied Police Sciences. This study surveys police officers for their thoughts about drug policy and dealing with cannabis-related offenses. Results show that the attitudes of criminal detectives (contrary to the officers of the security police) have changed since the 1990s and that prohibition is not considered effective. Indications of a paradigm shift in drug policy, as required by the Global Commission on Drug Policy, are appearing in Germany.

Key words

Cannabis Policy, Regulation, Germany, Police Survey, Police Attitudes

1. INTRODUCTION

Numerous German initiatives to liberalize cannabis-related criminal law have arisen against the backdrop of global debates, stimulating reform. Current drug policy is being discussed intensively, including calls to end prohibition of cannabis from well-known criminal law professors aligning

with the resolution of Prof. Dr. med. Lorenz Böllinger.[1] Advocates cite the benefits of relieving the police and courts to focus resources on organized crime. Opponents fear legalization will increase the number of consumers and magnify healthcare costs at the expense of society.

In Western and Central Europe, including Germany, a market for illegal drugs emerged in the late 1960s (Schwindt 2013, § 27 para. 10), which has not yet been stabilized politically or socially. The climate favoring drug reforms is a paradigm shift. Liberalization of drug laws in the Netherlands, Switzerland, Spain, Belgium, Portugal, several US states, and the Czech Republic has shown no increase in drug use, as feared (Rosmarin & Eastwood 2012). In 2014, Uruguay legislated to regulate cultivation, sale, and consumption of cannabis to deprive organized crime of the market and to prevent use of harder drugs (Hudak, Ramsey & Walsh 2018). Cannabis has been grown, consumed, and sold in small quantities legally in Canada since October 17, 2018.[2]

After reviewing Germany's current legal situation regarding cannabis in Section 2, we analyze its constitutional and political discourse in Section 3. Section 4 presents a criminological examination of arguments advocating prohibition of cannabis and citing risks to health and society. Section 5 analyzes the effects of current German drug policy on law enforcement agencies, supplemented by presentation of a criminological study in Hamburg on their attitude toward the current law enforcement practice regarding cannabis in Section 6. The conclusion compares current criminological findings with the German legal situation and drug policy.

2. GERMAN LEGAL FRAMEWORK

The German legal framework for drugs and addiction is multi-layered because policy affects many spheres of life. The handling of drugs, dealing and trafficking, medical prescriptions, drug use, and addiction are governed by provisions set at the international, European, and national levels. At the national level, a range of parties oversee drug issues. Under Germany's federal structure, they erect cross-sectoral legal conditions concerning addiction and drug policy.

Since 1981, Germany's central national legislation has been the Narcotic Drugs Act (*Betäubungsmittelgesetz*; BtMG).[3] Alongside administrative regulations concerning narcotics trade, the Act is significant practically because narcotics offenses loom large in the daily business of German courts. BtMG determines what substances are narcotics, regulates their trade, and sanctions their handling. Sanctions for violating its provisions include penalties for misdemeanors and crimes, fines for regulatory offenses, rehabilitation and prevention measures, and administrative acts such as confiscation. Numerous other laws set criminal provisions and sanctions for drug-related offenses, including the German Criminal Code,[4] German Road Traffic Act,[5] German Precursors

---

1 The resolution is available at http://www.schildower-kreis.de [03/01/2019].

2 Department of Justice of Canada on Cannabis Legalization and Regulation https://www.justice.gc.ca/eng/cj-jp/cannabis/ / [03/01/2019].

3 The Act on the Trade in Narcotic Drugs July 28, 1981, entered into force January 1, 1982, current version 1 March 1994, Federal Law Gazette I pp. 681, 1187: http://www.gesetze-im-internet.de/btmg_1981/ [03/01/2018].

4 Strafgesetzbuch (StGB) https://www.gesetze-im-internet.de/stgb/ [03/01/2019].

5 Straßenverkehrsgesetz (StVG) https://www.gesetze-im-internet.de/stvg/ [03/01/2019].

Monitoring Act,[6] and the German New Psychoactive Substances Act.[7] Plants and their constituents belonging to *genus cannabis* are listed in Annex I–§1 (1) BtMG and are not marketable narcotics. Central forms of action related to cannabis production, sale, and purchase are prohibited.

Although consumption is not subject to sanctions, purchase and possession preceding it are subject to sanctions. A permit under § 3 BtMG can be granted only for scientific or purposes in the public interest. In March 2017, Germany legalized therapeutics containing tetrahydrocannabinol, mainly in the form of the flower or extracts, for patients with chronic pain, multiple sclerosis, and cancer (§ 13 BtMG). Legalizing medicinal cannabis had a domino effect. Portugal and Denmark followed suit, discussing the legalization or initiating cannabis-related research (Aguilar et al., 2018).

German legislation allows dismissal of criminal cases against drug users. The most relevant is § 31a BtMG[8], introduced in 1992 (Weber 2017, § 31a BtMG para. 2). If there is no public interest in prosecution and the offense can be considered minor, § 31a BtMG allows prosecutors to dismiss cases without consulting the court. The core consideration in applying § 31a BtMG is that of small amounts (*geringe Menge*), which is undefined by the law but specified by the German federal states, typically 6–10 grams (Weber 2017, § 31a BtMG, para. 82 ff.). The intent is to "improve the procedural recruitment options for the public prosecutor's offices by waiving judicial approval."[9] Police have no discretion in reporting all suspected offenders to the public prosecutor.

Germany's ban on cannabis and threat of punishment constitute interference with general freedom of action by adults. In consistent case law of the Federal Constitutional Court, general freedom of action under Article 2 (1) of the Basic Law includes acts that pose health risks. Protection against self-injury can justify interference with adults' general freedom of action only in particularly serious cases.[10] In 1989, the Federal Administrative Court decided that the article contravened the comprehensive right of citizenship "to grant state authorities the power to dictate to the citizen what he has to do in the interests of his own protection."[11]

---

6 Grundstoffüberwachungsgesetz (GÜG) https://www.gesetze-im-internet.de/g_g_2008/ [03/01/2019].

7 Neue-psychoaktive-Stoffe-Gesetz (NpSG) https://www.gesetze-im-internet.de/npsg/ [03/01/2019].

8 § 31a Betäubungsmittelgesetz (BtMG) = Section 31a: Refraining from prosecution
1) If the subject matter of the proceedings is an offence pursuant to section 29 subsection 1, 2 or 4, the public prosecutor's office may refrain from prosecution if the offender's guilt could be regarded as minor, if there is no public interest in a criminal prosecution and if the offender cultivates, produces, imports, exports, carries in transit, acquires, otherwise procures or possesses narcotic drugs in small quantities exclusively for his personal use. Prosecution should be refrained from if the offender possesses narcotic drugs in a drug consumption room in small quantities exclusively for his personal use, which may be tolerated pursuant to section 10a, without being in possession of a written licence for acquisition.
European Monitoring Centre for Drugs and Drug Addiction: http://www.emcdda.europa.eu/topics/law/drug-law-texts?pluginMethod=eldd.showlegaltextdetail&id=677&lang=en&T=2 [01/02/2018].

9 Bundestag printed matter (BT-Drs.) 12/934, June, 12th, 1991 12, 1991 http://dipbt.bundestag.de/doc/btd/12/009/1200934.pdf [03/01/2019].

10 BVerfG, 12/21/2011, 1 BvR 2007/10.

11 BVerwGE 82, 45 (48 f.)).

In March 1994, the Federal Constitutional Court[12] ruled that criminal cases involving possession, purchase, or import of small amounts of cannabis for personal use must be dismissed because the offender's guilt and harm caused by the offense must be considered trivial. Criminal prosecution in such cases amounts to violations of the principle of proportionality and disrespect for the *ultima ratio* of criminal law. While defending the constitutionality of BtMG, the Federal Constitutional Court found large differences in dismissal rates unacceptable because they violate rights to equal and non-discriminatory treatment. The Constitutional Court concluded that infringing rights to equal treatment and proportionality could be avoided by implementing consistent non-prosecution policies throughout Germany in cases involving possession of small cannabis quantities for personal use. The 1994 Federal Constitutional Court decision set the standard for prosecution of personal use. It declared that German law enshrines a "ban on excessive punishment" that had to be observed for minor offenses involving personal use of cannabis.

The decision further states that "in view of the open criminal policy and scientific debate on the dangers of cannabis use and the correct way to combat them, the legislator has to observe and review the effects of existing law, including the experience of others." It requested German federal states to assure a "basically uniform practice of application" and, as a rule, to refrain from prosecution if conditions in § 31a BtMG apply.

In short, the court affirmed cannabis prohibition as constitutional. It would not infringe the principles of proportionality, equality, and personal freedom.[13] In dissent, Judge Bertold Sommer complained that BtMG was too broad and did not meet the principle of proportionality.[14]

3. CONSTITUTIONAL AND POLITICAL DISCOURSE

More than 20 years after the 1994 Federal Constitutional Court decision, the entire German narcotics law was put to test when 122 criminal law professors (the *Schildower Kreis*) submitted a resolution to the Bundestag, draw legislators' attention to unintended harmful side effects and consequences of criminalizing cannabis. In the resolution, they demanded to check the effectiveness of the drug law. They criticized the unsuccessful criminal prosecution of drug demand and supply and noted that Taliban terrorism in Afghanistan is mainly financed via black market heroin and hashish. This gigantic black market "generates […] other subsequent criminal activity and [has] destabilising effects on global financial markets just as [on] national economies." Science had proven that the danger of drugs would be mastered "better by health-juridical regulation […] as well as with adequate youth welfare measures."[15]

In 2015, opposition fractions in the Bundestag, the Lefts and the Greens, filled a joint petition to review criminal drug law based on this resolution and to seek support from the Social Party. They drafted the Cannabis Control Bill to remove cannabis from criminal restrictions under

---

12 BVerfGE 90, 145. A translation of the decision appears at https://germanlawarchive.iuscomp.org/?p=85 [03/01/2019].

13 BVerfGE 90, 145.

14 BVerfGE 90, 145.

15 The resolution can be found at http://schildower-kreis.de/resolution-deutscher-strafrechtsprofessorinnen-und-professoren-an-die-abgeordneten-des-deutschen-bundestages/ [03/01/2019].

BtMG and to open a strictly controlled legal market for cannabis.[16] Facing opposition from the Christian Party and the Social Party, the draft was rejected in 2017.

In December 2017, the Free Democratic Party joined the cannabis-liberalization-movement and proposed in a "small request" to the government for a controlled legal market in cannabis and model projects for its free use.[17]

In February 2018, the Green Party introduced a Cannabis Control Bill (*Cannabiskontrollgesetz*), claiming it was justified by a failed cannabis drug policy. Cannabis was then Germany's most common illegal drug, consumed by an estimated 3.1 million adult citizens.[18]

4. CANNABIS CONSUMPTION IN GERMANY AND THE EU AND ITS HEALTH AND SOCIAL RISKS

One argument cited for years concerns the physical and psychological dangers of cannabis use. Opponents portray it dramatically (Habschick, 2014; Hambrecht, 2003; Duttge & Steuer, 2015).[19] Whereas a few years ago, scientific evidence was slight and many claims were made case-by-case, numerous studies of varying quality have appeared. A meta-analysis commissioned by the Federal Ministry of Health evaluated 2,100 international papers published over a decade (CaPRis, 2017). Studies rated the health risk of cannabis low, especially in recreational use by adults, and presented fewer health risks than consumption of alcohol and nicotine (Bonnet, 2016, p.61; Bonnet et al., 2016, p.126; DG-Sucht, 2015, p.1; Gantner, 2016, p.55, Nutt et al., 2010, p.1562, 1563). Most mental and physical harm from chronic cannabis use in adulthood is reversible (Bonnet, 2016, p.64, 69). Physical withdrawal is relatively mild (Soyka et al., 2017, p.311, 323). Studies linking cannabis use and anxiety/depression (Danielsson et al., 2016, Horwood et al., 2012) or psychotic disorders (Power et al., 2014; Bonnet et al., 2016) are inconsistent. However, risk of psychotic disorders among persons with genetic predispositions appear increased (Radhakrishnan et al., 2014, p.9; van Winkel & Kuepper, 2014, p.784). Overall, inconsistent or incomplete findings sometimes require methodologically reliable longitudinal studies (CaPRis, 2017, p.2).

Early cannabis use represents risks to younger adolescents (Radhakrishnan et al., 2014, p 9; van Winkel & Kuepper, 2014, p.771, 772; Bonnet et al., 2016, p.127; CaPRis, 2017, p.3). Regular consumption by young consumers suppresses development of brain functions responsible for impulse control, affect control, control of attention and concentration, memory, élan, and social-organizational abilities (van Winkel & Kuepper, 2014, p.771, 772, Bonnet et al., 2016, p.127). Risk of later psychotic disorders increases with early onset. It remains unclear whether

---

16 Bundestag printed matter (BT-Drs.) 18/4204 March, 4th, 2015 http://dip21.bundestag.de/dip21/btd/18/042/1804204.pdf [03/01/2019].

17 Bundestag printed matter (BT-Drs.) 19/181 December, 5th, 2017 https://dip21.bundestag.de/dip21/btd/19/001/1900181.pdf [03/01/2019].

18 Bundestag printed matter (BT-Drs.) 19/819 February, 20th, 2018 http://dip21.bundestag.de/dip21/btd/19/008/1900819.pdf [03/01/2019].

19 "Cannabis should not be downplayed." Drug Officer Marlene Mortler, Tagesspiegel Mai 14, 2015: http://www.tagesspiegel.de/politik/drogen¬beauftragte-marlene-mortler-im-interview-cannabis-darf-nicht-verharmlost-werden/11774800.html [01/03/2019].

early onset causes long-term cognitive disorders or are reversible. Nonetheless, early cannabis use is associated with psychosocial risks such as lower educational attainment (CaPRis, 2017, p.3). Overall, however, it is unclear to what extent mediators exist. Possibly, adolescents who start early belong to a delimited subpopulation (childhood abuse, low socioeconomic status) (Radhakrishnan et al., 2014, pp.9, 10).

However, increased demand for treatment (Bonnet & Scherbaum, 2010, p.299, DGKJP/BAG KJPP/BKJPP, 2015) cannot be cited as evidence of elevated risk for adolescents. Initial treatment numbers indicate only that a help system with cannabis-specific offers, which are also used, has been established in the past 10 years (Gantner, 2016, p.55, 56; Tossmann & Gantner, 2016, p.85).

The argument that prohibition protects the young against social and educational problems and developing criminal behavior remains scientifically unproven. Studies of links between cannabis and crime yield no consistent results. Cross-sectional studies that could prove a connection cannot make causal claims (Hoaken & Stewart, 2003). Some longitudinal studies do associate increased risk of violence with long-term cannabis use (Schoeler et al., 2016, p.1673), others don't (Green et al., 2010, pp.123f.).

Baier et al. (2016) found no causal relation between cannabis use and shoplifting, damage to property, or violence in their longitudinal study of 1,269 seventh and ninth graders in Hanover. However, it is confirmed that early alcohol consumption leads to later increased delinquency, in particular to violent offenses. These findings accord with international research (Maldonado-Molina et al., 2011). Despite inconsistent international findings, it is certain that cannabis use occurs predominantly in combination with alcohol and tobacco (ESPAD Group, 2016, p.15). No drug in itself leads to crime; drug use is embedded in complex psychosocial conditions (Kreuzer, 1990, 2005, 2015, Kreuzer et al., 1992). This statement is important, especially with regard to violent offenses, whose complex origins are well researched in early socialization environments shaped by violence.

Closely linked to the argument that "cannabis leads to criminal behavior" is the argument that cannabis is a gateway drug. That assumption long has been refuted. The majority of cannabis users do not switch to harder drugs (Kreuzer & Wille, 1988, S. 29; Krumdiek, 2008, p.441; Stöver & Plenert, 2013, p.8 with further notes). On the basis of the "Monitoring the future" study, empirical evidence suggests alcohol is a "gateway drug" before consumption of cigarettes and cannabis (Kirby & Barry, 2012, p.372, 373). Prohibitionists seem influenced by the "gateway drug" argument (Duttge & Steuer, 2015, p.801; Duttge & Steuer, 2014, p.183; Habschick, 2014, p.629). But even the Federal Constitutional Court rejected this argument in the 1994 decision.

Perhaps the foremost arguments against far-reaching reforms are that a regulated market sends the wrong message and seduces youth into cannabis use. These arguments assume that regulatory policies increase availability and that consumption increases as a result (Duttge & Steuer, 2014, Hambrecht, 2003, Weber, 2008). Neither assumption withstands scrutiny. First, cannabis is Germany's most prevalent illicit drug. About a quarter (23.2%) of German adults age 18 to 64 claim to have used cannabis at least once (Epidemiological addiction survey 2012, 2015: Pabst et al., 2013; Kraus et al. 2014; 27.2%, Piontek et al., 2017). Few are regular users, as shown by the prevalence rate of the last 30 days (2.3% respectively 3.1%). The slight potential for addiction is below that for alcohol or nicotine (Behrendt et al., 2009, p.70ff.). Approximately

1.00% of the German population age 18 to 64 is cannabis-dependent (CaPRis, 2017, p.4: 0.5% cannabis abuse and 0.5% cannabis dependence; Soyka et al., 2017, p.323).

Rates for young people vary with the sample and age group studied. One in five German 15 to 16 year-olds has tried cannabis at least once according to the European Monitoring Center for Drugs and Drug Addiction (EMCDDA, 2017, p.87) using data from the European School Survey Project on Alcohol and Other Drugs (ESPAD). The lifetime prevalence rate among young adults age 18 to 25 is higher (34.5%) according to the Drug Affinity of Young People in the Federal Republic of Germany Study 2015. Within this age group 7% state they have consumed within 30 days (Orth, 2016, p.56). Among adolescents and young adults, the highest prevalence rates were recorded in 2004. Thereafter, rates fell and remained largely constant between 2008 and 2015 (Orth, 2016, p.62).

Country-specific data give an indication whether drug policy influences availability and consumption. In Europe, the lifetime prevalence rate of 15-year-old German girls and boys (15% and 18%, respectively) falls in the mid-range behind France, Switzerland, Italy, Belgium, England, and Spain (Health Behaviour in School-aged Children Study [HBSC Survey] of the World Health Organization (WHO, 2016, p.172).

Large differences in consumption rates and patterns emerge within Europe and North America. Studies have sought evidence of increased consumption in the Netherlands, which has pursued liberal cannabis policies for 40 years. None has been found during the 1980s, 1990s (Reuband, 1992, p.43), or today. Ownership, acquisition, trade, and production are not legalized, but retailing in coffee shops under strict conditions is not prosecuted. Adolescents are prohibited from coffee shops. Lifetime and 12-month prevalences of young people stand at German levels (EMCDDA, 2017, p.87; WHO, 2016, p.172). The lifetime prevalence of German 15 to 64 year-olds is higher (27.2% versus 25.6%) than in the Netherlands (EMCDDA, 2017, p.87). Per the HBSC Survey (WHO, 2016, p.172), France, where cannabis use is banned but barely traced, has the highest rates of lifetime prevalence (29% for 15 year-old males and 26% for 15 year-old females). In the Czech Republic, where consumption of soft and hard drugs is largely an administrative offense, cannabis consumption rates were 23%, among 15 year-old girls and boys, but no higher than in France (WHO, 2016, p.172).

Portugal's decriminalization model is associated with decreasing rates among young people (Hughes & Stevens, 2010, p.1017): in 2013/14 about 10% and 13%, respectively, among 15-year-old girls and boys (WHO, 2016, p.172). These and other improvements in Portugal's drug situation (declining rates of intensive use and drug-related harm) are not only attributed to decriminalization but also to health improvements and harm minimization (Hughs & Stevens, 2010, p.1917; Hughs & Stevens, 2012, p.102f.; Murkin, 2014, p.3). The extent to which these changes are influenced by introducing the Commission for Dissuasion of Drug Addiction (CDT) cannot be quantified (Hughes & Stevens, 2010, p.1018).

Overall, there is no correlation between national drug strategy and consumption rates (Degenhardt et al., 2008; DG-Sucht, 2015; EMCDDA, 2017). Even in highly prohibitive Sweden, often cited as a positive example in Germany, repressive drug policy does not explain consumption rates (Rolles & Murkin, 2014, p.2), which are embedded in complex economic, social, and cultural factors, as well as drug policy. Decriminalization has neither increased consumption rates in Portugal nor reduced the age of onset in the Czech Republic (Červený et al., 2017, p.128). Strongly divergent consumption rates under a range of policy models suggest that even reg-

ulated markets will not mono-cause higher consumption. The decisive factors are ancillary, including measures geared to prevention, addiction therapies, and reducing damage.

Indications of the effects of a regulated market are available in the US, but data provide limited evidence because adolescents under 21 are subject to total prohibition in all states that have legalized cannabis (Barsch 2018, p.71). Results from the 2017 National Survey of Drug Use and Health Substance Abuse by the Mental Health Services Administration (SAMHSA, 2017) show that cannabis use among 12 to17 year-olds in 2016 was below 2009–2014 despite legalization in further US states.[20] Consumption has increased only among those over 26 and little among those 18 to 25 (SAMHSA, 2017, p.1). In Colorado, the first state to legalize marijuana by referendum in 2012, cannabis use among 12 to 17 year-olds has fallen steadily since the legalized opening of cannabis shops in 2014. Colorado's 30-day prevalence rate of 9% for 2015/2016 was the lowest since 2007/2008 (over 12%).[21] US findings indicate that regulated availability increases adult demand and consumption only temporarily. Slightly higher consumption among US adults could be attributed partly to different reporting behavior; in case of true moderate increases, it must be observed how they develop in the long term.

Hints of declining consumption by US adolescents could indicate reduced availability. About one-third of 16 year-olds in 35 European countries report cannabis is readily or very readily available (ESPAD, 2016, p.30). Availability rates span 5% to 50%. Looking again at France, the Czech Republic, the Netherlands, and Portugal, 41% of French, 42% of Dutch, 50% of Czech, and 31% of Portuguese adolescents indicate easy availability. As shown, however, consumption among adolescents diverges significantly, and correlations between drug policy and availability (the more repressive the lower) are not provable. Availability of a drug is embedded amid complex conditions. For example, young people in a prohibitive model may find it easier to obtain drugs because prohibition triggers black markets. Contrary to expectations of prohibitionists, prices in Colorado and Washington have fallen since legalization, and prison sentences for distributing unlicensed cannabis have declined—facts taken as evidence that black markets are increasingly unable to compete with legal trade (Boyd, 2018, p.64). There seems no connection between regulation and increased consumption via greater availability among adolescents (GCDP, 2014, p.8; DG-Sucht, 2015, p.3; EMCDDA, 2017, p.12; Gantner, 2016, p.55, 56 with further notes).

Drug consumption does burden healthcare (Effertz et al., 2016), but no reliable data yet indicate that regulation elevates that burden (as claim Duttge & Steuer, 2014, p.183; 2015, p.802). Moreover, tax revenues from regulated markets create resources for preventive measures that could counteract consumption and exert positive effects on healthcare system.

Criminalization has no demonstrable positive impact on consumption and availability of cannabis. Lifetime prevalence of cannabis use in Germany, for example, rose until the mid-2000s

---

20 The District of Columbia and 10 states—Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont and Washington— have the most expansive laws legalizing recreational marijuana use: http://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html [01/02/2019].

21 Ingraham, C., Following marijuana legalization, teen drug use is down in Colorado. Washington Post, December 11, 2017: https://www.washingtonpost.com/news/wonk/wp /2017/12/11/following-marijuana-legalization-teen-drug-use-is-down-in-colorado/?utm_term=.3ca34e69943c [01/02/2018].

despite existing prohibition (Orth, 2016, p.62). According to the Global Commission on Drug Policy (GCDP 2016, 2014) there is no justification for a repressive drug policy. Drug prohibition is regarded as a failure because black markets generate social damage. (GCDP 2018, 2016, 2014; Stöver & Plenert, 2013, p.44).

Another important argument is that regulated markets or even downgrading consumption to an administrative offense lead to a massive discharge of law enforcement authorities (Gaßmann, 2005, p.100; Flöter & Pfeiffer-Gerschel, 2012; pp.40f; Stöver & Penert, 2013, p.18; Simon & Hughes, 2015, pp.21–23; Pollähne, 2016, p.78). Even if black markets cannot be eliminated, they can be reduced significantly (Caulkins et al., 2015, p.63), thereby releasing resources for prevention or to fight serious crimes.

5. POLICE RESOURCES AND REFUSAL TO PROSECUTE UNDER § 31A BTMG

The introduction of § 31a BtMG has relieved public prosecutors and the courts and freed police to investigate more serious crimes alongside transgressions of consumer law (Aulinger, 1997, p.321; Schäfer & Paoli, 2006, p.395). Although § 31a BtMG and corresponding guidelines have helped standardizing prosecution, problems in practice remain, as shown by Stock and Kreuzer's (1996) large study of law enforcement and drug offenses. Limited capacity *de facto* forces police to act opportunistically or to make decisions under informal rules (Stock, 1999, p.105). In addition, police are unwilling to "work for nothing" (Stock & Kreuzer, 1996) if they perceive that most consumer offenses are dismissed.

Refraining from prosecuting consumer crime cannot be quantified according to public prosecutor's statistics,[22] which do not report consumer offenses separately. In 2016, 54.2% of completed narcotics proceedings in Hamburg were not prosecuted (6,731 of 12,410), and half of those invoked § 31a BtMG (3.120 of 12.410: 25.1 %). These shares are slightly lower for Germany as a whole (37.2 % respectively 19.2 %).

Hamburg has a higher rate of refraining from prosecuting drug crimes than Germany overall, rising from 43% in 2008 to 57% in 2015 there versus rising from 32% to 37% in Germany overall for the period.

Of 231,926 drug-related offenses recorded in police crime statistics, 77% were general violations under § 29 BtMG (BKA PKS 2016, p.139, 140), which covers consumer transgressions. So, by deduction, three-quarters of drug offenses are consumer offenses. Among all recorded 2016 drug cases, 61.6% involved cannabis. Thus, almost every charge of acquiring and possessing cannabis was not prosecuted. Schäfer and Paoli (2006) examined 2,011 consumer offenses in six federal states. The proportion of refusals to prosecute offenses involving fewer than six grams of cannabis ranged from 1% in Berlin and Schleswig-Holstein to 24% in Bavaria. The increased number of cases and completed procedures suggest massive increases in police effort. Consumer-related offenses rose 39.8% from 165,880 in 2010 to 231,926 in 2016. The number of completed BtMG procedures rose 36.5% from 254,604 in 2010 to 347,430 in 2016.

In next section surveys attitudes about consumption related offenses among Hamburg police officers.

---

22 Federal Statistical Office, Judiciary, Public Prosecutor, Fachserie 10 Reihe 2.6.

6. ATTITUDES ABOUT PROSECUTION OF DRUG OFFENSES AMONG POLICE OFFICERS IN HAMBURG

We surveyed Hamburg police to discover their reactions to drug prosecutions of consumer crimes. We wanted to know what their attitudes are and what factors explain them. During May and June 2016, we sampled 96 Hamburg law enforcement officers who specialize in drug offenses. Only departments devoted exclusively to drug-related crime were selected.[23] Among those surveyed, 69% were detectives in Hamburg's *Landeskriminalamt* (LKA). They served in one of two offices, which we identify as LKA 62 and LKA 68. The remaining 31% of subjects were local police, designated PK 113.

Subjects answered 13 questions. Four collected socio-demographic data; others included estimates of refusal to prosecute drug offenses, police workload and effectiveness, work motivation, work focus, and officers' attitudes toward prosecution in Hamburg. Subjects had the opportunity to evaluate drug policy and to state preferences for handling cannabis consumption offenses. Three questions were transferred from Stock and Kreuzer (1996) to compare today with 20 years earlier.

Twenty detectives from LKA 62 (33.9%), 21 from LKA 68 (35.6%) and 18 officers from PK 113 (30.5%) completed the questionnaire (61.46% response rate). Among these 59 respondents, 86% were male, 56.9% were 35 or older, 73.7% had at least 10 years of police experience, and 36.2% had investigated drug crimes more than six years. No significant socio-demographic characteristics distinguish detectives and local officers.

More than 66.8% of LKA detectives favor downgrading cannabis use to an administrative offense or legalizing it, whereas 92.8% of PK officers favor harsher punishments or fines.

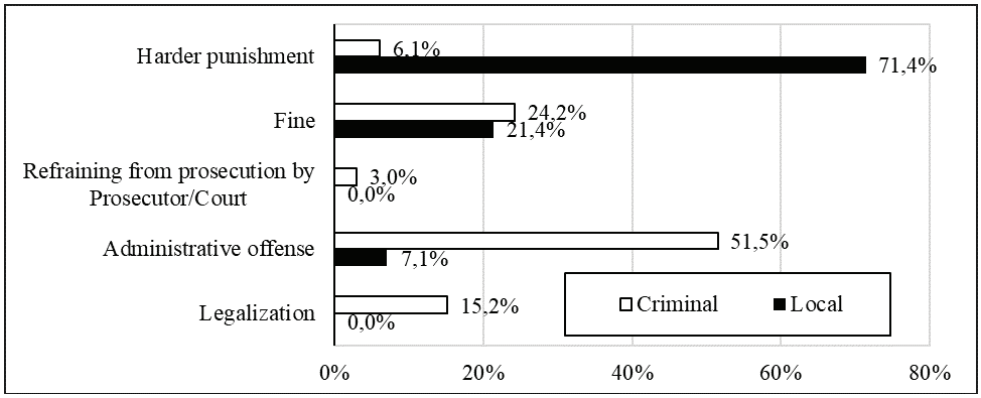


Figure 1: Future legal treatment of cannabis offenses (acquisition / possession), N = 47

Stock and Kreuzer (1996) collected data shortly before 31a BtMG appeared in 1992, when refusal to prosecute was available only under § 29 V BtMG. A comparison with 1992 reveals

[23] LKA 68 pursues consumer offenses and street dealers. LKA 62 deals solely with drug traffickers, but we assumed it regularly encounters consumer offenses. Local police officers surveyed at PK 113 investigate drug crimes.

similarities and changes. Then as now, refusal to prosecute—today's prevailing practice in Germany—is respondents' least-favored option: 5.1% to 8.0% of Stock and Kreuzer's respondents favored it. In our study, 3% of LKA detectives and no local police officer favored it (Figure 1).

More than half (51.5%) of surveyed LKA detectives favor classifying cannabis-related crimes as administrative offenses. In 1992 (Stock & Kreuzer, 1996), only 10% approved that approach in, although 26% of officers they surveyed from North Rhine-Westphalia approved it. However, their approval percentages do not approach those we uncovered (Figure 1).

Surveyed PK officers' preference for harsh punishment mirrors 1992. Here the polled groups demanded retention of the criminal prohibition with an agreement between 83.5% in Hesse and 92.1% in Bavaria. The approval rate for investigators in North Rhine-Westphalia was 57.4% (Stock & Kreuzer, 1996, p.128, 129). In this respect, regarding our results, at least for the group of criminal officials today can be spoken of a rethink; they strongly favor decriminalization strategies.

This also can be seen in respondents' reactions to drug policy regarding all drugs. LKA detectives favor prioritizing trafficking offenses, whereas PK officers advocate harsher punishment and enforcement for consumption.

Officers surveyed by Schäfer and Paoli (2006, p.389) did not endorse shifting prosecutorial discretion to the police ("discretionary prosecution principle"). In our survey, half of LKA detectives (n = 19) want more discretion over cannabis offenses, whereas 13.2% (n = 5) want discretion over harder drugs (cocaine, heroin, crack, ecstasy, LSD, crystal meth). No sampled PK officer wanted that shift irrespective of the drug involved. Stock and Kreuzer (1996) found that 51.6% of all sampled officers supported police discretion to pursue soft and hard drugs in 1992. However, they found large differences between Bavaria (35.1%) and North Rhine-Westphalia (77.2%) (Stock and Kreuzer, 1996, p.156).

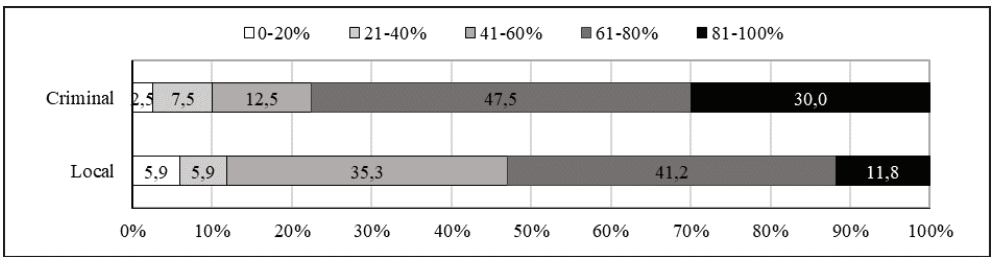


Figure 2: Estimated refraining from prosecution for consumption-related offenses

Discretion receives high priority. One explanation may be an aversion to what is deemed pointless use of resources. We asked respondents to estimate the rate of refused prosecutions. None of the factors—respondents' ages, time in service, or assignment—influenced their assessments. Again, however, assessments by LKA detectives differed from those of PK officers: 77.5% of the former estimated that refusals to prosecute surpassed 60%, versus 52.9% of the latter (Figure 2).

Estimated rates of refusal to prosecute influenced motivation to work and estimated workload only among LKA detectives: 39.3% indicated that a rate exceeding 60% dampened their motivation. The rate was irrelevant among PK officers. Almost none felt unmotivated to pursue their work (Figure 3).

We measured estimated workload for consumer offenses on a scale of 1 to 6. Significantly higher, in turn, is the workload of LKA detectives, who assume a high rate of refusal to prosecute (Figure 4). No difference was reported among local officers.

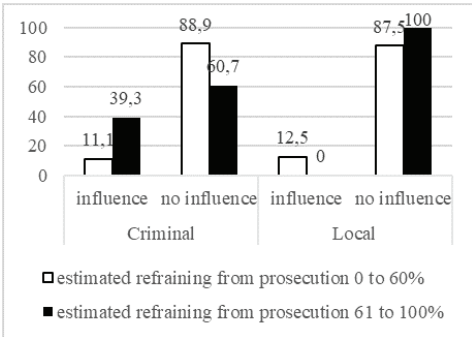


Figure 3: Work motivation by estimated rate of refusal to prosecute

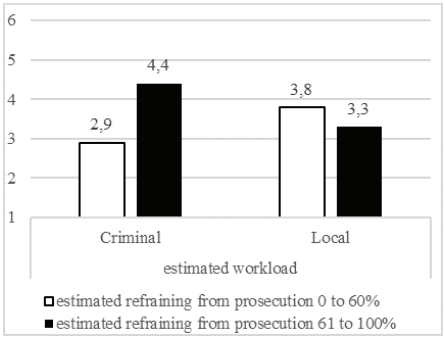


Figure 4: Workload by estimated rate of refusal to prosecute

The categories "Decriminalization" and "Repression" examined the extent to which attitudes about cannabis offenses influence motivation, workload, or effectiveness of current drug policy. Respondents who rate refusals to prosecute as relatively low are more likely to favor greater repression (Figure 5). Results also show that advocating repressive measures ties to higher perceived effectiveness of police measures (Figure 6). On the other hand, respondents who favor decriminalization estimate that refusals to prosecute exceed 60% and regard the workload of consumer offenses as high (Figures 5 and 6).

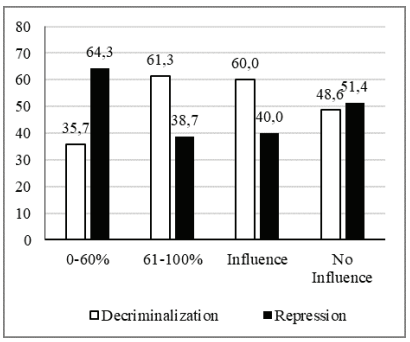


Figure 5: Estimated rate of refusal to prosecute and work motivation by attitudes on cannabis policy

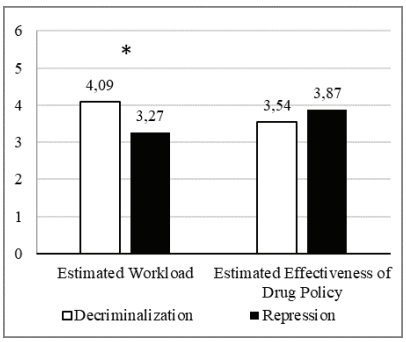


Figure 6: Estimated workload and estimated effectiveness of drug policy by attitudes toward cannabis policy

We calculated final logistic regressions to discern the influence of estimated rate of refraining from prosecution, work motivation, workload and effectiveness of drug policy on attitudes about cannabis offenses. Dependent variables capture the dichotomized approach to cannabis and the desire for discretion in pursuing cannabis offenses.

As expected, group membership explains most of the variance: PK officers prefer repression and tougher punishment. Older officers are slightly more punitive, whereas those who have worked as narcotics investigator for many years are more lenient. The higher the estimated rates of refusal to prosecute and workload, the more lenient officers tend to be. Among LKA detectives, age is associated with punitive attitudes. Longer involvement with narcotic crimes and belief most consumer offenses are not prosecuted contribute to preferences for decriminalization. Older PK officers and those who believe police measures to combat drug crime are effective notably oppose granting discretion to pursue cannabis offenses.

7. CONCLUSION

The current German legal regime of cannabis control is based on strict prohibition of cannabis outside medical or scientific use. That makes its production, trade, distribution, and consumption punishable. Even though § 31a BtMG gives the public prosecutor in cases of small amounts of cannabis (*geringe Menge*) the opportunity to waive judicial approval, the German police has no discretion in reporting all suspected offenders to the public prosecutor and its workload occasioned by cannabis offenses drains resources from more serious crimes.

As shown, organized criminal control of production and supply cannot be broken by police means, and a strategy of prohibition promotes it. The cannabis market is large, profitable, organized, and characterized by violence and associated crimes (EMCDDA & Europol, 2016, p.17). Technological innovations raise production volumes and product potency (EMCDDA & Europol 2016, p.7). The market is booming — 1% of Europeans consume cannabis daily (EMCDDA & Europol, 2016, p.7) — a fact that historically neither consumption nor criminalization strategies influence. Efforts to decriminalize cannabis consumption are overdue. Results of our recent survey among police officers in Hamburg show that the attitudes of criminal detectives (contrary to the officers of the security police) have changed since the 1990s and that prohibition is not considered effective.

Twenty years after the German Federal Court declared criminalization of cannabis by the BtMG constitutional, numerous scientists and politicians argue that the basis for the Federal Constitutional Court decisions no longer exists. Studies would rate the health risk of cannabis low, especially in recreational use by adults, and presented fewer health risks than consumption of alcohol and nicotine. The argument that prohibition protects the young against social and educational problems and developing criminal behavior would remain scientifically unproven. Science had proven that the danger of drugs would be mastered "better by health-juridical regulation […] as well as with adequate youth welfare measures. The Narcotics Act would need an urgent review.

The public debate on decriminalization of cannabis use initiated by the *Schildower Kreis* has reached German parliament. The advocates of decriminalization of cannabis use argue, the prohibition would allow criminal organizations to control the supply chain and that the world would suffer from the attendant violence, corruption, and money laundering etc. Production areas and transit routes were contested, the state and democratic institutions were undermined, and legal economies weakened.

Several times in recent years a Cannabis Control Bill *(Cannabiskontrollgesetz)* liberalizing cannabis use has been introduced to German Parliament. Policy reform seems increasingly likely.

REFERENCE LIST

- Aguilar, S. & Gutiérrez & V. Sánchez, L. & Nougier, M. (2018), Medicinal cannabis policies and practices around the world, http://fileserver.idpc.net/library/Medicinal%20cannabis%20briefing_ENG_FINAL.PDF [03/01/2019].
- Aulinger, S. (1997). Rechtsgleichheit und Rechtswirklichkeit bei der Strafverfolgung von Drogenkonsumenten: Die Anwendung von § 31a BtMG im Kontext anderer Einstellungsvorschriften. [Equal rights and legal reality in the prosecution of drug users: The application of § 31a BtMG in the context of other regulations to refrain from prosecution]. Baden-Baden: Nomos.
- Baier, D., Schepker, K. & Bergmann, M.C. (2016). Macht Kiffen friedlich und Saufen aggressiv? [Makes smoking Marijuana peaceful and drinking aggressively?] *Zeitschrift für Jugendkriminalrecht und Jugendhilfe, 27(4),* 324-332.
- Barsch, G. (2018). Effekte und Nebeneffekte der Umsetzung der Regulierung von Marihuana in den USA: Stand Herbst 2016. [Effects and side effects of the implementation of the regulation of marijuana in the USA: Status autumn 2016]. akzept e.V. Bundesverband für akzeptierende Drogenarbeit und humane Drogenpolitik, Deutsche AIDS-Hilfe, JES e.V. Bundesverband [Federal Association for Acceptable Drug Work and Human Drug Policy, German AIDS Aid, JES e.V. Bundesverband] (eds.). *5. Alternativer Drogen- und Suchtbericht 2018 (Alternative Drug and Addiction Report 2018),* pp. 67-75.
- Boyd, N. (2018). Cannabis-Legalisierung in Kanada: „Bill C-45“ – Chancen und Probleme [Cannabis Legalization in Canada: “Bill C-45” - Chances and Problems]. akzept e.V. Bundesverband für akzeptierende Drogenarbeit und humane Drogenpolitik, Deutsche AIDS-Hilfe, JES e.V. Bundesverband [Federal Association for Acceptable Drug Work and Human Drug Policy, German AIDS Aid, JES e.V. Bundesverband] (eds.). *5. Alternativer Drogen- und Suchtbericht 2018 (5th Alternative Drug and Addiction Report 2018),* pp. 59-66.
- Behrendt, S., Wittchen, H.U., Höfler, M., Lieb, R., Beesdo, K. (2009). Transitions from first substance use to substance use disorders in adolescence: is early onset associated with a rapid escalation? *Drug Alcohol Depend, 99,* 68-78.
- Bonnet, U. (2016). Rauschzustände: Risiken und Nebenwirkungen. Im Focus: nicht-medizinisches Cannabis und synthetische Cannabinoide. [Intoxication states: risks and side effects. In focus: non-medical cannabis and synthetic cannabinoids. Addiction treatment.] *Suchttherapie, 17 (02),* 61-70.
- Bonnet U & Scherbaum N. (2010). Cannabisbezogene Störungen Teil I: Pharmakologie, Epidemiologie und Therapieverfahren. [Cannabis-related disorders Part I: Pharmacology, Epidemiology and Therapeutic Procedures.] *Fortschritte der Neurologie Psychiatrie, 78,* 297-305.
- Bonnet, U., Specka, M. & Scherbaum, N. (2016). Häufiger Konsum von nicht-medizinischem Cannabis. Gesundheitliche Folgen und Wirkung der Entzugsbehandlung. [Frequent consumption of non-medical cannabis. Health consequences and effects of withdrawal treatment.] *Deutsche Medizinische Wochenschrift, 141 (2)*, 126-131.
- CaPRis (2017). *Cannabis: Potential und Risiken. Eine wissenschaftliche Analyse. [Cannabis: potential and risks. A scientific analysis.]* https://www.bundesgesundheitsministerium.de/

fileadmin/Dateien/5_Publikationen/Drogen_und_Sucht/Berichte/Kurzbericht/171127_Kurzbericht_CAPRis.pdf [01/03/2019].

- Caulkins, J.P., Kilmer, B., Kleiman, M.A.R., MacCoun, R.J., Midgette, G., Oglesby, P., Pacula, R.L., Reuter, P.H. (2015). *Considering Marijuana Legalization: Insights for Vermont and Other Jurisdictions.* RAND Research Report. Santa Monica: Rand.
- Červený, J., Chomynová, P., Mravčík, V. & van Ours, J.C. (2017). Cannabis decriminalization and the age of onset of cannabis use. *International Journal of Drug Policy, 43,* 122-129.
- Danielsson, A.-K., Lundin, A., Agardh, E., Allebeck, P. & Forsell, Y. (2016). Cannabis use, depression and anxiety: A 3-year prospective population-based study. *Journal of Affective Disorders, 193,* 103-108.
- Degenhardt, L., Chiu, W.-T., Sampson, N., Kessler, R.C., Anthony, J.C., Angermeyer, M., et al. (2008). Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys. *PLoS Medicine, 5 (7),* 1053-1067.
- DGKJP/BAG KJPP/ BKJPP (2015). *Gemeinsame Stellungnahme zur Legalisierungsdebatte des nicht-medizinischen Gebrauchs von Cannabis*. *[Joint statement on the legalization debate on the non-medical use of cannabis.]* http://www.dgkjp.de/images/files/stellungnahmen/2015/2015_11_23%20Stellungnahme%20KJP%20Cannabis_final%20mit%20Unterschriften.pdf [01/03/2019].
- DGSAS (Deutsche Gesellschaft für Soziale Arbeit in der Suchthilfe) (2015). *Stellungnahme „Erfahrungen in der Frühintervention bei jugendlichen Cannabiskonsumenten". [Statement "Experiences in Early Intervention in Juvenile Cannabis Consumers"]* www.dgsas.de/downloads/Stellungnahme%20Cannabis%20BMG_DGSAS_23.2.15.pdf [03/03/2018].
- DG-Sucht (Deutsche Gesellschaft für Suchtforschung und Suchttherapie e.V.) (2015). *Stellungnahme zur Legalisierungsdebatte des nichtmedizinischen Cannabiskonsums. [Statement on the legalization debate on the non-medical use of cannabis.]* http://www.dg-sucht.de/fileadmin/user_upload/pdf/stellungnahmen/Stellungnahme_Legalisierungsdebatte_Cannabis_DG-Sucht.pdf [01/03/2019].
- DHS (Deutsche Hauptstelle für Suchtfragen e.V.) (2015). *Cannabispolitik in Deutschland. Maßnahmen überprüfen. Ziele erreichen. [Cannabis policy in Germany. Check measures. Achieve goals.]* http://www.dhs.de/fileadmin/user_upload/pdf/news/Cannabispolitik_in_Deutschland.pdf [01/03/2019].
- DGS (Deutsche Gesellschaft für Suchtmedizin e.V.) (2014). Warum das Betäubungsmittelgesetz (BtMG) aus suchtmedizinischer Sicht auf den Prüfstand gehört. [Why the Betäubungsmittelgesetz (BtMG) belongs from the point of view of addiction medicine to the test.] *Suchttherapie, 15,* 49.
- Duttge, G. & Steuer, M. (2014). Legalisierung von Cannabis: Verkommt Deutschland zu einer berauschten Gesellschaft? [Legalization of cannabis: Does Germany turn into an intoxicated society?] *Zeitschrift für Rechtspolitik, 6,* 181-185.
- Duttge, G. & Steuer, M. (2015). Zur fehlenden Empirie in der Debatte um eine Legalisierung von Cannabis. [The lack of empiricism in the debate on the legalization of cannabis.] *Medizinrecht, 33,* 799–804.

- Effertz, T., Verheyen, F. & Linder, R. (2016). Ökonomische und intangible Kosten des Cannabiskonsums in Deutschland. [Economic and intangible costs of cannabis use in Germany.] *Sucht, 62,* 31-41.
- ESPAD Group (2016). *ESPAD Report 2015: Results from the European School Survey Project on Alcohol and Other Drugs*. Publications Office of the European Union, Luxembourg.
- EMCDDA (European Monitoring Centre of Drugs and Drug Addiction) (2017). *Europäischer Drogenbericht 2017: Trends und Entwicklungen. [European Drug Report 2017: Trends and developments.]* Amt für Veröffentlichungen der Europäischen Union, Luxemburg.
- EMCDDA (European Monitoring Centre of Drugs and Drug Addiction) und Europol (2016). *EU-Drogenmarktbericht: Ein strategischer Überblick. [EU Drugs Market Report: A Strategic Overview.]* Gemeinsame EMCDDA-Europol-Veröffentlichungsreihe. Amt für Veröffentlichungen der Europäischen Union, Luxemburg.
- Flöter S. & Pfeiffer-Gerschel T. (2012). Ökonomische Auswirkungen der Prohibition. [Economic Impact of Prohibition.] In: Gerlach R, Stöver H, (Hrsg.). *Entkriminalisierung von Drogenkonsumenten – Legalisierung von Drogen.* [*Decriminalization of drug users - legalization of drugs.]* Frankfurt am Main: Fachhochschulverlag, 33-47.
- Gantner, A. (2016). Jenseits der Evidenz: Eine Replik zur Cannabispolitik. [Beyond Evidence: A Replica to the Cannabis Policy.] *Suchttherapie, 17,* 55-57.
- Gaßmann, R. (2005). Die Cannabis-Diskussion aus der Perspektive von Prävention und Suchthilfe. [The cannabis discussion from the perspective of prevention and addiction.] *Suchttherapie, 6,* 97-101.
- GCDP (Global Commission on Drug Policy) (2014). *Taking Control: Pathways to Drug Policies That Work. 2014.* http://www.globalcommissionondrugs.org/wp-content/uploads/2016/03/GCDP_2014_taking-control_EN.pdf [01/03/2019].
- GCDP (Global Commission on Drug Policy) (2016). *Advancing Drug Policy Reform: a new approach to decriminalization. 2016*. http://www.globalcommissionondrugs.org/wp-content/uploads/2016/11/GCDP-Report-2016-ENGLISH.pdf [01/03/2019].
- GCDP (Global Commission on Drug Policy) (2017). *The World Drug Perception Problem. 2017*. http://www.globalcommissionondrugs.org/wp-content/uploads/2018/01/GCDP-Report-2017_Perceptions-ENGLISH.pdf [01/03/2019].
- GCDP (Global Commission on Drug Policy) (2018). *Regulation. The Responsible Control of Drugs. 2018.* http://www.globalcommissionondrugs.org/wp-content/uploads/2018/09/ENG-2018_Regulation_Report_WEB-FINAL.pdf [01/04/2018].
- Green, K.M., Doherty, E.E., Stuart, E.A. & Ensminger, M.E. (2010). Does heavy adolescent marijuana use lead to criminal involvement in adulthood? Evidence from a multiwave longitudinal study of urban African Americans. *Drug and Alcohol Dependence, 112 (1),* 117-125.
- Habschick, K. (2014). Cannabis: „Legalize it" – not! *Kriminalistik, 11,* 627-635.
- Hambrecht, M. (2003). Schöne neue Welt. Cannabis für alle. [Beautiful new world. Cannabis for everyone.] *Psychiatrische Praxis, 30,* 179-181.

- HBSC (2016). *Growing up unequal: gender and socioeconomic differences in young people's health and well-being. Health Behaviour in School-Aged Children (HBSC) Study. International Report from the 2013/2014 Survey.* WHO.
- Hoaken, P.N.S. & Stewart, S.H. (2003). Drugs of abuse and the elicitation of human aggressive behavior. *Addictive Behaviors, 28(9),* 1533-1554.
- Horwood, L.J., Fergusson, D.M., Coffey, C., Patton, G.C., Tait, R., Smart, D., Letcher, P., Silins, E. & Hutchinson, D.M. (2012). Cannabis and depression: An integrative data analysis of four Australasian cohorts. *Drug and Alcohol Dependence, 126,* 369–378.
- Hudak, J. & Ramsey, G. & Walsh, J. (2018) *Uruguay's cannabis law: Pioneering a new Paradigm,* https://www.brookings.edu/wp-content/uploads/2018/03/gs_032118_uruguaye28099s-cannabis-law_final.pdf [03/01/2019].
- Hughes, C. & Stevens, A. (2010). What Can We Learn From The Portuguese Decriminalization of Illicit Drugs? *British Journal of Criminology, 50 (6),* 999-1022.
- Hughes, C. E. & Stevens, A. (2012). A resounding success or a disastrous failure: Re-examining the interpretation of evidence on the Portuguese decriminalisation of illicit drugs. *Drug and Alcohol Review, 31,* 101-113.
- Kirby, T. & Barry, A.E. (2012). Alcohol as a gateway drug: a study of US 12th graders. *Journal of School Health, 82(8),* 371-379.
- Kraus, L., Pabst, A., Gomes de Matos, E. & Piontek, D. (2014). *Kurzbericht Epidemiologischer Suchtsurvey 2012. Tabellenband: Prävalenz des Konsums illegaler Drogen, multipler Drogenerfahrung und drogenbezogener Störungen nach Geschlecht und Alter im Jahr 2012. [Short Report Epidemiological Addiction Survey 2012. Tables: Prevalence of illicit drug use, multiple drug experience and drug-related disorders by gender and age in 2012.]* München: IFT Institut für Therapieforschung.
- Kreuzer, A. (1990). Endstation Sucht? – Wege aus der Sucht? [Last Stop Addiction? - Ways out of addiction?] In: Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen e.V. (Hrsg.). *Mehrfach Auffällige - Mehrfach Betroffene. Erlebnisweisen und Reaktionsformen. [Multiple Offenders - Multiple Victims. Experiences and forms of reaction.] Schriftenreihe des DVJJ,* Bd. 18*.* Forum Verlag: Bonn, S. 276-297.
- Kreuzer, A. (2005). Drogen, Kriminalität und Strafrecht. [Drugs, crime and criminal law.] *Zeitschrift für Jugendkriminalrecht und Jugendhilfe, 3*, 235-241.
- Kreuzer, A. (2015). Zusammenhänge zwischen Drogen und Kriminalität. [Connections between drugs and crime.] *Forensische Psychiatrie, Psychologie, Kriminologie 9,* 3-9.
- Kreuzer, A., Römer-Klees, R. & Schneider, H. (1992). Drugs and Delinquency: Some results of a current self-report study of university students and of recent in-depth interviews with drug addicts. In Bühringer, G. & Platt, J.J. (Hrsg.). *Drug Addiction Treatment Research. German and American Perspectives.* Malabar/Florida, 409-431.
- Kreuzer, A. & Stock, J. (1997). Policing Drug Addicts in Germany - Some Results of an Empirical Study. *European Addiction Research, 3,* 67-74.
- Kreuzer, A. & Wille, R. (1988). *Drogen - Kriminologie und Therapie. [Drugs - criminology and therapy.]* C.F. Müller: Heidelberg.

- Krumdiek, N. (2008). Cannabis sativa L. und das Aufleben alter Vorurteile. [Cannabis sativa L. and the revival of old prejudices.] *Neue Zeitschrift für Strafrecht,* 437-444.
- Lev-Ran, S., Roerecke, M. Le Foll, B., George, T. P., McKenzie, K. & Rehm, J. (2013). The association between cannabis use and depression: a systematic review and meta-analysis of longitudinal studies. *Psychological Medicine, 44,* 797-810.
- Maldonado-Molina, M.M., Reingle, J.M. & Jennings, W.G. (2011). Does alcohol use predict violent behaviors? The relationship between alcohol use and violence in a nationally representative longitudinal sample. *Youth violence and juvenile justice, 9(2),* 99-111.
- Murkin, G. (2014*). Drug decriminalisation in Portugal: setting the record straight.* Transform. http://www.tdpf.org.uk/resources/publications/drug-decriminalisation-portugal-setting-record-straight [01/03/2019].
- Nutt, D.J., King, L.A., Phillips, L.D. on behalf of the Independent Scientific Committee on Drugs (2010). Drug harms in the UK: a multicriteria decision analysis. *The Lancet, 376,* 1558-1565.
- Orth, B. (2016). *Die Drogenaffinität Jugendlicher in der Bundesrepublik Deutschland 2015. Rauchen, Alkoholkonsum und Konsum illegaler Drogen: aktuelle Verbreitung und Trends. BZgA-Forschungsbericht. [The drug affinity of young people in the Federal Republic of Germany 2015. Smoking, alcohol consumption and use of illegal drugs: current distribution and trends. BZgA research report.]* Köln: Bundeszentrale für gesundheitliche Aufklärung.
- Pabst, A., Kraus, L., Gomes de Matos, E. & Piontek, D. (2013). Substanzkonsum und substanzbezogene Störungen in Deutschland im Jahr 2012. [Substance use and substance-related disorders in Germany in 2012.] *Sucht, 59 (6),* 321-331.
- Piontek, D., Dammer, E. Schulte, L. & Pfeiffer-Gerschel, T. (2017). *Bericht 2017 des nationalen REITOX-Knotenpunkts an die EBDD (Datenjahr 2016 / 2017) [2017 Report of the National REITOX Focal Point to the EMCDDA (Data year 2016 / 2017)]* Workbook Drugs. München: DBDD.
- Pollähne, H. (2016). Cannabis-Legalisierung: Rechtliche und Justizielle Konsequenzen. [Cannabis Legalization: Legal and Judicial Consequences.] *Suchttherapie, 17,* 77-80.
- Power, R., Verweij, K., Zuhair, M., Montgomery, G., Henders, A., Heath, A. & Martin, N. (2014). Genetic predisposition to schizophrenia associated with increased use of cannabis. *Molecular psychiatry. 19 (11),* 1201–1204.
- Radhakrishnan, R., Wilkinson, S. T. & D´Souza, D. C. (2014). Gone to pot - a review of the association between cannabis and psychosis. *Frontiers in psychiatry, 5*, 1-24.
- REITOX Report on Germany of the National Focal Point to the EMCDDA (Data year 2017 / 2018) https://www.dbdd.de/fileadmin/user_upload_dbdd/05_Publikationen/PDFs/REITOX_BERICHT_2018_ENG/02_Legal_Framework_2018_eng.pdf [03/01/2019].
- Reuband, K.-H. (1992). *Drogenkonsum und Drogenpolitik. Deutschland und die Niederlande im Vergleich. [Drug use and drug policy. Germany and the Netherlands in comparison.]* Opladen.
- Rolles, S. (2014). *Cannabis policy in the Netherlands: moving forwards not backwards*. Transform. http://www.tdpf.org.uk/resources/publications/cannabis-policy-netherlands-moving-forwards-not-backwards [01/03/2019].

- Rolles, S. & Murkin, G. (2014). *Drug policy in Sweden: a repressive approach that increases harm*. Transform. http://www.tdpf.org.uk/resources/publications/ drug-policy-sweden-repressive-approach-increases-harm [03/01/2019].
- Rosmarin, A. & Eastwood, N, *A quiet revolution: Drug decriminalization policies in practice across the globe*, http://fileserver.idpc.net/library/release-quiet-revolution-drug-decriminalisation-policies.pdf [03/01/2019].
- SAMHSA (Substance Abuse and Mental Health Services Administration) (2017). *Key substance use and mental health indicators in the United States: Results from the 2016 National Survey on Drug Use and Health (NSDUH) (HHS Publication No. SMA 17-5044, NSDUH Series H-52).* Rockville, MD: Center for Behavioral Health Statistics and Quality, Substance Abuse and Mental Health Services Administration. https://www.samhsa.gov/data/ [01/03/2019].
- Schäfer, C. & Paoli, L. (2006): *Drogenkonsum und Strafverfolgungspraxis. Eine Untersuchung zur Rechtswirklichkeit der Anwendung des § 31a BtMG und anderer Opportunitätsvorschriften auf Drogenkonsumentendelikte. [Drug use and law enforcement practice. An investigation into the legal reality of the application of § 31a BtMG and other opportunity regulations on drug consumption offenses.]* Freiburg i. Br.: Max-Planck-Institut.
- Schoeler, T., Theobald, D., Pingault, J.B., Farrington, D.P., Jennings, W.G., Piquero, A.R., Coid, J.W. & Bhattacharyya, S. (2016). Continuity of Cannabis use and violent offending over the life course. *Psychological Medicine, 46(8),* 1663-1677.
- Schwind, H.D. (2013) Kriminologie [Criminology], Schriftenreihe der "Kriminalistik".
- Simon, R. & Hughes, B. (2015). Cannabis und Drogenrecht in Europa: Gesetzeslage, Umsetzung und aktuelle Diskussionen zur Weiterentwicklung. [Cannabis and drug law in Europe: legislation, implementation and current discussions on further development.] *Sucht,* 18-26.
- Soyka, M., Preuss, U. & Hoch, E. (2017). Cannabisinduzierte Störungen. [Cannabis-induced disorders.] *Nervenarzt 88,* 311-325.
- Stock, J. & Kreuzer, A. (1996). *"Was, wie und gegen wen ermittelt wird, entscheiden wir ..." Drogen und Polizei - Eine kriminologische Untersuchung polizeilicher Rechtsanwendung. ["What, how and against whom is investigated, sentenced ..." Drugs and police - A criminological study of police application of law.]* Gießener Kriminalwissenschaftliche Schriften, Bd. 3, Forum Verlag Godesberg, Bonn.
- Stock, J. (1999). Polizeiliches Ermittlungsverhalten und staatsanwaltschaftliche Einstellungspraxis in Drogenstrafsachen. [Police investigative behavior and prosecutorial refraining practices in drug-related criminal matters.] In Geisler, C. (Hrsg.). *Das Ermittlungsverhalten der Polizei und die Einstellungspraxis der Staatsanwaltschaften.* Bd. 28, Wiesbaden: KrimZ, 83-106.
- Stöver, H. & Plenert, M. (2013). *Entkriminalisierung und Regulierung. Evidenzbasierte Modelle für einen alternativen Umgang mit Drogenhandel und -konsum. [Decriminalization and regulation. Evidence-based models for an alternative approach to drug trafficking and consumption.]* Friedrich-Ebert-Stiftung. http://library.fes.de/pdf-files/iez/10159.pdf [01/03/2019].

- Tossmann, P. & Gantner, A. (2016). Frühintervention, Beratung und Behandlung bei Cannabisstörungen. [Early intervention, consultation and treatment for cannabis disorders.] *Suchttherapie, 17,* 85-89.
- WHO (*2016). Growing up unequal: gender and socioeconomic differences in young people's health and well-being. Health Behaviour in School-aged Children (HBSC)*. http://www.euro.who.int/en/health-topics/Life-stages/child-and-adolescent-health/health-behaviour-in-school-aged-children-hbsc/growing-up-unequal.-hbsc-2016-study-20132014-survey [01/03/2019].
- Van Winkel, R. & Kuepper, R. (2014). Epidemiological, Neurobiological, and Genetic Clues to the Mechanisms Linking Cannabis Use to Risk for Nonaffective Psychosis. *Annual Review of Clinical Psychology, 10(1),* 767-791.
- Weber, K. (2008). Freigabe illegaler Drogen: Ethisch geboten oder unverantwortlich? – Kontra. [Illegal drug release: ethically required or irresponsible? - Contra.] *Suchttherapie, 9,* 170-176.
- Weber, K. (2017). BtMG [Narcotic Drugs Act], § 31a, München: Beck.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 189-204
ISSN 1512-5505

SPECIAL COURTS AND PROTECTION OF CHILDREN FROM SEXUAL OFFENSES IN INDIA

Sesha KETHINENI
Murugesan SRINIVASAN

Abstract

In India, the incidents of crimes against children, in particular, sexual offenses, are on the increase. The 2016 Crime in India report documents 106,958 offenses against children compared to 89,423 and 94,172 in 2014 and 2015, respectively. These incidents include crimes under the Indian Penal Code (IPC) such as the murder of a child, abetment of suicide of children, kidnapping and abduction, infanticide, trafficking of a child, and compelling children into marriage as well as crimes against children under various Special and Local Laws (SLL). The SLL crimes fall under the Juvenile Justice Act (JJA), Immoral Traffic Act, Child Labor Act, Prohibition of Child Marriage Act, and, more recently, the Protection of Children from Sexual Offenses Act (POCSO, 2012). The article addresses the impact of the POCSO Act, including the creation of special courts to address these crimes. Information was obtained from published sources, data from the southern state of India, and an interview with the judge of the special court to identify the salient features of the POCSO Act, the role of the Mahila (women's) Court, structural barriers for implementation of the Act, as well as risk factors for children becoming victims of child abuse.

Key words

Cannabis Policy, Regulation, Germany, Police Survey, Police Attitudes

SPECIAL COURTS AND PROTECTION OF CHILDREN FROM SEXUAL OFFENSES

There is frequent reporting of sexual offenses against children in India. *The Times of India* (2018) cited that a child is a victim of a sexual offense every 15 minutes. The prevalence of child sexual abuse in India revealed that every second child was a victim of sexual abuse at some point in time (Ministry of Women & Child Development, 2007). The non-governmental agency, Child Rights and You (CRY, 2016), noted a 500% increase in crimes against minors between 2006 and 2016. Of those crimes, 50% came from four states—Uttar Pradesh (northern India), Maharashtra (western India), Madhya Pradesh (central India), West Bengal (eastern India)—and Delhi[1] (a union territory).

[1] Delhi is the National Capital Territory (NCT), also a city and union territory of India and contains the capital New Delhi. The union territory is a federal territory, which is governed by the central/federal government of India.

Although India has been a signatory to the United Nations Convention on the Rights of the Child, 1989 (United Nations Treaty Collection, n.d.), until recently the country has primarily relied on the general criminal law, the Indian Penal Code (IPC) of 1860, and Special and Local Laws (SLL) to prosecute offenders for sexual crimes against children. Many child rights advocates argued for better protection for children and stringent punishments for perpetrators of sexual violence against children (Jha, 2017; Human Rights Watch, 2013). They contend that most of the child abuse laws were ineffective in addressing atrocities committed against children. The lack of attention is attributable to the reluctance on the part of the victims or victims' families to come forward due to social stigma, lack of effective legislation that focused on child abuse, and the absence mandatory reporting requirements of child welfare professionals and related agencies (Human Rights Watch, 2013; Carson, Foster, & Tripathi, 2013).

To develop a comprehensive understanding of the nature and extent of child abuse in the country and to formulate policies to control and prevent child abuse effectively, the Ministry of Women and Child Development (2007) conducted a large-scale study, "A Study on Child Abuse: India 2007," involving 12,447 children, 2,324 young adults, and over 2,000 stakeholders. The study covered different types of child abuse (physical abuse, severe forms of abuse, and sexual abuse), as well as children from different environments (e.g., family environment, school, work, streets, and institutional setting). The study noted an alarming trend in child sexual abuse cases. In the study, over 50% of respondents reported being a victim of sexual abuse, and 22% reported being victims of severe forms of sexual abuse (Ministry of Women & Child Development, 2007). The report called for "immediate and appropriate action . . . by families, community, government and civil society organizations" to come forward to protect the nation's children (Mathew, 2017, p. 61). In addition, incidents such as the abduction of 38 children in the nation's capital (who were raped and killed by a serial killer in 2008) have shaken the collective consciousness of the Indian people (Nautiyal & Mal, 2010; Singh, 2015), and prompted the Indian Government to pass the Protection of Children from Sexual Abuse Act (POCSO) in 2012.

The article presents official data on crimes against children and various legislations that address offenses against children in India, specifically related to child sexual abuse. Aggregate data on the number of special courts created under the POCSO Act, the jurisdiction of these courts, nature, and type of cases handled by the special courts, the number of cases disposed of, and the outcome of those cases were collected from the southern state of Tamil Nadu. Also, a judge of the special court (Mahila Court or women's court) was interviewed to identify, from the judge's perspective, the salient features of POCSO Act, the role of the Mahila Court, structural barriers (economic, cultural, or other) at various phases of the proceedings, and risk factors for children becoming victims of child abuse.

Crimes Against Children: Official and Unofficial Reports

Crime in India, official crime statistics published by the National Crime Records Bureau (NCRB), shows steep increases in crimes against children, despite legislative reforms. The number of crimes against children reported to the authorities increased by more than 50% between 2006 and 2012 (see Table 1). In 2014, there were 89,423 reported crimes against children, compared to 94,172 and 1,06,958 in 2015 and 2016, respectively (National Crime Records Bureau, 2016). In 2016, kidnapping and abduction of children accounted for 48.9% (n = 52,253) of crimes against children, followed by rape of children (18%, n = 19,765; CRY, 2016).

It is possible that the significant increase in the number of crimes against children may be due to the change in the age of consent for sex in 2013 from 16 years to 18 years of age. Also, an investigation conducted by *The Hindu*, a news media, of about 600 rape cases in Delhi (a national Capital Territory, which is also a city and a Union territory) reported that it is a routine practice where adult women file cases as juveniles so that they could secure arrest for their male partners (Rukmini, 2016). Others have raised concerns about the underreporting of child sexual abuse cases in India (Moirangthem, Kumar, & Math, 2015). A study conducted in the Southwestern state of Kerala revealed that out of 1614 students between the ages of 15 and 19 years, 36% of boys and 35% of girls had been victims of sexual abuse. Most of the incidents involved sexual advances while the students were using public transportation (Krishnakumar, Satheesan, Geeta, & Sureshkumar, 2014).

Until 2013, the NCRB combined crimes against children, except for the rape of female children, along with other crimes, made it impossible to disaggregate child sexual abuse against boys. The 2014 NCRB documented specific offenses against children under sections 376 (rape of girl children), 354 [assault on women (girl children) with intent to outrage the modesty, such as sexual harassment, stalking, and voyerurism], 377 (unnatural offenses against children such as homosexuality), and 509 [insulting the modesty of women (girl children)] of IPC. In 2014, the rate of rape of young children was at 3.1% (incidents = 13,766) per 100,000 children compared to 2.4% (incidents = 10,854) in 2015 (see Table 1 & 2).

Table 1. Incidence & Rate of Specific Crimes Committed Against Children, 2006–2013

Year	Incidence	Rate	Murder-other than infanticide	Rape	Kidnapping & Abduction	Selling/ Buying Girls for Prostitution/ Procurement of Minor Girls	Exposure/ Abandonment
2006	18,967	1.7	1,324	4,721	5,102	389	909
2007	20,410	1.8	1,377	5,045	6,377	363	923
2008	22,500	2.0	1,296	5,446	7,650	303	864
2009	24,201	2.1	1,488	5,368	8,945	326	857
2010	26,694	2.3	1,408	5,484	10,670	887	725
2011	33,098	2.7	1,451	7,112	15,284	1,002	700
2012	38,172	8.9	1,597	8,541	18,266	932	821
2013	58,224	13.2	1,657	12,363	28,167	1,330	930
2014	89,423	20.1	1,817	13,766	10,854	2,117	983
2015	94,172	21.1	1,758	37,854	41,893	3,207	885
2016	106,958	24.0	1,640	*31,991	54,723	2,594	811

*Note: Includes Child Rape and Sexual Assault of Children under IPC and POCSO Act
Source: National Crime Records Bureau (NCRB; 2006–2016).

Beginning in 2014, the NCRB start to include under the crimes against children, incidents under the Immortal Trafficking Act, Juvenile Justice (Care and Protection of Children) Act, the POCSO Act, and unnatural offenses against children. Under the previous categories of selling or buying girls for prostitution had replaced minors in place of girls only. More specific categories of sexual offenses were included in the 2016 statistics.

Table 2. Incidence & Rate of Specific Crimes Committed Against Children, 2014–2016

Crimes Under Various Laws	Year		
	2014	2015	2016
	Incidents	Incidents	Incidents
*Assault on women (girl children) with intent to outrage their modesty (IPC)	11,335	10,854	-
*Insult to the modesty of women (girl children) (IPC)	444	348	-
*Immoral Trafficking (P) Act	86	58	56
*Juveniles Justice(C&P of Children) Act	1,315	1,457	2,253
*Protection of Children from Sexual Offences Act	34,449	34,505	36,022
*Unnatural offences (IPC)	795	814	1,247

Note: * New offenses added in 2014.
Source: NCRB, 2014, 2015, & 2016.

POLICE INVESTIGATION STATUS OF CRIMES AGAINST CHILDREN, 2016

Of all the IPC cases investigated by the police (See Table 3), charges were filed by the police in over 80% of murder cases, abetment[2] of suicide of a child, attempt to commit murder, human trafficking, kidnapping for ransom, and unnatural offenses. The lowest (less than 25%) percentage of charges were filed in kidnapping and abduction cases, followed by infanticide and foeticide. In regards to charges under the POCSO Act, charges were filed in over 80% of cases investigated by the police, which indicates the importance given to these cases. Of the 34,449 cases registered in 2014, trials were completed in 7,487 (21.7%) of cases, compared to 10,498 (30.4%) out of 34,505 cases in 2015 and 10,884 (30%) out of 36,202 cases in 2016 (Dubbudu, 2018).

The conviction rate for offenses such as procurement of minor girls for prostitution under IPC was the lowest with 4.4% conviction rate. The rate of conviction for offenses under the POCSO Act ranged from 44.6% (Other offenses) to 17.4% (sexual harassment). Offenses such as rape, sexual assault of children, use of children for photography, or storing child pornography had less than 30% conviction rate (NCRB, 2017).

[2] According to Section 306 of IPC, any person who assists in the commission of suicide of another person shall receive imprisonment for up to ten years. Under Section 305 of IPC, the punishment for abetment of suicide of a minor or insane person is death or up to 10 years of imprisonment.

Table 3. Reported Crimes against Children: Police Investigation Status, 2016

Crimes Under Specific Legislations	Pending Previous Year	Incidents	Investigated	Insufficient Evidence/ False/ Other	Charge Filed **Rate**
IPC Crimes					
1. Murder	910	1640	2550	192	88.4
2. Abetting the Suicide of Child	30	41	71	6	83.8
3. Attempt to Commit Suicide	335	213	548	26	87.6
4. Infanticide	42	93	135	48	36,8
5. Foeticide	47	144	191	93	37.2
6. Exposure and Abandonment	445	811	1256	700	10.6
7. Kidnapping & Adduction	26954	54723	81677	29155	40.4
7.1 Kidnapping & Adduction	14998	27534	42532	17829	24.6
7.2 Kidnap & Abduct to Murder	99	222	321	105	51.6
7.3 Kidnap of Ransom	93	166	259	35	77.4
7.4 Kidnap & Abduct for Marriage	6194	16636	22830	6322	59.1
7.5 Procuration of Minor girls	2311	2465	4776	994	60.4
7.6 Importation of girls	1	5	6	2	50.0
7.7 Other Kidnapping	3258	7695	10953	3868	44.2
8. Human Trafficking	89	340	429	31	85.2
9. Selling Minors for Prostitution	170	122	292	23	75.5
10. Buying Minors for Prostitution	41	7	48	4	78.9
11. Unnatural Offenses	284	1247	1531	71	93.5
SLL Crimes					
12. Protection of Children from Sexual Offenses (POCSO)	12038	36022	48060	1835	94.2
12.1 Child Rape (Sec. 4 & 6 POCSO/ Sec. 376 IPC)	7133	19765	26898	924	94.8
12.2 Child Sexual Assault (sec. 8 & 10 POCSO/Sec. 354 IPC)	4088	12226	16314	700	93.8
12.3 Sexual Harassment (Sec. 12 POCSO/Sec. 509 IPC)	176	934	1110	36	94.7
12.4 Use of Child for Pornography/ Storing Child Pornography	22	47	69	6	84.6
12.5 Other Section of POCSO	619	3050	3669	169	92.1
13. Juvenile Justice (Care & Protection of Children) Act	606	2253	2859	122	93.4
14. Immoral Traffic (Prevention) Act	67	56	123	0	100.0
15. Child Labour (Prohibition & Regulation) Act	198	204	402	8	94.6
16. Prohibition of Child Marriage Act	156	326	482	41	84.6
17. Other Crimes (IPC+SLL)	2933	8716	11649	1065	87.0
Total	45345	106958	152303	32924	65.4

Note: Other category includes cases withdrawn by the government, transfer cases, cases not investigated due to insufficient evidence, false accusations, and mistake of fact.
Source: NCRB, 2016.

RISK FACTORS

Community studies in North American have shown that certain groups of children are more vulnerable to abuse than others. For example, children from a divorced family or single parent household, children living with step-parents, children who experience violence at home, or live in a household where parents have alcohol or drug abuse problem are more likely to experience abuse. Other factors include physical disability or mental retardation or children, inadequate parental supervision, children being subject to extreme punitiveness, and emotionally-deprived children (Finkelhor, 1984; Finkelhor & Baron, 1986). Putnam (2003) identified gender, age, low socioeconomic status, disabilities, and parental dysfunction as risk factors for child sexual abuse. Compared to boys, girls are more prone to sexual abuse (Conklin, 2000; Krug, Mercy, Dahlberg, & Zwi, 2002; Putnam, 2003; Martin & Silverstone, 2013). Also, the risk of child abuse increases with age, and it tends to last longer for girls. Others have not found a link between low socio-economic status and child sexual abuse (Ronan, Canoy, & Burke, 2009). Instead, marital conflict, lack of parental attachment, overprotective parent, and parental alcohol found to increase the risk.

Studies conducted in India of school-aged children, more boys (57.3%) than girls (42.7%) reported being sexually abused (Ministry of Women & Child Development, 2007). Deb and Modak (2010) study found similarities between male and female children regarding the nature of sexual abuse. Both genders reported being inappropriately "touched or looked at their private body parts or asked them or forced them to touch their private body parts" (p. 9) or were made to watch adult pictures. Females children (about 20%) were victims of forced sexual intercourse (Ministry of Women & Child Development, 2007). The primary perpetrators of sexual abuse were mostly relatives. In the case of male children, the perpetrators also included older siblings/cousins and teachers, while female children reported teachers, in addition to relatives. Deb and Modak (2010) study also noted the prevalence of sexual violence in all socioeconomic groups. In India, cultural beliefs and practices also contribute to increased incidents of child sexual abuse. Choudhry et al. (2018) conducted a systematic review of child abuse in India. Using the socio-ecological model, they uncovered that child sexual abuse "is a multifaceted phenomenon grounded in the interplay between individual, family, community, and societal factors" (p. 12). Also, their review found factors such as "negative perception about parents, lower education of mother, and perceived congeniality of family were found to be significantly associated with CSA experience" (Choudhry et al., 2018, p. 12; Deb & Modak 2010).

Laws about Children in India

Offenses against children, particularly sexual offenses against children, are dealt with both under the provisions of IPC and SLL. Sections 376,[3] 354,[4] and 509[5] of IPC are the most widely used

[3] Sec. 376: Punishment for rape- whoever commits rape shall be punished for a term which shall not be less than 7 years, but which may extend to imprisonment for life, and shall also be liable to fine

[4] Sec. 354:Assault or Criminal force to woman with intent to outrage her modesty- whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, [shall be perceived with imprisonment of either description for a term which shall not be less than one year, but which may extend to five years, and shall also be liable to fine.

[5] Sec.509: Word, gesture or act intended to insult the modesty of a woman- whoever intending to

sections. However, the law has failed to recognize "child sexual abuse as a distinct criminal offense" (Nautiyal & Mal, 2010, p. 79). For example, in cases of child abuse, the courts tend to apply sexual offenses against women under IPC such as rape or provision of 'outraging the modesty of women' as a standard. Also, the law recognized only girl victims under the definition of rape but failed to recognize the molestation of boys. When sexual offenses are committed against boys, the courts categorize such offenses under "unnatural sexual offense' provision of the law. In addition to IPC, special laws such as Juvenile Justice (Care and Protection of Children) Act, Child Labor (Prohibition and Regulation) Act, Prohibition of Child Marriage Act, and Immoral Traffic (Prevention) Act have been in place to address crimes against children. However, none of these legislations have differentiated between adult and child victims nor have they addressed the gender disparities when it comes to sexual offenses. To address these disparities and to exclusively focus on child sexual abuse (Nautiyal & Mal, 2010), the Government of India had passed the Protection of Children from Sexual Offenses (POCSO) Act in 2012 (National Commission for the Protection of Child Rights, 2016).

PROTECTION OF CHILDREN FROM SEXUAL OFFENSES (POCSO ACT OF 2012)

Unlike the previous legislation, the POCSO Act defines child sexual abuse as a gender-neutral crime and includes penetrative, nonpenetrative, and unwanted touch as categories of abuse. In addition, the Act increases the sanctions based on whether the offense is regular or aggravated in nature; lays out various child-friendly procedures, including the establishment of special courts (i.e., Mahila Courts); sets a time frame to complete the trial (within one year); mandates notification of the Child Welfare Committee within 24 hours of recording the complaint; requires the National and the State Commission for the Protection of Child Rights to monitor the implementation of the Act; and places the burden of proof on the accused (Bajpai, 2015).

DEFINITION OF SEXUAL OFFENSES AND PUNISHMENTS

The penetrative child sexual assault is further classified into sexual assault and aggravated sexual assault. Penetrative sexual assault is committed by the guardians of the child or by anyone who holds a position of trust, and the offender is often known to the child. Aggravated penetrative sexual assault is committed by gangs and institutional officers such as medical officers, police officers, members of the armed forces, public servants, management or staff of a jail, remand home, individuals involved with protection/observation/custody/care, hospital staff, and members of educational and religious institutions. If anyone commits sexual assault on the child who is younger than 12 years, it is considered aggravated sexual assault irrespective of the nature of the offender. Punishment for penetrative sexual assault may range from 7 years to life imprisonment and a fine. The punishment for aggravated penetrative sexual assault is at least ten years and may extend to life imprisonment and a fine (Ministry of Law & Justice,

---

insult the modesty of any woman, utters any word, makes any sound or gestures, or exhibits any object, intending that such word shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, (shall be punished with simple imprisonment for a term which may extend to three years, and also with fine).

2012). Nonpenetrative sexual assault includes touching, with sexual intent, any private parts of the child. The punishment can range from 3 to 5 years as well as a fine.

The other offenses covered under the Act include sexual harassment, the use of children for pornographic purposes, and an attempt to commit an offense. Although no minimum punishment was set, imprisonment may extend up to 3 years and a fine. The minimum punishment for using children for pornography and directly participating in the act is 8 to 10 years and a fine. Finally, if the pornographic material involving children is used for commercial purposes, punishment could extend to 3 years and a fine.

SPECIAL COURTS

The Act stipulates that each district (i.e., county) designate a Court of Session[6] to serve as a special court. However, if the Court of Session is designated as a Special Court (or Children's Court) under any other law, then that court will address the cases falling under the POCSO Act. There are no exclusive Children's Courts in most states. However, in some states, such as the southern state of Tamil Nadu, cases involving violation of children's rights, offenses against children under other laws, and sexual offenses against children under the POCSO Act are tried by the Mahila Courts, in addition to crimes against women(i.e., offenses under Dowry Prohibition Act[7] and other social laws). Proceedings in these special courts are required to be child-friendly and do not permit prosecutors to question children in a threatening manner (Ministry of Law & Justice, 2012).

In 2015, the Centre for Child and the Law of the National Law School of India University conducted a study on special courts in Delhi. The study examined the extent to which Special Courts are following child-friendly procedures during the trial, any structural and procedural compliance issues, the conviction rate, factors affecting convictions and acquittals, and gaps and challenges in the functioning of the Special Courts. The results showed that the Special Courts were operating in all districts in Delhi. However, many courts did not have special public prosecutors who exclusively tried cases falling under the POCSO Act. Also, many of the facilities were ill-equipped and lacked a separate room for recording evidence from child witnesses, a waiting room for children and their families, or a separate entrance for children to enter the courtroom. Although the Act prohibits the prosecutor or the defense attorney from questioning the child in a threatening manner, in many instances, attorneys did not follow the mandate, and the questions were not age or developmentally appropriate.

The study further noted that the conviction rate was 16.8% (n = 112), and the remaining (83.2%; n = 555) cases ended in acquittals. In some cases, judges sentenced defendants to less than the minimum sentence, and some defendants received probation. Some of the challenges identified include the determination of age. The study reported "the allegation of age regarding the age of a child vary anywhere from 11–12 years and sometimes extends till even 27 or 28 years. This in turn has resulted in ad hoc age determination processes especially in borderline cases. . ." (Centre for Child & the Law, 2016, p. 21). Some of the recommendations included

---

6 Sessions court is the highest court at the district (county) level.

7 The Dowry Prohibition Act of 1961 prohibits giving money, property, or goods by the bride's family to the groom's family or making demands by the groom's family is a punishable offense.

designating additional Special Courts in areas with a high number of cases, issuing guidelines for Special Courts "on core minimum measures . . . to ensure compliance with the child-friendly procedures. . ." (p. 125), educating court staff on sensitivity training for handling traumatized children, and including an age determination component in judicial academy training.

A more recent study conducted in Andhra Pradesh (a southeastern state) by the Centre for Child and the Law (2017) showed that the majority of the accused persons (74.45%, n = 446) were between the ages of 18 and 30, followed by 31 and 45 years old (13.68%, n = 82). Fewer than 10% (9.18%, n = 55) were between 46 and 60 years. Only 1.66% (n = 10) were above 60 years of age. In contrast, an overwhelming majority of victims were aged 18 and under. Only five victims were above 18 years. Girls between the ages of 13 and 15 represented 30.12% (n = 158) followed by 16- and 18-year-old victims (26.57%, n = 139). Those 12 years old and younger accounted for 21.02% (n = 110). In addition, a vast majority of accused (93.7%, n = 625) and victims (n = 99.8%, n = 508) were males (Centre for Child & the Law, 2017).

METHODOLOGY

The current study gathered an aggregate data from the Registrar General of the High Court of Madras, Tamil Nadu, following approval from the university institutional review board. The data included:

- The number of Mahila Courts in Tamil Nadu.
- The number of cases under the POCSO Act.
- The number of cases (under POCSO Act) disposed of in a year.
- The number of cases (under POCSO Act) pending in a year.

In addition to collecting the aggregate data, an interview was conducted with a Mahila Court judge. The topics covered include the salient features of the acts, the role of the Mahila Court in trying POCSO Act cases, structural barriers at various phases of the proceedings, and risk factors for children becoming victims of child sexual abuse.

RESULTS

In Tamil Nadu, there are 43 different Mahila Courts—10 Mahila Courts, 22 Fast Track Mahila Courts, and 11 Additional Mahila Courts. The Mahila Courts and Fast Track Mahila Courts are headed by female district judges, whereas Additional Mahila Courts are headed by female Judicial Magistrates.[8] Of those 43 courts, the Mahila Courts and the Fast Track Mahila Courts are designated as Special Courts under Section 25 of the Commissions for Protection of Child Rights Act, 2005 (CPCR 2005), and these are the only courts that have the jurisdiction to deal with cases that fall under the Child Marriage and POCSO Acts.

As of December 31, 2017, 1,724 cases were pending in the 32 Mahila Courts. From January 1 through July 31, 2018, 1,185 new cases were included for trial. Of the cases, 546 cases had been disposed of as of July 2018, resulting in 2,363 pending cases (see Table 4). The large percentage of pending cases (81.2%) indicates problems in the timely processing of the cases

[8] Unlike judges, magistrates have limited law enforcement ad administrative powers.

under the POCSO Act. Reasons cited for a large number of cases awaiting disposition included a delay in filing complaints from victims' families due to social stigma, a lack of understating of the processes by stakeholders, and lapses in investigation and prosecution (Sivaraman, 2018).

Table 4.
Reported Crimes against Children: Police Investigation Status, 2016

Status of Cases	Number of Cases
Pending cases as on December 31, 2017	1,724
Number of new cases for trial between January 1 and July 31, 2018	1,185
Total cases as of July 31, 2018	2,909
Number of cases disposed of up to July 31, 2018	546 (-)
Number of pending cases as of July 31, 2018	2,363

THE INTERVIEW OF THE JUDGE OF THE MAHILA COURT

The qualitative interview provided information on the nuances of the POCSO Act, barriers to effective implementation, risk factors, as well as recommendations for improvement. The following are responses from the interview regarding the salient features of the Act:

Salient features of the POCSO Act

- Generally, in criminal cases, the law presumes that the accused is innocent until proven guilty but under POCSO Act it is presumed that the accused is guilty until proven innocent.
- The Act is a model for dealing with sexual offenses against children in a way that victims are entitled to free legal aid apart, and the State is bound to provide free legal aid.
- Victims are also entitled to pretrial compensation. If the offenses fall under both IPC and POCSO Act, whichever has the highest punishment shall be imposed.
- Under Section 19(1) of the Act, if anyone with knowledge of the occurrence of the offense fails to report or to register the child sexual abuse case, he/she shall be punished. However, under Section 21(3), a child cannot be punished for not reporting the occurrence of the offense.
- According to Section 35(1) of the Act, the evidence of the child shall be recorded within 30 days, and the special court shall complete the trial within one year from the date of taking cognizance of the offense.

Role of the Mahila courts

When asked about the role of the Maila Court, the judge stated:

- Mahila Courts were constituted in 2002, and they deal with cases where the victim is a woman. Because there are no exclusive Children Courts to deal with sexual offenses against children in the State, Mahila Courts handle cases related to the POCSO Act. If the victim is younger than 18 years in a nonsexual offense case, it is dealt with like any other criminal case. However, if it is a sexual offense, it is tried under the POCSO Act.

- Mahila Courts have facilities including child-friendly rooms where the child victim will not see the accused in the trial process. The rationale is to help the child avoid the trauma of attending a courtroom scenario. The judge will talk to the child victim through a monitor rather than in person, and the judge will act as a mediator between advocates (i.e., attorneys) and the child [Section 36 (2)].

Barriers in the proceedings of the case

When asked about the barriers to implementation of the Act, the judge highlighting the lack of specialized children's courts and budgetary constraints. The following are the comments from the judge:

- Barriers at various phases of the proceedings can be ascribed to the lack of specific Children Courts in the state. As a result, cases registered under the POCSO Act are tried in the Mahila Court along with the cases involving crimes against women.
- Because Mahila Courts deal with cases of victimization of women, it is not possible to try most of the cases under the POCSO Act within the stipulated time as mandated by the Act.
- Health and protection of children remain the most under-resourced sectors. Funding allocation for child protection in 2015–2016 was 26.57%, while in 2016–2017, the funding was reduced to 14.39%. The decrease is alarming because of the increase in the number of crimes against children as well as a number of children coming into conflict with the law (i.e., involved in crime). Due to a decreasing budgetary allocation for the protection of children, various child-related schemes, including establishing specific children courts throughout the country, have been affected.

  Finally, when asked about the risk factors for child sexual victimization, the judge provided the following response:

- The risk factors for children becoming victims of child sexual abuse include the environment in which the child lives, a lack of parent-child interaction, a lack of awareness of sexual abuse, an unwillingness of schools and families to educate children about being aware of their surroundings, absence of a guardian with regard to orphans, and development of interest in sexual activity as a result of prior victimization.

CONCLUSION AND DISCUSSION

India is known for having the world's largest percentage of sexually abused children. Poverty, lack of basic education, nutrition, health care (International Institute of Population Sciences, 2015-2016), and lack of awareness of the problem are some of the contributing factors for child victimization. For example, over 40% of children drop out before they complete elementary level education, and about 11.8% engage in some form of child labor.

Although both boys and girls are victims of sexual abuse, the lack of adequate data undermines the severity of the problem. A compounding problem is the conservative nature of the Indian family structure and fear of community shaming prevent children from discussing abuse with family members. Also, traditional cultural and social practices such as child marriages (about 45% of marrying before the age 18 [CRY,2013]), and barring marriages when the female is

not a virgin (Beinart, 2011), and *Devadasi*[9] tradition, dissuade victims from coming forward (Mathew, 2017). According to the National Commission for Women, there are about 48,358 *Devadasis* engaged in commercial sex (Kidron, 2011). Girls are often recruited from a *Devadasi* network to work in brothels (Banandur et al., 2012; Kidron, 2011; Ramanaik et al., 2018).

To understand the nature and extent of child sexual abuse, the Ministry of Women and Child Development (2007) conducted a comprehensive study covering over 13 states and a sample size of 12,446 children between the ages of 5 and 18. The study found that over 50% of children in India were victims of sexual abuse. Most of the perpetrators were family members, relatives, or family friends. The results, along with the growing number of victims speaking out about their victimizations, led the Indian government to pass or amend several legislations (Beinart, 2011). The POCSO Act is one of the most comprehensive national laws aimed at addressing child sexual abuse in India. As mentioned by the judge of the Mahila Court, the legislation provides a clear definition of sexual offenses and lays out punishments. Also, the law acknowledges that boys can also be victims of sexual abuse.

There are areas where there is a lack of clarity—for example, girls as young as 15 can "enter into sexual relationships within marriage, and enter into sexual relationships without marriage after the age of 18 . . ." whereas for boys the age of consent within marriage is 21, and without marriage is 18 (Mathew, 2017, p. 279). Mathew recommended that the law should introduce "close-in-age" exceptions where consensual sexual acts between adolescents close in age should not be penalized (p. 281). However, she is skeptical about the introduction of this concept in legislation because Indian society considers discussion about sexuality a taboo subject.

Despite the POCSO Act, the incidences of child rapes have not declined. To counter the problem, the Criminal Law Amendment Ordinance, which enhanced punishments for child rape was passed in 2018. The Ordinance amends IPC, Criminal Procedure Code, Indian Evidence Act, and the POCSO Act. Under IPC section 376(3), the minimum punishment for the rape of a girl under 16 years is 20 years. If the age of the child victim is younger than 12, the perpetrator may receive a capital sentence. Likewise, the death penalty is prescribed for those who gang rape a girl under 12 years of age. Also, under the amendment to the POCSO Act and the Evidence Act, the character or previous sexual experience of the victim is not relevant in certain proceedings (Ashok, 2018).

Despite legislative reforms, the country is grappling with a large number of pending cases in special courts. In Tamil Nadu alone, some cases are taking more than three years when the law stipulates that the verdict must be rendered within one year. The backlog of cases is not unique to Tamil Nadu; the problem seems to be widespread. To further complicate the problem, the conviction rate is also a serious concern. It is time for the government to allocate sufficient resources to establish an appropriate number of special courts; train personnel; and increase awareness among the public, teachers, medical professionals, counselors, and juvenile justice personnel.

---

[9] Although the Devadasi practice was made illegal in 1988, some regions in India still follow the tradition. It involves dedication of young girls from the scheduled caste (lower caste), to a Goddess through a marriage ceremony. In the name of religion, the young girl provides sexual services to priests and upper caste men.

REFERENCE

- Ashok, K. M. (2018, April 22). Death for child rape: The Criminal Law Amendment Ordinance 2018 promulgated: Read the salient features. *liveLaw.in*. Retrieved December 2, 2018, from https://www.livelaw.in/death-child-rape-criminal-law-amendment-ordinance-2018-promulgated-read-salient-features-read-ordinance/
- Bajpai, A. (2006). Right to protection against sexual abuse and exploitation. In A. Bajpai (Ed.), *Child Rights in India: Law, Policy, and Practice* (pp. 208–278). Delhi, India: Oxford University Press.
- Banandur, P., Ramanaik, S., Manhart. L. E., Buzdugan, R., Mahapatra, B., Isac, S., . . . Blanchard, J. F. (2012.) Understanding out-migration among female sex workers in South India. *Sexually Transmitted Diseases, 39*, 776–783.
- Beinart, J.B. (2011). Beyond Trafficking and Sexual Exploitation: Protecting India's Children from Inter- and Intra-Familial Sexual Abuse. *Indiana International & Comparative Law Review, 21*(1), 47–78.
- Carson, D. K., Foster, J. M., & Tripathi, N. (2013). Child sexual abuse in India: Current issues and research. *Psychological Studies, 58*, 318–325.
- Centre for Child & the Law. (2016). *Report of study on the working of special courts under POCSO Act, 2012 in Delhi.* National Law School of India University. Retrieved August 20, 2018, from https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOCSOAct2012.pdf
- Centre for Child & the Law. (2017*). Study on the working of special courts under POCSO Act, 2012 in Andhra Pradesh.* National Law School of India University. Retrieved August 20, 2018, from https://www.nls.ac.in/ccl/POCSOAP2017study.pdf
- Choudhry, V., Dayal, R., Pillai, D., Kalokhe, A. S., Beier, K., & Patel, V. (2018). Child sexual abuse in India: A systematic review. *PLoS ONE, 13*(10), e0205086. doi:10.1371/journal.pone.0205086
- Conklin, K. (2000). *Child sexual abuse I. An overview of statistics, adverse effects, and prevention strategies*. Advocates for youth. Retrieved October 2018, from https://www.advocatesforyouth.org/wp-content/uploads/storage//advfy/documents/child-sexual-abuse-i.pdf
- CRY. (2016). *Media release: Crime against children in India.* Retrieved August 10, 2018, from https://timesofindia.indiatimes.com/india/every-15-minutes-a-child-is-subjected-to-sexual-offence-in-india-cry-report/articleshow/63818155.cms
- CRY. (2013). Status report of child rights in India. *CRY: The Child Rights and You.* Retrieved November 10, 2018, from https://www.cry.org/cry-resources/reports-publications/status-of-children-report-2013
- Deb, S., & Modak, S. (2010). Prevalence of violence against children in families in Tripura and its relationship with socio-economic factors*. Journal of Injury & Violence, 2*(1), 5–18.
- Dubbudu, R. (2018, April 24). More than 90% of cases registered under POCSO Act remain pending. *The Quint*. Retrieved November 20, 2018, from https://www.thequint.com/news/india/pendency-of-close-to-90-in-cases-registered-under-pocso

- Finkelhor, D. (1984). Child sexual abuse. Challenges facing child protection and mental health professionals. *Childhood and Trauma*. In E. Ullmann & W. Hilweg (Eds.), *Childhood trauma: Separation, abuse, war* (pp. 101–116*)*. Brookfield, VT: Ashgate.
- Finkelhor, D., & Baron, L. (1986). Risk factors for child sexual abuse. *Journal of Interpersonal Violence, 1*(1), 43–71.
- Human Rights Watch. (2013). *Breaking the silence: Child sexual abuse in India*. Retrieved January 2, 2018, from https://www.hrw.org/sites/default/files/reports/india0113ForUpload.pdf
- International Institute of Population Sciences (2015-2016). *India Fact Sheet, National Family Health Survey (NFHS-4).* Ministry of Health and Family Welfare, Government of India.
- Jha, P. (2017, September 26). What will it take to end child sexual abuse in India? *OpenDemocracy.Net*. Retrieved January 1, 2018, from https://www.opendemocracy.net/5050/prita-jha/ending-child-sexual-abuse-india
- Kidron, B. (2011, January 21). 'Devadasis are a cursed community.' *The Guardian*. Retrieved November 2018, from https://www.theguardian.com/lifeandstyle/2011/jan/21/devadasi-india-sex-work-religion
- Krishnakumar, P., Satheesan, K., Geeta, M. G., & Sureshkumar, K. (2014). Prevalence and spectrum of sexual abuse among adolescents in Kerala, South India*. Indian Journal of Pediatrics, 81*(8), 770–774.
- Krug, E. G., Mercy, J. A., Dahlberg, L. L., & Zwi, A. B. (2002). World report on violence and health. *Lancet, 360*(9339), 1083–1088.
- Martin, E. K., & Silverstone, P. H. (2013). How much child sexual abuse is "below the surface," and can we help adults identify it early? *Frontiers in Psychiatry, 4*(58), 1–10.
- Mathew, L. A. (2017). *Legislative models of prosecuting child sexual abuse in India: A review and critical analysis* (Doctoral dissertation). Brisbane, Queensland University of Technology,
- Ministry of Women & Child Development. (2007). *Study of child abuse in India*. Government of India. Retrieved August 10, 2018, from https://childlineindia.org.in/pdf/MWCD-Child-Abuse-Report.pdf
- Ministry of Law & Justice. (2012). *The Protection of Children from Sexual Offences Act 2012. Gazette of India*. Retrieved August 10, 2018, from http://arpan.org.in/wp-content/uploads/2014/07/POCSO-Act-English.pdf
- Moirangthem, S., Kumar, N. C., & Math, S. B. (2015). Child sexual abuse: Issues and concerns. *Indian Journal of Medical Research, 142*(1), 1–3.
- National Crime Records Bureau. (2016). *Crime in India 2016 statistics*. New Delhi, India: Ministry of Home Affairs, Government of India.
- _____. (2015). *Crime in India 2015 statistics*. New Delhi, India: Ministry of Home Affairs, Government of India.
- _____. (2014). *Crime in India 2014 statistics*. New Delhi, India: Ministry of Home Affairs, Government of India.
- _____. (2013). *Crime in India 2013 statistics*. New Delhi, India: Ministry of Home Affairs, Government of India.

- _____. (2012). *Crime in India 2012 statistics*. New Delhi, India: Ministry of Home Affairs, Government of India.
- _____. (2011). *Crime in India 2011 statistics*. New Delhi, India: Ministry of Home Affairs, Government of India.
- _____. (2010). *Crime in India 2010 statistics*. New Delhi, India: Ministry of Home Affairs, Government of India.
- _____. (2009). *Crime in India 2009 statistics*. New Delhi, India: Ministry of Home Affairs, Government of India.
- _____. (2008). *Crime in India 2008 statistics*. New Delhi, India: Ministry of Home Affairs, Government of India.
- _____. (2007). *Crime in India 2007 statistics*. New Delhi, India: Ministry of Home Affairs, Government of India.
- _____. (2006). *Crime in India 2006 statistics*. New Delhi, India: Ministry of Home Affairs, Government of India.
- Nautiyal, P., & Mal, A. (2010). Towards protection of children against sexual abuse: No child's play. *NUJS Law Review, 2,* 77–92
- National Commission for the Protection of Child Rights. (2016). User handbook on protection of children from sexual offences act, 2012. New Delhi, India, Government of India.
- Putnam, F. (2003). Ten-year research update review: Child sexual abuse. *Journal of the American Academy of Child & Adolescent Psychiatry, 42*(3), 269–278.
- Ramanaik, S., Collumbien, M., Prakasj, R., Howard-Merrill, L. Thalinja, R., Javalkar, P., . . . Battacharjee, P. (2018). Education, poverty and "purity" in the context of adolescent girls' secondary school retention and dropout: A qualitative study in Karnataka, southern India, *PLoS One, 13*(9), doi: 10.1371/journal.pone.0202470
- Ronan, K. R., Canoy, D. F., & Burke, K. J. (2009). Child maltreatment: Prevalence, risk, solutions, obstacles. *Australian Psychologist, 44*(3), 195–213.
- Rukmini, S. (2016, March 29). Sharp rise in crimes against children. *The Hindu.* Retrieved August 12, 2018, from https://www.thehindu.com/data/sharp-rise-in-crimes-against-children-reveals-ncrb/article7558364.ece
- Sivaraman, R. (2018, May 19). When the law fails children: On POCSO Act in Tamil Nadu. *The Hindu*. Retrieved November 10, 2018, from https://www.thehindu.com/news/national/tamil-nadu/when-the-law-fails-children/article23939123.ece
- Singh, K. P. (2015, July 22). Cops shocked as Delhi serial rapist reveals he killed. *Hindustan Times.* Retrieved August 10, 2018, from https://www.hindustantimes.com/delhi-news/cops-shocked-as-delhi-serial-rapist-reveals-he-killed-38-kids/story-chpScFrXlnhImcPRJ9ydBI.html
- *The Times of India*. (2018, April 19). Every 15 minutes, a child is subjected to sexual offence in India: CRY report. Retrieved August 12, 2018, from https://timesofindia.indiatimes.com/india/every-15-minutes-a-child-is-subjected-to-sexual-offence-in-india-cry-report/articleshow/63818155.cms

- The Indian Penal Code, 1860. Act No. 45 of 1860. Retrieved August 12, 2018, from http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814358.pdf
- United Nations Treaty Collection. (n. d). *Convention on the Rights of the Child*, 1989. Retrieved November 15, 2018, from https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 205-224
ISSN 1512-5505

THE PHENOMENOLOGY OF REGISTERED ENVIRONMENTAL CRIME IN BOSNIA AND HERZEGOVINA

Sandra KOBAJICA

Abstract

Environmental crimes and their harms go largely neglected in present-day Bosnia and Herzegovina [BIH]. Efficient and effective environmental protection is hindered by limited (empirical) knowledge as to the phenomenology and aetiology of these crimes, and the lack of formal reaction mechanisms. This study examines the phenomena of environmental crime in BIH based on the legalistic perspective in green criminology. Therefore, the main objectives of this study are to determine the forms, extent and distribution of registered environmental crime in BIH. The data originates from the Agency for Statistics at the state level, as well as from Entities' offices of statistics. The study findings indicate that environmental crime does exist in BIH. The most frequently registered forms are illegal logging, following by illegal hunting and fishing, and the torture and killing of animals. It is widely assumed that a considerable number of criminal offenses against the environment go unreported, and thus official statistics give only a partial insight into such phenomena. The creation and implementation of criminal justice policies is crucial for any successful response to environmental threats, with any such policies needing to take into consideration such findings.

Key words

Environmental crime, green criminology, phenomenology, Bosnia and Herzegovina

INTRODUCTION

Bosnia and Herzegovina [BIH] is an independent, sovereign and democratic country situated in the western part of the Balkan Peninsula. With a surface area of 51,209 km2, it is characterized by exceptional natural, landscape and architectural diversity (Ministry of Foreign Trade and Economic Relations of BIH, 2008). Forest and freshwater ecosystems, as well as agricultural land, play a dominant role in the landscape and resource pattern. Out of the total territory of BIH, 63% is covered by forests and other wooded land; one of the highest proportions in Europe (Nemeth, 2015). About 20% of the land is arable, and 2% is permanently utilized for crops (United Nations Economic Commission for Europe, 2011). BIH is rich in wa-

ter resources, with a dense river network in the Sava River Basin, and with a less developed network of surface waters in the Adriatic Basin, with significant karstic ground watercourses (Ministry of Foreign Trade and Economic Relations of BIH, 2012). Natural resources also include deposits of minerals such as salt, manganese, silver, lead, copper, iron ore, bauxite and coal. The richness of the living world, with a high degree of endemic and relict forms, is a result of the spatial ecological heterogeneity, geomorphological and hydrological diversity, specific geological history, and climate diversity (Ministry of Foreign Trade and Economic Relations of BIH, 2012).

Being the center of heavy industry, and the resource and energy base of the former Yugoslavia, BIH was exposed to serious pollution of its basic natural resources in the pre-war period. During the 1992-1995 war, BIH faced a sharp decline in economic activity across all sectors, and the country emerged with its infrastructure and industry in ruins, and a devastated economy. As a consequence of the war, vast areas of land were left covered with landmines; significant quantities of different types of waste were left behind as well as thousands of hectares of cut or destroyed forests (Ministry of Foreign Trade and Economic Relations of BIH, 2012). In the period of post-war rehabilitation and reconstruction, BIH was faced with acute social, economic and environmental challenges. Even though the country experienced strong economic growth and reconstruction due to significant sums of international aid, it is still struggling in some aspects such as privatization, managing the transition process, implementing structural reforms, creation of a functioning legal system, and high unemployment[1] (Matsson, 2015). Today, BIH's economy is based on natural resources and, as such, it has often proven to be environmentally unsustainable. Pollution of water, air and land, deforestation and unsustainable mining are just some of the negative results of such an economy and use of unclean technologies (Ministry of Foreign Trade and Economic Relations of BIH, 2012).

Yet, understanding and addressing environmental criminality in a contemporary BIH struggling with the aforementioned challenges and the introduction of European standards necessary for the European Union [EU] accession process is undoubtedly challenging task. No comprehensive (reliable and evidence-based) review of environmental crimes and their harms exists for BIH. This is primarily due to the fact that criminological thought, even for the analysis of conventional crimes, is an extremely new subject in BIH, and therefore it should be made clear in advance that the field of environmental protection and crime has not yet been sufficiently studied, when compared to other developed countries in Europe and beyond (Petrović & Muratbegović, 2008). Environmental management has not been a priority in the economic recovery process in BIH, and the country suffers from suboptimal institutional, policy and legal frameworks. Consequently, policies, plans and programmes fail to consider environmental impacts (United Nations Economic Commission for Europe, 2011). According to official crime statistics, the country does not face a large-scale problem of environmental crime. However, numerous environmental issues associated with systematic corruption have been identified in official state reports as internal challenges that pose a

[1] The unemployment rate in 2016 was one of the highest in the region (25.4%), while the youth unemployment rate was one of the highest in the world (54.3%) (Agency for Statistics of BIH, 2017). For comparison, the share of young people in the EU28 in 2016 who were neither in employment nor in education or training, expressed in relation to the population of the same age, stood at 15.2% (Eurostat, 2017, p. 84).

serious threat to the social, political, security and many other forms of stability of the country (Ministry of Security of BIH, 2016).

In order to improve upon the limited empirical understanding of environmental crime in BIH, this study examines the phenomenology of registered environmental crime through the lens of the legalistic perspective in green criminology. Therefore, the main aims of the study are to determine the forms, volume and distribution of registered environmental crime in BIH, including efficiency and effectiveness of formal reaction mechanisms. Criminal justice responses that are based on research findings are crucial for any successful responses to environmental threats, and evidence-based proposals for solutions normally receive greater public attention and approval, especially in the field of environmental protection (Cohen, 1998, as cited in Eman, Meško, Dobovšek, & Sotlar, 2013). This study hypothesizes that environmental crime in BIH is heterogeneous type of crime. Furthermore, it seeks to answer the following research questions: (1) To what extent does environmental crime occur in total number of registered crimes in BIH; (2) What are the general trends and dynamics in relation to registered environmental crimes in BIH; and (3) Which types of crime dominate the structure of registered environmental crime in BIH? The questions are tested using the method of secondary data analysis concerning criminal offenses against the environment.

RESEARCH ON ENVIRONMENTAL CRIME IN BOSNIA AND HERZEGOVINA

Given the gap in green/environmental criminological literature in BIH, little is known about the nature and extent of environmental crime in general, and, in particular, knowledge concerning those crimes is lacking at different levels of governance within the country. A variety of factors contribute to this. Environmental crime has not been considered a scientific research priority over the years in BIH. Even though scientific results are considered the most reliable way of planning high-quality criminal policy, only a few empirical studies on environmental crime have been conducted. Discussion within scientific papers is still – to a large extent – limited to ecological-legal regulation and environmental security in a largely fragmentary and overly theoretical manner. On the other hand, enthusiastic, albeit limited, efforts are evident in the research of criminological, criminal, legal, victimological, sociological and other aspects of environmental protection in the final papers of individual undergraduate and postgraduate students throughout BIH.

The results of theoretical research on environmental criminality and environmental issues suggest that environmental crime in BIH has become increasingly present in the post-war period. Pressures that have had an impact on the environment in the country include the rapid development of technologies, especially the use of powerful new energy sources and new industrial plants (Muratbegović & Guso, 2011). According to recent pollutant statistics from the World Health Organization (2017), BIH is the worst-placed country in Europe. In 2014, BIH was the country with the highest concentration of airborne harmful particulate matter, with 55.1 micro grams per m^3, followed by Macedonia with 42.7, Bulgaria with 30.3 and Poland with 25.4 (World Health Organization, 2017). According to data from 2012, BIH is, alongside Bulgaria, Albania and Armenia, classified as one of the countries with the highest mortality rate attributed to home and air pollution (World Health Organization, 2017). A 2015 report by the European Environment Agency [EEA] estimated that over 44,000 years of life are lost in BIH each year due to particulate matter, nitrogen dioxide or ozone pollution (European Environment Agency, 2015). Air pollution generally arises from industrial activities and the transport sector, and mostly affect major urban centers (i.e.

Sarajevo, Zenica and Tuzla). According to a comprehensive environmental crime study of South Eastern Europe in the period from 2009 to 2012[2], BIH faces water and air pollution (i.e. industrial plant emissions, along with increased volumes of ash and soot from thermal power plants), deforestation and timber trafficking; and animal torture and trafficking (e.g. violent behaviour towards animals in the form of poaching and hunting endangered species for meat, trophies or trafficking) (Eman et al., 2013). The World Wildlife Fund [WWF] claims that BIH, together with other Eastern European countries, represents a major source for illegal or suspicious wood entering the EU market. According to the WWF, the amount of illegally harvested wood in BIH has been estimated to be 1.2 million m3 (Hirschberger, 2008)[3]. Soil degradation is increasing, and land use changes and loss of agricultural land have resulted from sudden urbanization, industrialization, and changes to commercial development (Ministry of Foreign Trade and Economic Relations of BIH, 2012). Nevertheless, the most worrying factor is the continued growth of industrial capacity as more coal and natural mineral mines are opening, and construction of hydro-accumulation lakes is being undertaken. While there have been attempts to regulate these industries, new categories of crime have emerged from the flouting of these environmental rules (e.g. hazardous waste and the involvement of organized crime) (Eman et al., 2013). Since 2003, the quantities of municipal waste generated have been constantly increasing. Due to a lack of adequate treatment and disposal facilities, non-hazardous and hazardous waste from production activities, as well as medical waste, often ends up at existing municipal waste disposal sites, which represent the main sources of eco-toxic substances (Ministry of Foreign Trade and Economic Relations of BIH, 2012). In a survey of the most important environmental concerns facing the Balkans for the period 2009-2011, polluted watercourses, poor waste management and air pollution have been identified as primary causes for concern with regard to BIH (Mihajlov, 2010). According to results of the Aarhus Centre in BIH's (2014) survey of 465 randomly selected participants from Sarajevo Canton, waste (57% of respondents), air pollution (37% of respondents) and water pollution (20% of respondents) are identified as the three most important environmental issues. Citizens are generally dissatisfied with the state of the environment overall, as well as the micro community in which they live, be it their neighborhood, municipality or the City of Sarajevo overall. In addition, citizens point to systemic failures as one of the key causes for the poor state of the environment, but also recognize their own lack of awareness and irresponsibility at individual level, as contributors to this state (Aarhus Centre in BIH, 2014). Completely contrary to the perception of citizens, an analysis of court decisions in the field of criminal justice in 2012 (Delalić, Pilipović, & Petrović, 2012) has shown that prosecutors' offices in BIH dominantly prosecute only one type of criminal offence - forest theft[4]. The fact that only one criminal offence against the environment in BIH accounts for more than 96% of the confirmed indictments suggests that other criminal offenses are either not reported or that the relevant prosecutors' offices treat other criminal offenses against

---

2 For more information, see Eman et al. (2013) and Meško, Dimitrijević & Fields (2011).

3 Official national data suggests much lower figures. For instance, the Ministry of Agriculture, Water Management and Forestry of the Federation of BIH reported that only 38,603 m3 of timber was illegally harvested in 2012, with a total value of BAM 1,902.347 (Ministry of Agriculture, Water Management and Forestry of the Federation of BIH, 2013).

4 An analysis of the criminal protection of the environment in BIH was carried out on the basis of data submitted by ten cantonal and five district prosecutors' offices and the Brčko District Prosecutor's Office of BIH related to criminal offenses against the environment during 2012 (Delalić et al., 2012).

the environment in BIH inconsistently (Delalić et al., 2012). The previous period bore the same pattern; more precisely, in the total amount of completed cases before the judicial authorities in BIH, in the preceding five-year period (2007-2011), courts resolved 3,646 criminal cases in the field of environment protection, of which 97%, that is, 3,570 cases, related to criminal offenses of forest theft (Council of Ministers of BIH, 2012). When it comes to misdemeanor protection, there is a large disparity in the representation of certain laws in BIH, and a vast majority of cases referred to offenses under provisions of the Law on Waters of the Federation of BIH (Delalić et al., 2012). The Environmental Performance Index [EPI] of Yale University ranks countries according to how close they are to established environmental policy goals. The 2018 EPI ranks BIH 158th out of 180 countries, with a score of 41.84 in overall environmental performance. This performance placed it far behind other countries in the region; Slovenia (34th place) Albania (40th place), Croatia (41st place), Macedonia (65th place) and Serbia (84th place) (Wendling, Emerson, Esty, Levy, & de Sherbinin, 2018). The country has poor results in most categories: biodiversity and habitat protection, climate protection, air pollution and agriculture, and received zero scores for water resources and wastewater treatment. According to the International Monetary Fund (2015), BIH may be growing after decades of hardship. Attention to environmental policymaking and enforcement could boost the country's performance in future years (Wendling et al., 2018).

THE PRESENT STUDY

Although the definition of environmental crime is not universally agreed, it is most commonly understood as a collective term to describe illegal activities harming the environment and aimed at benefiting individuals or groups or companies via the exploitation of, damage to, trade in, or theft of natural resources, including, but not limited to serious crimes and transnational organized crime (Nellemann, et al., 2016). It is clear, as Eman (2012, p. 34) stated, that a violator could be anyone or every one of us (corporations, companies, groups, individuals, state, etc.). At the same time, anyone or anything harmed by environmental disruptions may be seen as a victim (individuals, communities, non-human species, the environment, both local and global, and future generations) (Skinnider, 2011, p. 23). In this study, following its aims and scope, the legal analytical approach to the study of environmental crime has been applied. The legalist perspective defines environmental crime as violations of criminal laws designed to protect the health and safety of people, the environment, or both (Clifford & Edwards, 1998). Thus, Situ and Emmons (2000, p. 3) define an environmental crime as "an unauthorized act or omission that violates the law and is therefore subject to criminal prosecution and criminal sanctions." In that manner, a catalogue of offenses against the environment, which have been stipulated in BIH Criminal Codes, are considered within the scope of environmental crime. Analysis focuses specifically on individuals who are reported and prosecuted before the judicial authorities in BIH for such offenses.

BIH is politically decentralized, and is comprised of two entities; the Federation of BIH and Republika Srpska, which have shared sovereignty over the Brčko District of BIH. Each level of government has its own legislative, executive, administrative and judicial institutions. Environmental protection in BIH has been governed at entity and Brčko District of BIH levels, with a wide range of legislative and regulatory acts (of varied legal force and authority) that regulate diverse issues pertaining to environment protection as a whole, or some of its specific elements (i.e. soil, water, air, animals, plants), as well as their interactions. The most serious

criminal wrongdoings of natural persons, subject to the most stringent criminal sanctions, are environmental criminal offenses. As such, they are stipulated in a separate chapter of criminal codes of the Federation of BIH, Republika Srpska and Brčko District of BIH, as follows:

- Criminal Code of the Federation of BIH (2017)[5], Chapter 26 - Criminal offenses against Environment, Agriculture and Natural Resources (articles 303 – 322);
- Criminal Code of the Republika Srpska (2017)[6], Chapter 29 - Criminal offenses against the Environment (articles 370 – 393);
- Criminal Code of the Brčko District of BIH (2018)[7], Chapter 26 - Criminal offenses against Environment, Agriculture and Natural Resources (articles 297 – 316).

Criminal Codes of Federation of BIH (2017) and Brčko District of BIH (2018) prescribe almost identical environmental criminal offenses, but these differ somewhat from the Criminal Code of Republika Srpska (2017) (in terms of their names, length of sentences, a qualified form of a criminal offence, etc.). The Criminal Code of the Federation of BIH (2017) and Brčko District of BIH (2018) cover 20 criminal offenses against the environment, agriculture and natural resources.[8] The Criminal Code of Republika Srpska (2017) contains 23 offenses against the environment[9]. In order to achieve effective protection of the environment in accordance with the

---

5 Criminal Code of Federation of BIH: Official Gazette of Federation of BIH, Nos. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16, and 75/17.

6 Criminal Code of Republika Srpska: Official Gazette of Republika Srpska, No. 64/17.

7 Criminal Code of Brčko District of BIH: Official Gazette of Brčko District of BIH, Nos. 10/03, 45/04, 06/05, 21/10, 52/11, 33/13, 26/16, 13/17, and 50/18.

8 Article 303 - Pollution of the environment, Article 304 - Endangering the environment with installations, Article 305 - Endangering the environment with waste materials, Article 306 - Endangering the environment by noise, Article 307 - Production of harmful preparations for the treatment of animals, Article 308 - Veterinary malpractice, Article 309 - Unauthorized rendering of veterinary services, Article 310 - Failure to comply with regulations for suppressing animal and plant diseases, Article 311 - Concealing the existence of a contagious animal disease, Article 312 - Contaminating fodder or water used by livestock, Article 312 - Destruction of plantations, Article 314 - Careless actions in circulation of pesticides, Article 215 - Devastation of forests, Article 316 - Forest theft, Article 317 - Causing forest fire, Article 318 - Torturing and killing animals, Article 319 - Illegal hunting, Article 320 - Illegal fishing, Article 321 - Damage, destruction and illicit export of cultural monuments and protected natural objects, Article 322 - Illicit research and appropriation of cultural monuments.

9 Article 370 - Pollution of the environment, Article 371 - Pollution by waste, Article 372 - Endangering the environment by noise or ionizing radiation, Article 373 - Illegal construction and putting facilities and plants into operation, Article 374 - Damaging facilities and devices for protection of the environment, Article 375 - Damage and destruction of protected natural goods, Article 376 - Destruction of habitats, Article 377 - Production of harmful preparations for the treatment of animals, Article 378 - Contaminating food and water used by animals, Article 379 - Unauthorized export and import of specially protected plant or animal species or genetically modified organisms, Article 380 - Endangering the ozone layer, Article 381 - Failure to comply with regulations for suppressing animal and plant diseases, Article 382 - Careless actions in circulation of pesticides, Article 383 - Veterinary malpractice, Article 384 - Unauthorized rendering of veterinary services, Article 385 - Destruction of plantations, Article 386 - Failure to implement a decision on environment protection measures, Article 387 - Importing dangerous substances into the Republika Srpska, Article 388 - Devastation of forests, Article 389 - Causing forest fire, Article 390 - Torturing and killing animals, Article 391 - Illegal

EU Directive on the Protection of the Environment through Criminal Law (2008), it stipulates several offenses against the environment that are not incorporated into the Criminal Code of Federation BIH (2017) and Brčko District of BIH (2018). These are:

- Endangering the environment by noise or ionizing radiation (Article 372)
- Destruction of habitats (Article 376)
- Unauthorized export and import of specially protected plant or animal species or genetically modified organisms (Article 379) and
- Endangering the ozone layer (Article 380).

The EU Directive on the Protection of the Environment through Criminal Law (2008) has not been transposed into environmental laws of the Federation of BIH nor Brčko District of BIH. Activities on these issues at the cantonal level in the Federation of BIH are mainly related to federal legislation (Council of Ministers of BIH, 2012).

The criminal codes do not, however, provide a definition environmental criminal offenses or environmental crimes, and neither does any other law. According to the legal literature, the offenses against the environment in above-mentioned chapters are so called real environmental criminal offenses (i.e. environmental offenses in a narrow sense). The object of protection of these offenses is the environment as a whole, or some of its integral elements which are found in the lithosphere, pedosphere, hydrosphere, biosphere and technosphere (Jovašević, 2011). Most of these provisions have their origins outside of criminal law, in other regulations in the field of environmental protection (Meško, Bančić, Eman, & Fields, 2011). Furthermore, most of them are designed as abstract endangerment criminal offenses[10,] while negligent behavior is regularly punishable, and an attempt to commit such behavior is also often punishable.

Methodology

Official crime statistics have been employed in order to obtain indicators on reported, accused and convicted juvenile and adult offenders of environmental criminal offenses alike – which are an important tool for the study of the phenomenology of environmental criminality and decisions of formal social control institutions. The study is based on the justice statistics provided by the Agency for Statistics of BIH for the period 2011-2017, the Federal Office of Statistics for the period 2008-2017, and the Republika Srpska Institute of Statistics for the period 2011-2017. In terms of the study, a 'crime' ranges from the filing of a report for criminal offence to a final decision of the proceedings by the competent judicial authority. The reported adult is a perpetrator of a criminal offence for whom procedure was concluded by one of the following decisions: order issued or decision passed not to conduct investigation, investigation interrupted or terminated, or indictment filed. The reported juvenile is a perpetrator of a criminal offence for whom a procedure was completed by means of a decision not to initiate the procedure, to terminate the preparatory

usurpation and exploitation of natural resources and goods of general interest; Article 392 - Illegal hunting, Article 393 - Illegal fishing.

10 Conviction of an offence of abstract endangerment does not require proof that 'an individual … was actually endangered …, and the offender cannot escape conviction by arguing that in the specific situation he or she in fact endangered no one'(Dubber & Hörnle, 2014, p. 591, as cited in Duff & Marshall, 2015).

procedure or to submit a proposal to impose criminal sanctions. An accused adult is defined as a person against whom an indictment was filed to a court, and against whom a procedure was legally ended by a decision of the court, either by termination of the procedure, dismissal or rejection of the charge(s), acquittal of the person of the said charge(s) or pronunciation of the person as guilty. An accused juvenile is a person for whom a decision was made to terminate the procedure or to impose criminal sanction. A convicted adult is a person who was found guilty of a criminal offence and upon whom one of the criminal sanctions was imposed, or a person who was found guilty and released from punishment. A convicted juvenile is a person against whom a criminal sanction was imposed. Data is presented in both absolute and relative numbers.

Limitations

The primary study limitations are related to the use of (and reliance upon) official data. Environmental crimes are largely hidden crimes. It can be assumed that the number of crimes reported does not equal the actual number of occurred environmental crimes. As a result, the validity of official crime statistics may be significantly reduced (Sahramakia, Korsellb, & Terhi, 2015). Most information on crime in BIH is dealt with by the police, the Ministries of Interior and the Ministries of Justice. Yet, the availability of official crime data is limited at both the national level and the level of the Entities and Brčko District of BIH. Such data that is available is fragmented and of a general nature (United Nations Office on Drugs and Crime, 2010). That is particularly evident for data on (convicted) juvenile offenders. Due to the limited and slow data-sharing process, the author only gained aggregated data on persons reported, accused and convicted of environmental criminal offenses for Brčko District of BIH for the period 2011-2017, while data separated according to particular offenses was unavailable. Annual data from the Agency for Statistics of BIH is available from 2011, when for the first time the Republika Srpska Institute of Statistics began to publish statistics on crime, which have since been published regularly on an annual basis. It is important to state that data from Republika Srpska Institute of Statistics for the period 2011-2016 was submitted in accordance with legal provisions from the earlier Criminal Code of Republika Srpska (2013)[11].

Environmental crime is typically defined on a continuum ranging from strict legal definitions through to broader harm perspectives (White, 2015). The use of strict legal as well as socio-le-

[11] Criminal Code of Republika Srpska: Official Gazette of Republika Srpska, Nos. 49/03, 108/04, 37/06, 70/06, 73/10, 1/12, and 37/13. Chapter 33 - Criminal offenses against the Environment stipulated offenses as follows: Pollution of the environment (Article 415), Pollution by waste (Article 416), Endangering the environment by noise (Article 417), Illegal construction and putting facilities and plants into operation (Article 418), Damaging facilities and devices for protection of the environment (Article 419), Damage and destruction of protected natural goods (Article 420), Production of harmful preparations for the treatment of animals (Article 421), Contaminating food and water used by animals (Article 422), Failure to comply with regulations for suppressing animal and plant diseases (Article 423), Careless actions in circulation of pesticides (Article 424), Veterinary malpractice (Article 425), Unauthorized rendering of veterinary services (Article 426), Destruction of plantations (Article 427), Failure to implement a decision on environment protection measures (Article 428), Importing dangerous substances into the Republika Srpska (Article 429), Forest theft (Article 430), Devastation of forests (Article 431), Causing forest fire (Article 432), Torturing and killing animals (Article 433), Unauthorized export of specially protected plant or animal species (Article 434), Usurpation of real property (Article 435); Illegal hunting (Article 436), Illegal fishing (Article 437).

galist definitions of environmental crime and related interventions has been criticised for failing to recognise the impact of power on environmental law (Gibbs & Boratto, 2017). Critical green criminologists tend to use more expansive definitions of environmental crime or harm than strictly legal definitions, in a large part due to the fact that many environment-related harms are facilitated by the state, as well as corporations and other powerful actors. These institutions have the capacity to shape official definitions of environmental crime in ways that allow or condone environmentally harmful practices (White, 2011). In response, green criminology provides an umbrella under which to theorise and critique both illegal environmental harms (that is, environmental harms currently defined as unlawful and therefore punishable) and legal environmental harms (that is, environmental harms currently condoned as lawful, but which are nevertheless socially and ecologically harmful) (White, 2015).

RESULTS

In order to examine the extent to which environmental crime occurs among the total number of registered crimes in BIH, data provided by the Agency for Statistics of BIH for the period 2011-2017 was used.

The Agency for Statistics of BIH aggregates data on persons who committed a crime by obtaining statistical crime surveys from the statistical offices of the Entities and Brčko District of BIH. Each statistical survey covers reported, accused and convicted persons by groups of criminal offenses (i.e. classified by the protected assets/values). Out of a total of 15 groups of criminal offenses, Table 1 summarizes data for the five most commonly represented in the total number of registered crimes in BIH. A total of 188,490 criminal offenders were reported, 98,208 accused, and 87,288 convicted in the period 2011-2017 in BIH for all criminal offenses. Criminal offenses against property were the most represented. Figures show that property crime accounted for 44% of crimes reported, while for both accused and convicted this percentage stood at 39%. The section other criminal offenses includes 10 groups of criminal offenses as follows: against official duty, against traffic safety, against human health, against civil rights and freedoms, against the economy and payment transactions, against general safety of people and property, against the administration of justice, against sexual integrity, against labour relations and social security rights and against security of computer data. These groups of criminal offenses account for 5% and less of the total number of reported, accused or convicted offenders for all criminal offenses in the seven-year period. Environmental criminal offenders accounted for 9% of the total number of those reported, 9% for accused and 8% for convicted offenders. Environmental criminal offenses are thus the third most-reported criminal offenses, or the fourth when it comes to charges and convictions. In addition, an average of 2,404 offenders were reported for criminal offenses against the environment in BIH, while an average of 1,205 offenders were accused per year. Furthermore, an average of 1,068 offenders were convicted annually. The ratio between the number of reports and the number of indictments is almost two-to-one, while 89% of filed indictments ended with successful convictions.

Table 1. Structure of registered crime in BIH for the period 2011 – 2017

Group of criminal offenses against	Offenders (reported)		Handled by the prosecuting authorities		Convicted persons	
	f	%	f	%	f	%
Property	78,668	41	36,621	39	33,903	39
Public order	18,718	10	12,846	13	12,015	14
Environment	16,830	9	8,438	9	7,478	9
Life and body	13,782	7	9,311	10	8,409	10
Traffic safety	8,228	4	6,642	7	6,435	7
Other criminal offenses (10)	46,268	25	20,522	22	19,048	22
Total	182,494	100	94,380	100	87,288	100

Source: Authors' calculation based on data in statistical bulletins of the Agency for Statistics of BIH

In order to discover trends in environmental crime in BIH, data made available in the statistical bulletins of Entities' offices for statistics, as well as of the Agency for Statistics of BIH were used. Figure 1 presents reported, prosecuted and convicted environmental offenders' rates per 100,000 population in the Federation of BIH for the period 2008-2017. These rates slightly decreased during the first three years of their statistical coverage in the Federation of BIH. Between 2010 and 2014, the rate of recorded offenders steadily increased. Between 2014 and 2017, however, it underwent an apparent decrease, from 82 to 42 recorded offenders per 100,000 population. Prosecution and conviction rates were fairly consistent in the period 2010-2015, reaching a peak in 2015, before dropping significantly in 2016 and 2017 (from 49 to 34 prosecuted offenders, and from 46 to 31 convicted offenders per 100,000 population). The overall trend decreased slightly for reported offenders, while it increased slightly for prosecuted and convicted offenders over the last ten years, as shown in Figure 1. In addition, the average number of reported offenders in the Federation of BIH was 63 per 100,000 population annually, with an average decrease of 1.9%. An average of 41 offenders were accused annually, with an average annual decrease of 1.9%. Moreover, the average number of convicted offenders annually was 37 per 100,000 population, with an average annual growth of 1.5%. It can be interpreted from this that almost two-thirds of reports per 100,000 population ended with successful indictments, while 90% of filed charges culminated in a conviction.

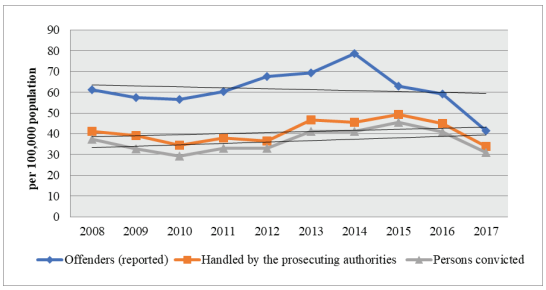


Figure 1. Trends in registered environmental crime in Federation of BIH for the period 2008 – 2017

Source: Authors' graph based on data in statistical bulletins of the Federal Office of Statistics

Figure 2 presents environmental crime rates for reported, prosecuted and convicted offenders per 100,000 population in the Republika Srpska for the period 2011-2017. From 2011, the rate of reported offenders steadily increased, reaching a peak in 2015 (from 64 to 120 offenders per 100,000 population). In 2016 and 2017, this rate almost halved (from 120 to 58 offenders per 100,000 population). Prosecution and conviction rates did not vary considerably between 2011 and 2013, but declined slightly from 2013 to 2017. In addition, the average number of reported offenders in the Republika Srpska was 81 per 100,000 population annually, with an average growth of 5.5%. An average of 22 offenders were accused annually, with an average decrease of 10.7%. Moreover, the average number of convicted offenders was 18 per 100,000 population annually, with an average decrease of 11.1%. This may be indication that slightly more than a quarter of reports for environmental criminal offenses per 100,000 population ended with successful indictments, while 82% of filed indictments ended with a conviction.

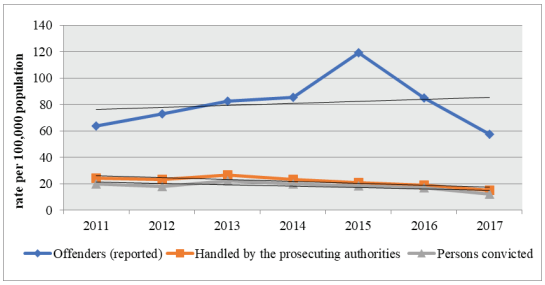


Figure 2. Trends in registered environmental crime in Republika Srpska for the period 2011 – 2017
Source: Authors' graph based on data in statistical bulletins of the Republika Srpska Institute for Statistics

The number of reported, accused and convicted offenders for environmental criminal offenses in Brčko District of BIH varies considerably in the period from 2011 to 2014, as shown in Figure 3. These numbers more-or-less doubled in 2012 compared to 2011, but from 2012 to 2014 decreased by almost two-thirds. Between 2014 and 2017, the number of reported, accused and convicted offenders was fairly consistent.

Additionally, in the period from 2011 to 2017, an average of 64 offenders were reported (an average annual growth of 2.6%), 19 accused (an average annual growth of 19.5%) and 16 convicted (an average annual growth of 15.9%) per year. This data may indicate that slightly more than one-third of reports for environmental criminal offenses successfully ended with filed indictments, while 87 % of indictments ended in a conviction.

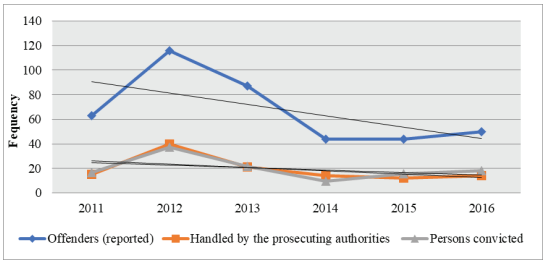


Figure 3. Trends in registered environmental crime in Brcko District of BIH for the period 2011 – 2016
Source: Authors' graph based on data in statistical bulletins of the Agency for Statistics of BIH

In the structure of registered criminal offenses against environment, agriculture and natural resources in the Federation of BIH for the period 2011-2016, the most frequent type of crime is forest theft. It accounts for 97% of all reported, 98% of all accused, and 97% of all convicted offenders (Table 2). Illegal hunting, torture and killing of animals, devastation of forests, causing forest fire and illegal fishing, are the five groups of environmental criminal offenses that, alongside forest theft, are most prominent, and form the most-often reported and prosecuted forms of environmental crime in the Federation of BIH. The category of other criminal offenses includes 14 environmental criminal offenses according to the Criminal Code of Federation of BIH (2017) that together account for less than 1% of the total number of reported, accused or convicted offenders in the six-year period. It is important to state that four of these had no single instance registered[12].

Table 2. Structure of registered environmental crime in Federation of BIH for the period 2011 – 2016

Article	Offenders (reported)	Handled by the prosecuting authorities	Convicted persons
	f	f	f
Forest theft (316)	8,536	6,844	5,576
Illegal hunting (319)	95	37	36
Torture and killing of animals (318)	78	48	36
Devastation of forests (315)	40	18	20
Illegal fishing (320)	15	7	32
Other criminal offenses (15)	61	20	31
Total	8,825	6,974	5,731

Source: Authors' table based on data provided by the Federal Office of Statistics

Among the registered criminal offenses against the environment in the Republika Srpska for the period 2011-2016, forest theft accounted for the largest share, followed by illegal hunting, torture and killing of animals, causing forest fire, devastation of forests and illegal fishing (Table

[12] Careless actions in circulation of pesticides, Production of harmful preparations for the treatment of animals, Unauthorized rendering of veterinary services and Concealing the existence of a contagious animal disease.

3). Forest theft accounts for 94% of all reported, 93% of all accused, and 92% of all convicted offenders. The category of other criminal offenses includes 17 environmental criminal offenses according to the Criminal Code of Republika Srpska (2013) that together account for less than 1% of the total number of reported, accused or convicted offenders in the six-year period. It is important to state that seven of these[13] did not have a single instance registered.

Table 3. Structure of registered environmental crime in Republika Srpska for the period 2011 – 2016

Article	Offenders (reported)	Handled by the prosecuting authorities	Convicted persons
	f	f	f
Forest theft (430)	5,549	1,841	1,477
Illegal hunting (437)	177	71	68
Torture and killing of animals (433)	58	16	8
Devastation of forests (431)	45	14	12
Illegal fishing (437)	37	24	19
Other criminal offenses (18)	68	10	15
Total	5,934	1,976	1,599

Source: Authors' table based on data provided by the Republika Srpska Institute of Statistics

DISCUSSION

The review of the aggregated data of the Agency for Statistics of BIH in the period 2011 to 2017 showed that environmental crimes comprise less than one-tenth of all registered, accused and convicted criminal offenses in BIH. Nevertheless, they compose the third most-commonly reported criminal offenses, or fourth when it comes to accusations and convictions. The ratio between the number of reports and the number of indictments is almost two-to-one, while 89% of indictments ended successfully with criminal convictions.

The overall environmental crime trend showed a slight decline in terms of reported offenders, while a slight increase in the rate of prosecuted and convicted offenders was evident over the last ten years in the Federation of BIH. A different situation can be interpreted in the Republika Srpska, where the overall environmental crime trend showed a slight increase for reported offenders and a clear decrease in prosecutions and convictions for the last seven years. In Brčko District of BIH, there is an evident trend of decrease across reports, prosecutions and convictions for environmental criminal offenses in the period 2011-2017. Almost two-thirds of reports for environmental criminal offenses per 100,000 population in the Federation of BIH, and slightly more than a quarter in Republika Srpska, ended successfully with indictments. Additionally, in Brčko District of BIH somewhat more than one-third of reports ended successfully with indictments. The biggest disparity between reported and charged offenders is evident in Republika Srpska. In more than 80% of cases in all three jurisdictions (82% in Republika Srpska, 87% in Brčko District of BIH, and 90% in the Federation of BIH), indictments filed ended with a convic-

[13] Endangering the environment by noise, Production of harmful preparations for the treatment of animals, Careless actions in circulation of pesticides, Veterinary malpractice, Failure to implement a decision on environment protection measures, Importing dangerous substances into the Republika Srpska and Unauthorized export of specially protected plant or animal species exporting.

tion. In the end, as investigations rarely lead to an accusation, it may be considered as an indicator that the enforcement chain of environmental crime has remained relatively limited in BIH.

Predominantly, from 2011 to 2016, the most common forms of environmental crime dealt with by institutions of formal social control in BIH were forest theft, causing forest fire and the devastation of forests, following by the torture and killing of animals and illegal hunting and fishing. In the Federation of BIH, forest theft accounted for 97% (94% in Republika Srpska) of all reported, 98% (93% in Republika Srpska) of all accused, and 97% (92% in Republika Srpska) of all convicted environmental crimes. This leaves other forms of environmental crime to compose an extremely small share, bearing in mind that some of the prescribed criminal offenses had zero instances recorded whatsoever. This may be interpreted either as a success of the criminal justice system, or as an indicator of its failure to diligently identify and report crimes which fall under such categories (Sina, 2014). It would seem that the latter of these two interpretations is more probable for BIH. A small share of reports for different environmental crime forms indicates that citizens, as well as the investigating authorities, are only able to recognize criminal offenses against the environment and conduct an efficient response in a small number of cases (Batrićević, 2012).

What must be borne in mind is that these statistics do not provide information regarding the impact of environmental crimes. A recorded case may consist of the illegal logging of thousands of cubic meters of timber, or of the illegal logging of one or more trees for the purpose of the theft (a quantity of timber exceeding 2 m3 is punishable as prescribed in the Criminal Code of Federation of BIH). The effects of illegal logging are wide ranging, with some of the most obvious being loss of habitat and biodiversity, erosion and land degradation, desertification, as well as social disruption and adverse economic impacts (Markus-Johansson et al., 2010). Illegal forestry activities, in the form of illegal logging and trade in illegally logged timber, are problems persistent in all countries in South Eastern Europe, and were already common in the years before social and economic reform (Markus-Johansson et al., 2010). In addition, the fact that statistics on wood use and wood production do not comply persists across the region (Dragović, Ristić, Pülzl, & Wolfslehner, 2017).

Forestry is one of the most important nature-based resource sectors in BIH. Following official crime statistics, forest theft should be recognized as a serious environmental problem in the country. As Markus-Johansson et al. (2010) found, the main drivers behind the continuing high rates of illegal logging and other related illegal forestry activities are socioeconomic conditions, especially in rural, forested regions. High unemployment figures and low salaries encourage illegal logging, both for firewood and commercial use. Other factors with an important role in stimulating illegal forestry activities include the favorable price of illegally logged wood; shortfalls in wood supply for the wood processing industry; and gaps in the legal and policy framework (Markus-Johansson et al., 2010). In the period 2012-2016, the estimated damages of forest theft in the Federation of BIH amounted to BAM 10,226,342 (EUR 5,228,646) (Ministry of Agriculture, Water Management and Forestry of the Federation of BIH, 2017). Altogether, 146,780 m3 of forests were destroyed. The total amount of fines imposed during this period was BAM 116,782 (EUR 59,710) or 1.4% of the estimated amount of damages on the basis of timber (Ministry of Agriculture, Water Management and Forestry of the Federation of BIH, 2017). Fines meted out to individuals engaged in illegal forestry activities are not effective as a deterrent: since the fines are lower than the potential profit that can be generated, there is no

disincentive to carry out illegal activities (Markus-Johansson et al., 2010). This raises questions of the expediency of filing reports and endangering of forest keepers, when other authorities do not protect state property and fail to fully resolve criminal and misdemeanor charges for forest theft and other illegal forestry activities in a timely manner (Muratbegović & Guso, 2011; Ministry of Agriculture, Water Management and Forestry of the Federation of BIH, 2017). The poor organization of the forestry administrations, limitations of human resources, and slow judiciary reaction bring into question the implementation of the government's Action Plan to Combat Illegal Activities in the Forestry Sector and Wood Industry in the Federation of BIH (Ministry of Agriculture, Water Management and Forestry of the Federation of BIH, 2017).

Although they account for less than 1% of the total number of reported, accused and convicted offenders for environmental crimes in BIH, criminal offenses of forest devastation14 and causing forest fires are another serious threats to the country's forest ecosystems. There are no valid and official data for the main causes of forest fires in BIH. But there is a belief that the leading cause is the human factor (in about 98 % of all forest fires) (Nemeth, 2015, as cited in Agić et al., 2014). Even though there are grounds for suspecting that forest fires are generally connected to illegal logging activities (Nemeth, 2015), gathering the necessary evidence in BIH is a complicated task. Furthermore, it is difficult to estimate the real situation of these criminal activities, given that they are generally conducted in areas whose isolation and geographical distance from populated areas make supervision and timely reaction by the competent state authorities impossible – or at least greatly complicate the implementation of the aforementioned. Therefore, the assumption of the presence of a particularly high percentage of 'dark figures of criminality' in this field may be quite justified and reasonable (Batrićević, 2012).

The criminal offenses of illegal hunting and illegal fishing are reported much more frequently than other criminal offenses designed to protect animals in BIH. However, the underlying assumption exists that many criminal offenses of this nature are often carried out within and behind the guise of completely legitimate and organized hunting or fishing activities, whether economic or sporting (Batrićević, 2012; Legal Protection of Animals - Laws, Practice and Legal Science on Animal Welfare, 2013). Therefore, available statistical data should be taken with reserve, and one should proceed from an assumption that, in reality, the number of offenders significantly exceeds the number of persons officially reported, accused and convicted for such criminal offenses.

Beirne (1999) defines animal abuse as acts which contribute to the pain or death of an animal or otherwise threaten its welfare. Due to the characteristics of the criminal offence of the torturing and killing of animals, but also due to the manner and circumstances surrounding phenomena of animal abuse, "only a tiny fraction of these cases is recorded in official data" (Beirne, 2004, p. 49). Furthermore, Beirne (2004) has stressed that animal abusers whose acts eventually enter official statistics do not necessarily typify animal abusers as a whole; but perhaps instead they are simply less adept at avoiding detection. From the other side, Beirne (2004) assumes

14 The forest devastation is defined as any unlawful activity that lowers forested land's fertility and thus threatens or makes impossible the sustainability of forest production or silviculture on that land, or endangers forest survival and multiple-use functions (e.g. larger-scale felling approximating forest clearing or clear cutting, overly intensive selection cutting, tree girdling, any activity that can cause weeding, runoff and soil loss by water or wind, etc.) (Law on Forests of Republika Srpska, 2013)

that perhaps the acts of those who commit greater abuse or who commit it more regularly are somehow less likely to be recognized, detected, and recorded. The criminal offence of torturing and killing animals is the third most commonly registered environmental criminal offence in BIH for the period 2011-2016. Although these account for less than 1% of the total number of environmental criminal offenders reported, accused and convicted, the torture and killing of animals should not be underestimated by experts or the general public. The social tolerance of animal abuse allows many individuals, who under different circumstances would avoid committing cruel acts, to learn and practice highly cruel methods of treatment of animals. From this perspective, violence and cruelty against humans is nothing but the final step of a longer process in which animal abuse usually acts as a forerunner (Lucia & Killias, 2011).

CONCLUDING REMARKS

In this study, several important facts that contribute to knowledge of environmental crime in BIH have been laid out. One of the first findings, based on a literature review, is the lack of previous empirical studies focusing on environmental crime, knowledge and awareness within the general public and as a research interest among the community of experts in criminology, law, criminal justice and related fields. A rapid development in environmental protection legislation occurred at the beginning of the 21st century on the one hand, but yet limited interest has been shown by criminologists in regard to the study of environmental crimes and their harms in BIH. As Eman, Meško, Dobovšek, & Sotlar (2013) emphasized six years ago, the countries of South Eastern Europe are still at the very beginning of research relating to the problems of environmental crime and environmental protection. As can be seen from the evidence presented in this paper, BIH is lagging behind all other countries of the region in this field.

The analysis presented here has revealed that crimes against the environment are present in BIH. The most commonly reported (prosecuted) forms are illegal logging, following by illegal hunting and fishing, and the torture and killing of animals.

Bearing in mind that BIH is a country with an economy in transition and with relatively slow progress in terms of the EU integration process, increasing the awareness of the need for prevention and combating of illegal activities represents one of the major challenges for BIH society (UNODC, 2011). Considering the environmental, social and economic impacts of environmental crime, a continuous lack of empirical studies as well as results of official reports on the state of ecological system and its (lack of) protection in BIH, this study can be considered both scientifically and socially justified and a suitable basis for further research.

The expected contribution of the study lies in its provision of a better understanding of the phenomenology of environmental crime in BIH. Valid and reliable data, alongside its correct interpretation, is crucial for the creation and application of efficient criminal justice policies. In this regard, further investigation of causes and conditions that give rise to inconsistencies between the numbers of registered, accused and convicted persons for these offenses, including the analysis of pronounced criminal sanctions, as well as the typology of offenders, should be conducted. Taking into account a reasonable assumption of a particularly high percentage of unregistered environmental crimes in BIH, further analyses should encompass alternative means by which to measure the volume, structure and other characteristics of the phenomena, such as fear of crime and victimization studies, expert surveys, and also observational studies.

REFERENCES

- Aarhus Centre in BIH. (2014). Interpretation and results of the environmental survey in the City of Sarajevo. Sarajevo.
- Agency for Statistics of BIH. (2016). Adult perpetrators of criminal offenses in Bosnia and Herzegovina 2011 - edited. Sarajevo: Agency for Statistics of BIH.
- Agency for Statistics of BIH. (2013). Adult perpetrators of criminal offenses in Bosnia and Herzegovina 2012. Sarajevo: Agency for Statistics of BIH.
- Agency for Statistics of BIH. (2014). Adult perpetrators of criminal offenses in Bosnia and Herzegovina 2013. Sarajevo: Agency for Statistics of BIH.
- Agency for Statistics of BIH. (2015). Adult perpetrators of criminal offenses in Bosnia and Herzegovina 2014. Sarajevo: Agency for Statistics of BIH.
- Agency for Statistics of BIH. (2016). Adult perpetrators of criminal offence in Bosnia and Herzegovina 2015. Sarajevo: Agency for Statistics of BIH.
- Agency for Statistics of BIH. (2017). Adult perpetrators of criminal offenses in Bosnia and Herzegovina 2016. Sarajevo: Agency for Statistics of BIH.
- Agency for Statistics of BIH. (2018). Adult perpetrators of criminal offenses in Bosnia and Herzegovina 2017. Sarajevo: Agency for Statistics of BIH.
- Agency for Statistics of BIH. (2017). Gross Domestic Product by Production, Income and Expenditure Approach 2015. Sarajevo: Agency for Statistics of BIH.
- Agić, S., Balotić, P., Krunić, R., Brković, I., Tihić, A., Doder, M., et al. (2014). Forest Fire Suppression in Bosnia and Herzegovina. Sarajevo.
- Batrićević, A. (2012). Criminal offence of forest theft in current legislation of the Republic of Serbia. Journal of the Institute of Criminological and Sociological Research, 105-130.
- Batrićević, A. (2012). Criminal Offence of Illegal Fishing in the Republic of Serbia. In A. Čavoski, & K.-B. Ana, Ecology and Law (pp. 48-67). Belgrade: The Institute of Comparative Law.
- Beirne, P. (1999). For a nonspeciesist criminology: Animal abuse as an object of study. Criminology, 37 (1), 117–148.
- Beirne, P. (2004). From animal abuse to interhuman violence? A critical review of the progression thesis. Society and animals , 12 (1), 39–65.
- Clifford, M., & Edwards, D. (1998). Defining "Environmental Crime". In M. Clifford, Environmental Crime: enforcement, policy and social responsibility. Gaithersburg: Aspen Publishers.
- Council of Ministers of BIH. (2012). Answers to the list of EU questions on Chapter 27 - Environment. Retrieved February 2019, from Directorate for European Integration: http://www.dei.gov.ba/dei/direkcija/sektor_strategija/Upitnik/pitanjapoglavlje5i27/default.aspx?id=16799&langTag=en-US
- Criminal Code of Federation of BIH: Official Gazette of Federation of BIH, Nos. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16, and 75/17.
- Criminal Code of Republika Srpska: Official Gazette of Republika of Srpska, No. 64/17.
- Criminal Code of Republika Srpska: Official Gazette of Republika Srpska, Nos. 49/03, 108/04, 37/06, 70/06, 73/10, 1/12, and 37/13.
- Criminal Code of Brčko District of BIH: Official Gazette of Brčko District, Nos. 10/03, 45/04, 06/05, 21/10, 52/11, 33/13, 26/16, 13/17, and 50/18.
- Delalić, M., Pilipović, R., & Petrović, D. (2012). Analysis of Court Decisions in the Area of Environmental Protection in Bosnia and Herzegovina in 2012. OSCE Mission to Bosnia and Herzegovina .

- Directive 2008/99/EC of 19 November 2008 on the Protection of the Environment through Criminal Law. (2008). Official Journal of the European Union L328/28. Retrieved from https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX%3A32008L0099
- Dragović, N., Ristić, R., Pülzl, H., & Wolfslehner, B. (2017). Natural resource management in South-east Europe: forest, soil and water. Skopje: GIZ.
- Duff, R. A., & Marshall, S. E. (2015). 'Abstract Endangerment', Two Harm Principles, and Two Routes to Criminalization. Bergen Journal of Criminal Law and Criminal Justice , 3 (2), 131–161.
- Eman, K. (2012). Crimes against the environment – comparative criminology and criminal justice perspectives [Doctoral dissertation]. Ljubljana: Faculty of Criminal Justice and Security.
- Eman, K. (2013). Introduction to phenomenological analysis of environmental criminality. In B. Petrović, & G. Meško, Eko kriminal i eko kriminologija - osnovna razmatranja (pp. 79-104). Sarajevo: Law Faculty of the University of Sarajevo.
- Eman, K., Meško, G., Dobovšek, B., & Sotlar, A. (2013). Environmental crime and green criminology in South Eastern Europe-practice and research. Crime, Law and Social Change, 59 (3), 341-358.
- European Environment Agency. (2015). Air quality in Europe - 2015 report. Luxembourg: European Environment Agency.
- Eurostat. (2017). Eurostat regional yearbook 2017 edition. Luxembourg.
- Federal Office of Statistics. (2009). Justice Statistics 2008. Sarajevo: Federal Office of Statistics.
- Federal Office of Statistics. (2010). Justice Statistics 2009. Sarajevo: Federal Office of Statistics.
- Federal Office of Statistics. (2009). Justice Statistics 2010. Sarajevo: Federal Office of Statistics.
- Federal Office of Statistics. (2011). Justice Statistics 2010. Sarajevo: Federal Office of Statistics.
- Federal Office of Statistics. (2012). Justice Statistics 2011. Sarajevo: Federal Office of Statistics.
- Federal Office of Statistics. (2013). Justice Statistics 2012. Sarajevo: Federal Office of Statistics.
- Federal Office of Statistics. (2014). Justice Statistics 2013. Sarajevo: Federal Office of Statistics.
- Federal Office of Statistics. (2015). Justice Statistics 2014. Sarajevo: Federal Office of Statistics .
- Federal Office of Statistics. (2016). Justice Statistics 2015. Sarajevo: Federal Office of Statistics .
- Federal Office of Statistics. (2017). Justice Statistics 2016. Sarajevo: Federal Office of Statistics.
- Federal Office of Statistics. (2018). Justice Statistics 2017. Sarajevo: Federal Office of Statistics.
- Food and Agriculture Organization of the United Nations [FAO]. (2015). Analysis of the Forest Sector in Bosnia and Herzegovina. Food and Agriculture Organization of the United Nations.
- Food and Agriculture Organization of the United Nations [FAO]. (2010). Global Forest Resources Assessment 2010. Rome: FAO.
- Gibbs, C., & Boratto, R. (2017). Environmental Crime. In Oxford Research Encyclopedia of Criminology. Oxford University Press USA.
- Hirschberger, P. (2008). Illegal wood for the European market - An analysis of the EU import and export of illegal wood. Frankfurt am Main: World Wildlife Fund - Germany.
- International Monetary Fund. (2015). Bosnia and Herzegovina: Concluding Statement of the 2015 Article IV Mission . Retrieved January 17, 2019, from Bosnia and Herzegovina: Concluding Statement of the 2015 Article IV Mission: https://www.imf.org/en/News/Articles/2015/09/28/04/52/mcs051215
- Jovašević, D. (2011). Environmental Crime in the Republic of Serbia: Theory, Practice and Legislation. Law and Politics, 9 (2), 109–134.
- Law on Forests: Official Gazette of Republika Srpska, Nos. 75/08 and 60/13.

- Legal Protection of Animals - Laws, Practice and Legal Science on Animal Welfare. (2013, November 18). Retrieved January 12, 2019, from Krivicno delo nezakonitog lova u Republici Srbiji – zvanicne pravosudne statistike: http://pravnazastitazivotinja.com/krivicno-delo-nezakonitog-lova-u-republici-srbiji-zvanicne-pravosudne-statistike/
- Lucia, S., & Killias, M. (2011). Is Animal Cruelty a Marker of Interpersonal Violence and Delinquency? Results of a Swiss National Self-Report Study. Psychology of Violence , 1 (2), 93–105.
- Lynch, M. J. (2018). County-Level Environmental Crime Enforcement: A Case Study of Environmental/Green Crimes in Fulton County, Georgia, 1998–2014. Deviant Behavior. 40(9), 1090–1104.
- Markus-Johansson, M., Mesquita, B., Nemeth, A., Dimovski, M., Monnier, C., & Kiss-Parciu, P. (2010). Illegal Logging in South Eastern Europe. Szentendre, Hungary: The Regional Environmental Center for Central and Eastern Europe.
- Matsson, K. (2015). The impact of the EU Timber Regulation on the Bosnia and Herzegovinian export of processed wood - Master thesis. Uppsala: Swedish University of Agricultural Sciences.
- Meško, G., Bančić, K., Eman, K., & Fields, C. B. (2011). Situation Crime-Prevention Measures to Environmental Crime. In G. Meško, D. Dimitrijević, & C. B. Fields, Understanding and Managing Threats to the Environment in South Eastern Europe (pp. 41-67). Springer Netherlands.
- Meško, G., Dimitrijević, D., & Fields, C. B. (2011). Understanding and Managing Threats to the Environment in South Eastern Europe. Dodrecht: Springer.
- Mihajlov, A. (2010). Fundamentals of analytical instruments in the field of environment. Sremska Kamenica: The University Educons - Faculty of Environmental Protection.
- Ministry of Agriculture, Water Management and Forestry of the Federation of BIH. (2013). The information on forest management in the Federation of Bosnia and Herzegovina for 2012 with plans for 2013. Sarajevo: Ministry of Agriculture, Water Management and Forestry of the Federation of BIH.
- Ministry of Agriculture, Water Management and Forestry of the Federation of BIH. (2017). The information on forest management in the Federation of Bosnia and Herzegovina for 2016 with plans for 2017. Sarajevo: Ministry of Agriculture, Water Management and Forestry of the Federation of BIH.
- Ministry of Foreign Trade and Economic Relations of BIH. (2008). A report of the agricultural Sector in Bosnia and Herzegovina. Ministry of Foreign Trade and Economic Relations of BIH.
- Ministry of Foreign Trade and Economic Relations of BIH. (2012). The State of the Environment Report of BIH 2012. Sarajevo: Ministry of Foreign Trade and Economic Relations of BIH.
- Ministry of Security of BIH. (2016). State of Security report of Bosnia and Herzegovina in 2015. Sarajevo: Ministry of Security of Bosnia and Herzegovina.
- Modly, D. (1998). The Dictionary of Criminal Justice. Sarajevo: Faculty of Criminal Justice Sciences.
- Muratbegović, E., & Guso, H. (2011). Primary Categories and Symbiotic Green Crimes in Bosnia and Herzegovina. In G. Meško, D. Dimitrijević, & C. B. Fields, Understanding and Managing Threats to the Environment in South Eastern Europe (pp. 101-120). Dodrecht: Springer.
- Nellemann, C., Henriksen, R., Kreilhuber, A., Stewart, D., Kotsovou, M., P, R., et al. (2016). The Rise of Environ mental Crime – A Growing Threat To Natural Resources Peace, Development And Security. A UNEP and INTERPOL Rapid Response Assessment. UNEP and RHIPTO Rapid Response–Norwegian Center for Global Analyses.
- Nemeth, A. (2015). Forest fires country study - Bosnia and Herzegovina 2015. Regional Environmental Center for Central and Eastern Europe.
- Petrović, B., & Muratbegović, E. (2008). Criminology in Bosnia and Herzegovina: history, recent trends and research. Journal of Criminal Justice and Security, 10 (2), 353-368.

- Republika Srpska Institute of Statistics. (2012). Crime Statistics Annual Release 2011. Banja Luka: Republika Srpska Institute of Statistics.
- Republika Srpska Institute of Statistics. (2013). Crime Statistics Annual Release 2012. Banja Luka: Republika Srpska Institute of Statistics.
- Republika Srpska Institute of Statistics. (2014). Crime Statistics Annual Release 2013. Banja Luka: Republika Srpska Institute of Statistics.
- Republika Srpska Institute of Statistics. (2015). Crime Statistics Annual Release 2014. Banja Luka: Republika Srpska Institute of Statistics.
- Republika Srpska Institute of Statistics. (2016). Crime Statistics Annual Release 2015. Banja Luka: Republika Srpska Institute of Statistics.
- Republika Srpska Institute of Statistics. (2017). Crime Statistics Annual Release 2016. Banja Luka: Republika Srpska Institute of Statistics.
- Republika Srpska Institute of Statistics. (2018). Crime Statistics Annual Release 2017. Banja Luka: Republika Srpska Institute of Statistics.
- Sahramakia, I., Korsellb, L., & Terhi, K. (2015). Prevention of environmental crime through enforcement - Finland and Sweden compared. Journal of Scandinavian Studies in Criminology and Crime Prevention, 16 (1), 41–59.
- Sina, S. (2014). Fighting Environmental Crime in Germany: A Country Report. Study in the framework of the EFFACE research project. Berlin: Ecologic Institute.
- Situ, Y., & Emmons, D. (2000). Environmental Crime: The Criminal Justice System's Role in Protecting the Environment. Thousand Oaks, CA: Sage.
- Skinnider, E. (2011). Victims of environmental crime: Mapping the issues. Vancouver: The International Centre for Criminal Law Reform and Criminal Justice Policy.
- United Nations Economic Commission for Europe. (2011). Environmental Performance Reviews. New York and Geneva: United Nations.
- United Nations Office on Drugs and Crime. (2010). Background Research on Systems and Context: Justice and Home Affairs Statistics in the Western Balkans.
- United Nations Office on Drugs and Crime. (2011). Corruption in BIH: Bribery as experienced by the population. Vienna.
- Wendling, Z. A., Emerson, J. W., Esty, D. C., Levy, M. A., & de Sherbinin, A. (2018). 2018 Environmental Performance Index. New Haven: Center for Environmental Law & Policy.
- White, R. (2015). Crime and the Natural Environment. In Oxford Handbooks Online. Oxford University Press.
- White, R. (2011). Transnational Environmental Crime: Toward an eco-global criminology. Abingdon, UK: Taylor & Francis Group.
- World Health Organization. (2017). World health statistics 2017: monitoring health for the SDGs, Sustainable Development Goals. Geneva: World Health Organization.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 225-242
ISSN 1512-5505

PASSIVE SUBJECT OF A CRIMINAL OFFENCE (THE VICTIM) IN BOSNIA AND HERZEGOVINA: POORLY PROTECTED AND UNDER-RESEARCHED

Sandra KOBAJICA
Almir MALJEVIĆ

Abstract

Development of Victimology, as a new research field, began in Bosnia and Herzegovina at the end of the 20th century. This paper provides an overview of the state of Victimology in Bosnia and Herzegovina, emphasizing legal position of victims and access to justice mechanisms over the years. There is an evident lack in victimology-related research and education in attempting to engage systematically with political and public attitudes toward understanding of the victim status and victim protection measures. However, the role and position of Victimology at universities will be explored. Research on crime victimisation, mostly limited to the fear of crime and self-reported delinquency surveys, will be presented as well. The overview concludes with proposals for strengthening victim-related legislation and policies aimed to improve position of victim, as well as victimological research efforts in Bosnia and Herzegovina.

Key words

criminal legislation, injured party, victim, victimology

1. Bosnia and Herzegovina – the background

Bosnia and Herzegovina [BiH] is an independent, sovereign and democratic country located in the western part of the Balkan Peninsula. With a total surface of 51,209 square kilometres, it is bordering Croatia to the north and south-west, Serbia to the east, and Montenegro to the southeast.

According to the 2013 Census of population, households and dwellings in BiH, it has a population of 3,531,159 inhabitants with density of 68.9 inhabitants per square kilometre.[1] Distribu-

[1] Agency for Statistics of BiH 2016, p. 25.

tion of the population according to sex included 50.94% of women and 49.06% of men. With respect to the age structure, the 2013 data shows that the children as well as older persons made up 30% of the BiH population, while persons considered to be of working age (15 to 64 years old) accounted for 70%. The average age was 39.5 in 2013 which places BiH among older nations in Europe. Estimated life expectancy at birth was 76.9 years (74.4 years for men and 79.4 years for women), which is under the average life expectancy in European Union [EU] of 80.6 years for both female and male in 2015.[2]

Among population aged 15 and over, 14% have incomplete primary education or no education.[3] Moreover, 21% of the population completed primary school, 52% secondary school or post-secondary school specialization, while 3% obtained high school and first grade of faculty degree and 10% university degree.[4] Share of illiterate[5] persons aged 10 and over in the total population in 2013 was 2.82%. The breakdown by gender is 4.76% female, 0.79% male (difference of -3.97%).[6]

BiH is one of the most rural countries in Europe. Around 60% of the population live in rural areas.[7] Around 25% of the population lives in the six major cities: Sarajevo, Banja Luka, Tuzla, Zenica, Mostar and Bijeljina. In four municipalities[8] the capital Sarajevo has an urban population of 275,524, while the Sarajevo metropolitan area has a population of 413,593.[9]

BiH has historically been a multi-ethnic state. The key characteristic of multi-ethnicity is inherited from former Yugoslavia. In accordance with the Dayton Peace Accords its structure rests on the principle of the balance and equality of the three "constituent peoples" – Bosniaks, Serbs and Croats. The 2013 census results showed that Bosniaks constitute 50.11% of the population (difference of 7% in comparison to 1991), Serbs 30.78% (difference of -1% in comparison to 1991), Croats 15.43% (difference of 2% in comparison to 1991). Some 2.73% of the population are categorised as "others", the official term for national minorities and people who do not identify with any of the three constitutive peoples.[10] The official languages are Bosnian, Croatian and Serbian and two alphabets (Latin and Cyrillic) are used. In BiH, religion is often linked to ethnicity. Census results showed that 50.7% of the population identify religiously as Muslim,

---

2 Eurostat 2017, p. 34.

3 The rate of population with no compulsory primary education is 14.1%. It could be concluded that every seventh resident of BiH did not fulfil his legal obligation to acquire free elementary education, nor did use his constitutional right to education. See *Pašić Kreso* 2017, p. 110.

4 Agency for Statistics of BiH 2016, p. 152.

5 For the past 40 years illiteracy in BiH has been reduced by eight times. The percentage of illiterate compared to the total population from 1991 has been reduced by three and a half times. See *Pašić Kreso* 2017, p. 102.

6 See *Pašić Kreso* 2017, p. 102; Agency for Statistics of BiH 2016, p. 138.

7 The FAOSTAT data for BiH shows a pronounced shift in the rural population, declining from 60% in 1989 to 51% in 2010. See United Nations Development Programme [UNDP] 2013.

8 Municipalities Centar, Stari Grad, Novi Grad and Novo Sarajevo.

9 Agency for Statistics of BiH 2016, p. 69.

10 Agency for Statistics of BiH 2016, p. 54.

30.75% as Orthodox Christian, 15.19% as Roman Catholic, 1.15% as other, 1.1% as agnostic or atheist, with the remainder not declaring their religion or not answering.[11]

In the past two decades BiH has lost around 19.32% of its population since 1991 when the previous census was conducted, both as an effect of the war and of massive emigration which has drained the country. After the breakup of former Yugoslavia, the war in BiH was at the same time an inter-state and inter-ethnic armed conflict that took place from 1992 to 1995. Signing of the Dayton General Framework Peace Agreement brought the end of war for three rival factions – Bosniaks, Serbs and Croats. As *Nettelfield* stated (2010) calculating the number of deaths resulting from the conflict has been subject to considerable, highly politicised debate sometimes "fused with narratives about victimhood", from the political elites of various groups. Considered today the most devastating warfare in Europe after the War World II, the three-year conflict resulted in more than 100,000 deaths that included combatants and civilians of all ethnicities.[12] In addition, it is estimated that about 113,000 people have been displaced and 4,500 persons have become stateless as a consequence of the war (*Andreescu*, 2015).

In the period of post-war rehabilitation and reconstruction BiH faced acute social and economic challenges. In 2015, GDP per capita in BiH was around 70% below the EU-28 average,[13] unemployment rate in 2016[14] was one of the highest in the region, while youth unemployment rate[15] one of the highest in the world.[16] Influenced by a combination of economic, environmental, political and social factors, BiH net migration rate was at level of -5 migrants per thousand population in the period 2010–2015.[17]

BiH has not yet been affected by the recent refugee crisis. Although it is not exposed to massive migration influx, the large number of migrants reside in the countries of region and they are stopped at the Balkan's route, trying to find alternative routes of movement toward EU countries, which includes also transit over the BiH territory.[18]

---

[11] Agency for Statistics of BiH 2016, p. 68.

[12] The Bosnian Book of the Dead represents the most comprehensive statistical analysis of human losses in the War. The 2012 figures recorded a total of 101,040 dead or disappeared, of which civilian deaths represented 37.9%. See *Čalić* 2012; *Sito-Sučić & Robinson* 2013. According to the report produced in 2010, after 12 years of data collection by the International Criminal Tribunal for the former Yugoslavia [ICTY] Demographic Unit, final estimate rests at 104,732 individuals killed during the 1992–1995 period. See *Zwierzchowski & Tabeau* 2010.

[13] GDP based on production approach at current prices is estimated at 28.522 million of BAM in 2015 or EUR 14.583 or USD 16.182. The nominal increase of GDP in relation with 2014 was 4.46%. The GDP per capita is estimated BAM 8.107 or USD 4.600 or EUR 4.145 in 2015. The average GDP per capita at current prices within the EU-28 in 2016 was EUR 29 thousand. See Eurostat, 2017, p. 115.

[14] The unemployment rate in 2016 was 25.4%. See Agency for Statistics of BiH 2017.

[15] Youth unemployment refers to the share of the labour force ages 15–24 without work but available for and seeking employment.

[16] Agency for Statistics of BiH 2017, p. 39. For instance, the share of young people in the EU-28 in 2016 who were neither in employment nor in education or training, expressed in relation to the population of the same age, stood at 15.2% (Eurostat 2017, p. 84).

[17] See UN Department of Economic and Social Affairs, Population Division 2013.

[18] In the first 11 months in 2017, the total number of illegal migrants were placed under surveillance

BiH is a federal state with multi-level governance, as stipulated in its Constitution.[19] A complicated and expensive[20] governmental structure is composed of two entities, the Federation of BiH and the Republika Srpska, which have shared sovereignty over the Brčko District of BiH. Each level of government has its own legislative, executive, administrative and judicial institutions. Until 2003 the criminal legislation of BiH was fragmented and to a large extent not harmonized between the Entities. However, in 2003, the Office of the High Representative imposed the Criminal Code of BiH [CC of BiH][21] and the Criminal Procedure Code of BiH [CPC of BiH][22] and required lower administrative units of the country to harmonize their respective codes with these. As a result, as of 2003, four new criminal and criminal procedure codes exist in BiH. Today, although some differences do exist between the laws, the criminal legislation in BiH can be said to show a considerable degree of internal harmonization (United Nations Office on Drugs and Crime [UNODC], 2010, p. 68).

The accession of BiH to the EU is the stated aim of the present relations between the two entities. BiH participates to the Stabilisation and Association Process and is a potential candidate for EU membership. The country submitted its application for EU membership in February 2016. Following the recognition of meaningful progress in the implementation of the Reform Agenda, in September 2016 the EU Council invited the European Commission to submit its opinion on BiH's application for EU membership.[23]

2. Victimology – in search for independence

Development of victimology in BiH over the past 30 years was inevitably linked to the overall functioning of higher education system, and more specifically evolution of the legal and criminological scientific research. Additionally, victim's protection legislation in accordance with international standards was intensified in line with development of the criminal justice system in post-Dayton period. This section will present victimology's position in BiH while identifying the law and criminal justice, criminology and security studies as primary areas victimology is affiliated with. Moreover, discussion will include the brief overview of victimological education provided in BiH, victimology related research, publications and its major actors.

---

or directly returned to country from which entered in BiH, is increased for 380%. From beginning of 2018, it has been detected in BiH in total 440 illegal migrants from countries of high migration risk, who are in individual cases or smaller groups trying to use the BiH territory as a transit area on the way toward EU countries. See Service for Foreigners' Affairs. Available at: http://sps.gov.ba/saopstenja-en/complex-situation-in-bih-regarding-issue-of-illegal-migration/?lang=en [10.03.2018]

[19] Annex IV on Dayton Peace Accords. Available at: http://www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf [10.03.2018]

[20] BiH's complex state structure incurs high administrative costs, estimated at 50% of its GDP. See *Lilyanova* 2015.

[21] Criminal Code of BiH: Official Gazette of BiH, Nos. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, and 40/15.

[22] Criminal Procedure Code of BiH: Official Gazette of Bosnia and Herzegovina, Nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, and 72/13.

[23] See European Commission 2016.

Victimology is not an independent science in BiH. As essential segment of criminological thought it is a part of the area of social sciences. The major institutions providing victimological education in BiH are faculties of law and the Faculty for Criminal Justice, Criminology and Security Studies at the University of Sarajevo. Victimology was initially studied at the University of Sarajevo Faculty of Law.[24] According to its latest curricula, students on the third year of undergraduate studies are provided with basic victimological education within an elective one-semester course of Victimology as well as within an elective one-semester course of Criminology. Meanwhile, more advanced knowledge on juvenile crime victims and juvenile's restorative justice is provided within postgraduate study programme of Criminal Law/Juvenile Delinquency.

Development of higher education system in BiH included establishment of law faculties in all major urban centres, primarily in Banja Luka and Mostar and over the past 20 years also in Bihać, Zenica, Tuzla and East Sarajevo with quite similar curriculums. Within undergraduate study programmes of Law, Victimology is only mandatory course at the Mostar Faculty of Law, Criminal Justice and Security Management Department. At Tuzla, Bihać and Zenica Faculties of Law Victimology is an elective course. At Banja Luka and East Sarajevo Law Faculties victimological topics have been explored within the mandatory Criminology course. Among postgraduate study programmes of Criminal Law predominantly, Victimology is or elective course or integral part of Juvenile Restorative Justice course, Juvenile Criminal Law or Criminology with Penology courses.

Beside the educational activities going on at the law faculties, victimology had also been introduced at the University of Sarajevo Faculty of Criminal Justice Sciences. Due to the enthusiasm of professor Alija Ramljak, forensic pathologist by profession, even before 2000 victimology was studied equally with sociology of deviance, psychology, criminal law, criminal procedure law, criminology, penology, forensic science in general etc. In 2007 the Faculty had been renamed, and its curriculum was transformed into three new departments – Criminal Justice Department, Criminology Department and Security Studies Department. Both as a theoretical and empirical discipline during past decade victimology was developing under independent Criminology department. Therefore, victimological education is broadened by four inter-related mandatory courses: Victimology 1 – General Theory of Victimology and Victimology 2 – Restorative Justice (undergraduate study programme), Victimology 3 – Special Victimology (postgraduate study programme) and Applied Victimology (doctoral programme).

Table 1. Development of victimology at the Faculty for Criminal Justice, Criminology and Security Studies, University of Sarajevo

YEAR	IMPORTANT VENUES
1993	Established Faculty of Criminal Justice Sciences, University of Sarajevo
1994	"Victimology with Restorative Justice" became a mandatory course for undergraduate students
2001	Hasan Balić, Ph.D. became the first professor of "Victimology with Restorative Justice" at the Faculty
2004	The first Chrestomathy of Victimology prepared by professors Balić, H., & Adžajlić-Dedović, A.
2004	The first BiH victimological textbook published by professors Ramljak, A., & Halilović, H.

[24] The University of Sarajevo Faculty of Law is the oldest such educational institution in BiH (founded in 1946).

2007–2008	Faculty recharged curriculum and introduced independent departments – Criminal Justice Department, Criminology Department and Security Studies Department
2008–	Development of victimology both as theoretical and empirical discipline within undergraduate, postgraduate and doctoral study programmes

It is important to state that BiH do not offer specialized master or doctoral programme in victimology. There is a possibility for students to write their thesis on a victimological subject, but usually in the framework of related field of study, i.e. criminology or law. In 2010 first Ph.D. thesis has been defended in BiH entitled "The legal position of the victim in the Constitution and International law - BiH paradigm" at the Faculty of Law, University of Bihać. At this point, a lot of Master thesis prepared and defended at the Faculty for Criminal Justice, Criminology and Security Studies of the University of Sarajevo represent a modest contribution to development of victimology in BiH.

In that manner, the Victimology Society of BiH should be also mentioned. It was jointly founded in 1996 by members of the Academy of Sciences and Arts of BiH, the Council of Displaced Persons and Refugees of BiH as well as the Institute for Research of Crimes Against Humanity and International Law from Sarajevo. As a non-government organization [NGO] its aim was to explore and advocate policies against human right violations and war for all victims regardless of their gender, religion, ethnicity, etc. Victimology Society of BiH made significant contribution in bringing victimization to public attention through translation of the UN Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power into Bosnian language in 2001. Due to the financial reasons and new regulations Society has been closed in 2001.

In the aftermath of the war, scholars in BiH have not been paying the needed attention to crime and its related issues, such as victims of crime and victimization. In that period, victimological research attention was directed to the victims of war, especially victims of mass sexual violence and torture. Soon after, evident growing trend of socio-pathological phenomena linked to social, political and economic transformation of the country influenced a change in the research agenda. From 1997 to 2003, BiH faced, among others, with a growing problem of trafficking in human beings, especially sexual exploitation of women. The very first project in this field conducted researchers from the Faculty of Criminal Justice Sciences at the University of Sarajevo. Following the needs of society other victimological relevant interests were in domestic violence, intimate partner violence, self-reported juvenile delinquency, fear of crime and restorative justice. It is important to state that a core of the research was supported from international funds. Governmental response in terms of investing funds in research of crime issues in general, has been lacking so far. To date, there is no accurate data on crime victimization rates or dark figures of adult crime and victimization by the Agency for Statistics of BiH or the statistical agencies of Entities. There is an evident need to conduct an empirical research in order to get a better idea on victims and the (individual and collective) impact of victimization in BiH.

In BiH there is no specialized victimological scientific journal. Papers of victimological substance are published in domestic journals from the related fields, primarily criminal justice journals. So far there have been published six university textbooks in victimology and victimology related topics:

- *Ramljak, A., & Halilović, H.* (2004): Victimology [Viktimologija]. Faculty of Criminal Justice Sciences, Sarajevo, 410 pages;
- *Ramljak, A., & Petrović, B.* (2005): Dictionary of Victimology [Viktimološki pojmovnik]. Association of Criminal Justice Practitioners in BiH, Sarajevo, 211 pages;
- *Ramljak, A., & Simović, M.* (2006): Victimology (2nd ed.) [Viktimologija 2. izmijenjeno i dopunjeno izdanje]. University Apeiron, Banja Luka, 554 pages;
- *Ramljak, A., & Simović, M.* (2011): Victimology (3rd ed.) [Viktimologija 3. izmijenjeno i dopunjeno izdanje]. Faculty of Law, Bihać, 307 pages;
- *Adžajlić-Dedović, A.* (2015): Victimology [Viktimologija]. Logico, Sarajevo, 231 pages;
- *Adžajlić-Dedović, A.* (2015): Restorative Justice [Restorativna pravda]. Logico, Sarajevo, 123 pages.

Logical continuation in development of victimology, both in theoretical and practical terms, was the very first international scientific and professional conference of victimology in BiH organised in 2015, in Sarajevo. For the first time, "victimologist", criminologist, jurists, government and law enforcement representatives from the country, region and wider established scientific basis for further cooperation with the aim to advocate improvement of social, economic and procedural policies for victims in BiH.[25]

3. Passive subject of a criminal offence (i.e. the injured party) – legal framework

In the contemporary law of BiH, by bearing in mind the fact that prosecution is conducted *ex officio* by the prosecutor, position of the victim of criminal offense concerning its functional role in criminal proceedings is quite marginalized and reduced to the role of a witness.[26] Consequently, one of the main features of BiH criminal policy, at the level of legal regulation and in particular in practice is insufficient protection of the victims' rights and interests.

The general term "victim" is not defined or regulated in the criminal legislation of BiH, including State and Entity CPCs.[27] The criminal procedure codes only define the general term "injured party". According to the CPC of BiH, the injured party is a person whose personal or property rights have been threatened or violated by a criminal offense.[28] The term victim is used twice in the CPC of BiH, in Articles 213, paragraph 2 and 264, paragraph 3.[29] The CC of BiH also does not provide definition of the victim, but from the definition of criminal offense of international

---

[25] Conference contribution was in publishing of *Hasković, E.* (ed.). (2015): International Review of Victimology "Ambassadors of Peace in Bosnia and Herzegovina". Sarajevo.

[26] For instance, the victim of a criminal offense may not participate in criminal proceedings as a subsidiary prosecutor, or a private prosecutor.

[27] Criminal Procedure Code of the Federation of BiH: Official Gazette of the Federation of BiH, Nos. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 09/09, 12/10, 08/13, and 59/14; Criminal Procedure Code of Republika Srpska: Official Gazette of Republika Srpska, No. 53/12; Criminal Procedure Code of Brčko District of BiH: Official Gazette of Brčko District of BiH, Nos. 10/03, 48/04, 06/05, 12/07, 14/07, 21/07, and 27/14.

[28] See Annex BiH, Criminal Procedure Code of BiH, Article 20, in the first paragraph, point (h).

[29] See Annex BiH, Criminal Procedure Code of BiH, Articles 213, paragraph 2 and 264, paragraph 3.

trafficking in human beings, it is evident that the victim is a person who has been used to carry out this criminal offense by using force or other forms of coercion.[30] It is important to state that the terms, victim of crime and injured party in legal discussions and the general public are largely used as synonyms.

In the period between 2002 and 2003 a significant reform of the criminal justice system was conducted and some laws stipulated a legal framework for protection of victims/witnesses were enacted at the State level, namely: the CC of BiH[31], the CPC of BiH, the Law on Protection of Witnesses under Threat and Vulnerable Witnesses,[32] and the Law on Witness Protection Program of BiH[33]. At the Entity levels, legal framework included: the CC of the Federation of BiH,[34] the CPC of the Federation of BiH,[35] the Law on Protection of Witnesses under Threat and Vulnerable Witnesses of the Federation of BiH,[36] the CC of Republika Srpska,[37] the CPC of Republika Srpska,[38] and the Law on Witness Protection of Republika Srpska.[39] At the level of Brčko District of BiH legal framework encompasses following: the CC of Brčko District of BiH,[40] the CPC of Brčko District of BiH,[41] and the Law on Protection of Witnesses under Threat and Vulnerable Witnesses of Brčko District of BiH.[42] As a result of a reform, the position of victims in criminal proceedings has been significantly weakened in BiH (*Filipović*, 2009, p. 295). The rights of victim as an injured party through the different stages of criminal proceedings are to be briefly observed in the following lines.

At the investigation phase, the injured party, as any other citizen, has the right to file charges regarding the criminal offense which has been committed,[43] to be informed if the investigation is not going to be conducted or if it is being suspended, and thus to appeal such a decision.[44] During the examination as witness, it has the right to be asked whether it wish to file a proper-

---

30 See Annex BiH, Criminal Code of BiH, Article 186.

31 The CC of BiH provides culpability for disclosure of identity of protected witnesses by any party in the proceedings including third parties. See Annex BiH, Criminal Code of BiH, Article 240.

32 Official Gazette of BiH, Nos. 3/03, 21/03, 61/04, and 55/05.

33 Official Gazette of BiH, No. 36/14.

34 Official Gazette of the Federation of BiH, 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14 and 76/14.

35 Official Gazette of the Federation of BiH, Nos. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 09/09, 12/10, 08/13, and 59/14.

36 Official Gazette of the Federation of BiH, No. 36/03.

37 Official Gazette of Republika Srpska, No. 64/17.

38 Official Gazette of Republika Srpska, No. 53/12.

39 Official Gazette of Republika Srpska, Nos. 21/03, 61/04, and 55/05.

40 Official Gazette of Brčko District, Nos. 10/03, 45/04, 06/05, 21/10, and 52/11.

41 Official Gazette of Brčko District of BiH, Nos. 10/03, 48/04, 06/05, 12/07, 14/07, 21/07, and 27/14.

42 Official Gazette of Brčko District of BiH, Nos. 11/03, and 8/07.

43 See Annex BiH, Criminal Procedure Code of BiH, Article 214.

44 See Annex BiH, Criminal Procedure Code of BiH, Article 216, paragraph 4 and Article 224, paragraph 2.

ty claim,[45] and to be informed of the reasons for application of the principle of opportunity in juvenile proceedings.[46] In the indictment phase, the injured party has the right to be informed about the results of the plea bargaining[47] and about the indictment withdrawing, by the decision of the prosecutor.[48] There is no provision in criminal legislation of BiH which obligates the court to notify the injured party about the main hearing. The injured party will be summoned to the main hearing only if it has the witness status. However, the right of the injured party to be present at the main hearing could be concluded indirectly from some provisions of the CPC of BiH.[49] Consequently, the injured party does not have the right to file evidence, which is urged by the European Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. As *Filipović* stated (2009, p. 310) delivery of a certified copy of the verdict to injured party, with the right to appeal,[50] which the CPC of BiH obliges the court, cannot replace the victims right to be informed of the conduct of the criminal proceedings. No later than the end of the main or sentencing hearing before the court, the injured party has the right to submit a request for a property claim.[51] In addition, the injured party has a right to initiate a proposal for mediation before the conclusion of the main hearing.[52] As an important source of information for the prosecutor about the criminal offense and its perpetrator, the injured party has the right to both during the investigation phase and at the main hearing to be questioned as a witness.[53]

However, it is important to mention that a number of good provisions about the protection of especially vulnerable victims from a secondary victimization. For example, the judge and the prosecutor are legally obliged to protect the victim/witness from insults, threats or any other assault from the part of the defendant, their associates or family members,[54] when a minor is being questioned, and especially if the said minor is the injured party, it is necessary to proceed with caution and with the assistance of a psychologist, educator or some other type of expert.[55] Also, given age, physical and mental condition, or other justified reasons the witness may be examined using technical means for transferring image and sound in such manner as to permit the parties and the defence attorney to ask questions although not in the same room as the witness.[56] Examinations of witness may be audio or audio-visual recorded at any stage of the

[45] See Annex BiH, Criminal Procedure Code of BiH, Article 86, paragraph 10.

[46] See Annex BiH, Criminal Procedure Code of BiH, Article 352.

[47] See Annex BiH, Criminal Procedure Code of BiH, Article 231, paragraph 9.

[48] See Annex BiH, Criminal Procedure Code of BiH, Article 232.

[49] See Annex BiH, Criminal Procedure Code of BiH, Article 258, paragraph 4, Article 195, paragraph 2, Article. 277, paragraph 1, and Article 288, paragraph 1.

[50] See Annex BiH, Criminal Procedure Code of BiH, Article 289, paragraphs 3 and 4.

[51] See Annex BiH, Criminal Procedure Code of BiH, Articles 194 and 195.

[52] See Annex BiH, Criminal Procedure Code of BiH, Article 198.

[53] Articles 81–91 of the CPC of BiH regulate the hearing and examination of witnesses in court proceedings.

[54] See Annex BiH, Criminal Procedure Code of BiH, Article 267.

[55] See Annex BiH, Criminal Procedure Code of BiH, Article 86, paragraph 4.

[56] See Annex BiH, Criminal Procedure Code of BiH, Article 86, paragraph 6.

criminal proceedings. Such recordings are mandatory for minors under the age of 16 or if it is possible that a witness may not be available for testimony at the main hearing.[57] If a sexual offense is committed, the injured party must not be asked questions about their sex life prior to the incident in question, nor is the evidence on the past sexual experience, behaviour or sexual orientation of the injured party admissible.[58]

Except for the above-mentioned provisions relating to underage victims and victims of so-called sexual offences, criminal procedure codes of BiH do not contain special provisions on other categories of particularly vulnerable victims of criminal offenses. Protection of victims/witnesses in criminal proceedings regardless of type of crime in case is indirectly regulated by the Law on Protection of Witnesses under Threat and Vulnerable Witnesses.[59] The Law was enacted in mid-2003 and it stipulates measures ensuring protection of witnesses under threat and vulnerable witnesses in criminal proceedings conducted in judicial institutions at the State level.[60] Therefore, the Law provides two categories of witnesses who can be granted protection, a witness under threat and a vulnerable witness.[61] Therefore, the purpose of the measures is to protect identity and other information that may indicate witness's identity as well as protection of vulnerable witnesses (most often children, women, the elderly, the disabled, as well as crime victims) from their intimidation, confusion and a negative psychological influence. This Law also provides the measures which ensure psychological, social and professional protection to witnesses under threat and vulnerable witnesses. The court, prosecutors and other bodies participating in the criminal proceedings have to inform witnesses on the measures of protection, assistance and support. The prosecutor provides this information in the course of an investigation whereas the court does it after an indictment is filed. The Law recognises two types of the protective measures ensuring protection of the identity of witnesses: procedural protective measures[62] and additional protective measures.[63] Both of the measures are granted by the court upon the prosecutors reasoned motion. In its decision the court defines the measures to be applied to the witness testifying before the court. In exceptional circumstances, where there is a manifest risk to the personal security of a witness or the family of the witness, and the risk is so severe that there are justified reasons to believe that the risk is unlikely to be mitigated after the testimony is given, or is likely to be aggravated by the testimony, the court may conduct a hearing of a protected witness granting him/her the status of the protected witness.[64] This is particularly important because of the large number

---

[57] See Annex BiH, Criminal Procedure Code of BiH, Article 90.

[58] See Annex BiH, Criminal Procedure Code of BiH, Article 86, paragraph 5 and Article 264.

[59] This paragraph is based on the presentation of the first Chief Prosecutor of BiH, Mr Marinko Jurčević entitled "Witness Protection in Criminal Proceedings, Past Experience and Identified Problems", 2008.

[60] It is thus clear that the Law does not regulate protection before and after criminal proceedings, which can be problematic.

[61] See Annex BiH, Law on Protection of Witnesses under Threat and Vulnerable Witnesses, Article 3.

[62] See Annex BiH, Law on Protection of Witnesses under Threat and Vulnerable Witnesses, Articles 7–12.

[63] See Annex BiH, Law on Protection of Witnesses under Threat and Vulnerable Witnesses, Article 13.

[64] See Annex BiH, Law on Protection of Witnesses under Threat and Vulnerable Witnesses, Articles 15–23.

of witnesses in war crimes cases[65] as well as in organized crimes, including human trafficking cases[66] and most of the witnesses to which the protection measures prescribed by law apply are specifically this kind of witness.

The Law on Witness Protection Program of BiH was passed in 2004. It provides operational-tactical and technical measures and actions that ensure the physical protection of life and integrity of witnesses who are faced with threats to their life, health or freedom.[67] The law prescribes the manner of conduct in the witness protection program, and types of care and support that can be given to a witness. The Law also provides opportunity for a protection of a family of a witness,[68] as well as other persons that have close relationship with a witness. The Law prescribes in which manner a witness could be included in witness protection program, and kinds of protection and support that could be given to a witness, including protection and support measures.[69] It is important to state that there is no mirror image of the State Law on the Witness Protection Programme at Entity levels. This means that victims who are involved in cases in Entity level courts simply cannot benefit from the law. The Law on Witness Protection Programme is applied only in extraordinary circumstances, and therefore in practice this may not present much of a problem, but the Witness Support Office at the state level is much more advanced and better resourced than anything at the Entity level.[70]

The Witness Support Office, established in 2005, provides support to witnesses at the Court of BiH. The Office takes care that all witnesses appear before the Court, that the witnesses are informed of their rights before the testimony and that anxiety caused by the testimony is minimized through psychological support, making sure that the testimony does not leave consequences on the mental health of the witness. It should be mentioned that within the project "Victim/Witness Support Services" the UNDP in BiH works on the expansion of Victim and Witness Support Offices to ensure equal treatment and access to support and protection

---

65 BiH has adopted the National War Crimes Strategy, which also contains a section called: Support and Protection of Victims and Witnesses, which, among other things, points out the need for some aspect of psychological support for witnesses and victims already during the investigation phase and giving statements.

66 In addition, the system of providing assistance to victims of human trafficking is regulated by the Rules on the Protection of Victims and Victim-Witnesses of Trafficking who are Nationals of BiH and the Rulebook on the Protection of Foreign Victims of Trafficking in Persons. These bylaws apply to the entire territory of BiH. Victims are entitled to safe accommodation, medical assistance, access to information about their rights, and legal assistance during criminal proceedings.

67 In order to provide physical protection, the Court of BiH uses the capacities of the State Investigation and Protection Agency [SIPA]. The Department for Witness Protection within the SIPA brings decisions and implements all the measures taken in conjunction with foreign witnesses in BiH, in accordance with an agreement or commitment concluded between BiH and a foreign state in relation to witness protection, promotes cooperation and exchanges information with certain NGOs, government bodies, as well as with foreign government bodies and international organizations responsible for protection of witnesses.

68 See Annex BiH, Criminal Procedure Code of BiH, Article 83, paragraph 1.

69 As support measures the Law prescribes: legal assistance, financial help, medical and psychological support, as well as social support. See Article 12.

70 International Forum of Solidarity – EMMAUS [IFS-EMMAUS] 2015, p. 40.

of victims/witnesses in criminal cases before, during and after court proceedings throughout other three jurisdiction in the country. From 2010 it has been established and equipped sixteen such offices in the Cantonal/District courts and Prosecutors' Offices in Sarajevo, Banja Luka, East Sarajevo, Bihać, Novi Travnik, Travnik, Mostar, as well as in Brčko District of BiH.[71]

As previously mentioned, any injured party in BiH can make a property claim related to pecuniary or non-pecuniary damages, return of items, or annulment of a particular legal transaction during the criminal proceedings.[72] Injured parties may file a petition to pursue a property claim with the prosecutor or the court.[73] When examined as witnesses, they have to be asked whether they wish to file a property claim. This is applicable to statements made during investigations, as well as to giving testimony during main hearings.[74] The primary obligation thus rests upon a prosecutor, whereas a court may meet this obligation in a subsidiary manner. An injured party may submit a petition to pursue a claim no later than the completion of the main hearing or sentencing hearing[75] (*Hanušić*, 2015, p. 9).

Complete adjudication of a property claim is possible if two conditions are met: that the court renders the verdict finding the accused guilty and that the data provide sufficient grounds for the adjudication of the property claim.[76] When pronouncing the accused guilty, the court may award the entire claim or only part of the claim and refer the victim to civil court for further action.[77] If the court decides to acquit the accused or reject the charge, then the victim will also be referred to civil courts for further action.[78] The court may refuse to examine a claim, if this would considerably prolong criminal proceedings.[79] In addition to this, the court, may propose the injured party and the accused, or his/her defence, to conduct a mediation procedure through a mediator in compliance with law, if it is assessed that the property claim may be settled through mediation.[80]

Finally, it should be mentioned that injured parties also have to be given a possibility to present their closing arguments[81] during which they may, among others, pronounce themselves on the property claim, i.e. the harm they suffered, and they have the right to appeal against the judg-

---

71 For more information about the Victim/Witness Support Services Project visit: http://www.ba.undp.org/content/bosnia_and_herzegovina/en/home/operations/projects/crisis_prevention_and_recovery/introduction-of-victim-witness-support-services-project.html [04.03.2018]

72 See Annex BiH, Criminal Procedure Code of BiH, Article 193.

73 See Annex BiH, Criminal Procedure Code of BiH, Article 195, paragraph 1.

74 See Annex BiH, Criminal Procedure Code of BiH, Article 86, paragraph 10 and Article 258, paragraph 4.

75 See Annex BiH, Criminal Procedure Code of BiH, Article 195, paragraph 2.

76 The legal procedural obligations put before prosecutors are therefore extremely important: to collect evidence that is relevant for the property claim of an injured party or to establish facts needed for decision making on such a claim. See Annex BiH, Criminal Procedure Code of BiH, Article 35, paragraph 2, point (g) and Article 197, paragraph 1.

77 See Annex BiH, Criminal Procedure Code of BiH, Article 198, paragraph 2.

78 See Annex BiH, Criminal Procedure Code of BiH, Article 198, paragraph 3.

79 See Annex BiH, Criminal Procedure Code of BiH, Article 193, paragraph 1.

80 See Annex BiH, Criminal Procedure Code of BiH, Article 198, paragraph 1.

81 See Annex BiH, Criminal Procedure Code of BiH, Article 277, paragraph 1.

ment with respect to the decision on the property claim[82] (*Hanušić*, 2015, p. 10).

Damages for pain and suffering, both pecuniary and non-pecuniary, among others, can be claimed in Entity and District courts in civil proceedings. At the same time, due to political and financial problems a fund for compensation of victims of (serious) crimes does not exist in BiH. Related to a State compensation fund, a system of mandatory compensation of victims should be established within the criminal proceedings, where the payment is made upon the judgment being passed, instead of the practice that the victim is referred to civil litigation to claim the compensation (IFS–EMMAUS, p. 77).

BiH has joined that circle of countries which by means of a unified law regulated the issue of dispute resolution through mediation. Thereby BiH acknowledged the importance of alternative dispute resolution for appropriate and efficient functioning of national legal protection mechanisms.[83] The establishment of the Association of Mediators of BiH was of a crucial importance for the introduction of mediation, creation of a legal framework and promotion of the mediation in legal and public discourse. In accordance with the legislation on civil procedure,[84] at the preparatory hearing at the latest, the court may, if it deems it appropriate given the nature of the dispute and other circumstances, suggest to the parties to resolve the dispute through mediation proceedings as provided by separate law. Such proposal may be jointly put forward by both parties until the conclusion of the main hearing. The institute of mediation was formally established in 2004 by adoption of the Law on Mediation Procedure.[85] The law provides that the parties to mediation procedure, upon the resolution of the dispute, with the help of the mediator, shall make a written settlement agreement and sign it immediately.[86] The filled settlement agreement has the force of a final and enforceable document.[87] Thus, as *Austermiller* stated (2006, p. 156), a mediated settlement can be enforced in the same was as a judgment or a judicial settlement, which represent the most significant aspect of the Law on Mediation Procedure. Mediation in criminal matters or other alternative methods have not been introduced in BiH.

The activities have been continuing though, because further popularization of this institute. In 2015, three mediations took place in a regular procedure, but in 2016, this figure was decreased to just one mediation. Simultaneously, number of parties seeking to resolve disputes prior institution of a court procedure had appeared. In 2015, 1,297 cases were mediated, and in 2016 1,931, which is an increase of 48,9%.[88] In achieving these results, the Association of Mediators of BiH has played a crucial role.

---

[82] See Annex BiH, Criminal Procedure Code of BiH, Article 293, paragraph 4.

[83] *Uzelac et al.* 2009, p. 19.

[84] Mediation in BiH was introduced for the first time through the Civil Procedure Code of the Federation of BiH: Official Gazette od Federation of BiH, Nos. 53/03, 73/05, 19/06, and 98/15, Civil Procedure Code of Republika Srpska: Official Gazette of Republika Srpska, Nos. 58/03, 85/03, 74/05, 63/07, 49/09, and 61/13, Civil Procedure Code of Brčko District of BiH: Official Gazette of Brčko District of BiH, Nos. 08/09, 52/10, and 27/14.

[85] Official Gazette of BiH, No. 37/04.

[86] See Annex BiH, Law on Mediation Procedure, Article 24.

[87] See Annex BiH, Law on Mediation Procedure, Article 25.

[88] The Federal News Agency [FENA] (July 10, 2017). Available at: http://www.fena.ba/article/955994/avdagic-broj-predmeta-upucenih-na-medijaciju-mogao-bi-biti-znatno-veci [11.03.2018].

4. Infancy of the victimization research

Victimological research on prevalence and incidence of victimisation is rather scarce in Bosnia and Herzegovina. The International Crime Victim Survey (ICVS) was carried out in BiH in 2001 (Keller, Villettaz & Killias, 2002). A total of 1,950 respondents were interviewed in the Federation of BiH and the Republika Srpska. The fieldwork was carried out by telephone by PRISM Research, a Sarajevo-based research company. The overall victimisation rate was found to be 13.7% for the previous year (2000) and 29.4% for the past 5 years (1996–2000) (Keller, Villettaz & Killias, 2002, p. 9). In terms of satisfaction with the police, 67% of nonvictims and 60% of victims of crime considered that the police do a good job. It is noteworthy that the level of satisfaction was generally lower in the Republika Srpska than in the Federation of BiH. (Keller, Villettaz & Killias, 2001, p. 29).

More recently, within the International Self-Reported Delinquency Study (ISRD - Round 2) in Bosnia and Herzegovina, it was found that the most prevalent type of victimization was theft (17,5%), followed by Robbery / Extortion (7,1%), Bullying (5,1%) and Assaults / Threats (5,0%) (Killias, Maljević & Lucia, 2010).

The third round of the same study (ISRD), Maljević et al. (2017) expanded the number of victimization questions so as to include the ICT victimization (cyber bullying), Physical punishment by parents and hate crime. Somewhat surprisingly, the most prevalent type of victimisation is by parents (31,4% in the Federation of Bosnia and Herzegovina and 29,2% in Republika Srpska). The second most prevalent type of victimization in the Federation of Bosnia and Herzegovina is that by Theft (21,3%), followed by cyber bullying (18,8%). In the Republika Srpska, similarly, the second most prevalent is again Theft (15,0%), followed by cyber bullying (9,0%).

5. Conclusions

In BiH victimology is not an independent science. Criminal justice, criminology and security studies as well as the law are primary areas victimology is affiliated with. Victimological courses are offered much more frequently by law faculties commonly as electives or as part of criminal law modules in postgraduate study programmes. One exception is the Faculty for Criminal Justice, Criminology and Security Studies at the University of Sarajevo where victimology is a mandatory course for students in their undergraduate, postgraduate and doctoral studies. Therefore, it is possible for students to write their final thesis on a victimological subject, but they do not graduate as "victimologists", but as criminal justice specialist, criminologists, security managers or jurists. Victimological scientific research is still undeveloped in BiH. The country has not been involved in any of the major international studies, primary ICVS. There is an evident need to conduct an empirical research in order to get a better idea on victims and the (individual and collective) impact of victimisation in BiH.

Criminal legislation of BiH recognizes the notion "injured party" as a subsidiary party in criminal proceedings, while the notion "victim of a criminal offense" is not determined by positive regulations. The most important legal and policy changes regarding protection of victim's rights in BiH were initiated and advocated by NGOs in post-Dayton period, which also had the support of international organisations and donors. Their significant efforts included legal changes related to domestic violence, trafficking and smuggling of persons, organised crime, war crimes, antidiscrimination and gender equality, protection and treatment of children and juveniles in

criminal proceedings, introduction of restorative justice measures etc. But still, there is no relevant legislation, i.e. *lex specialis* on the standing of crime victims in BiH. Legal changes for the position improvement of victims/injured parties before the court are mostly relevant for several most vulnerable categories, such as victims of organised crime and war crimes, as well as for underage victims. Those categories are in legal and public focus over years, while other victims are largely invisible and unrecognised. Moreover, apart from the legislative changes and their effective application, it is necessary to meet other conditions which would guarantee protection for of all victims from secondary victimization. This includes the victim/witness support services available in most of courts or prosecutor offices, as well as appropriate education of police, judges, prosecutors and lawyers, and moreover, establishment of a State compensation fund for victims within the criminal proceedings.

From the research point of view, victimisation is under-researched topic and comprehensive research is well over due.

References

- Agency for Statistic of Bosnia and Herzegovina (2016): Census of population, households and dwellings in Bosnia and Herzegovina, 2013; http://www.popis.gov.ba/popis2013/knjige.php?id=1 [06.01.2018].
- Agency for Statistic of Bosnia and Herzegovina (2017): Gross Domestic Product by Production, Income and Expenditure Approach 2015; http://www.bhas.ba/tematskibilteni/TB%20BDP%202007-2015%20HR_ENG_www.pdf [11.01.2018].
- *Andreescu, V.* (2015): Crime and Punishment in Bosnia and Herzegovina. The Encyclopedia of Crime and Punishment, pp. 1–4.
- Annex IV on Dayton Peace Accords; http://www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf [10.03.2018].
- *Austermiller, S.* (2006): Mediation in Bosnia and Herzegovina: A Second Application. Yale Human Rights and Development Journal 9/1; http://digitalcommons.law.yale.edu/yhrdlj/vol9/iss1/4 [10.03.2018].
- *Čalić, M.–J.* (2012): Ethnic Cleansing and War Crimes, 1991–1995, in: C.W. Ingrao & T.A. Emmert (eds.), Confronting the Yugoslav Controversies: A Scholars' Initiative. West Lafayette, pp. 139–140.
- Civil Procedure Code of Brčko District of BiH: Official Gazette of Brčko District of BiH, Nos. 08/09, 52/10, and 27/14.
- Civil Procedure Code of Republika Srpska: Official Gazette of Republika Srpska, Nos. 58/03, 85/03, 74/05, 63/07, 49/09, and 61/13.
- Civil Procedure Code of the Federation of BiH: Official Gazette od Federation of BiH, Nos. 53/03, 73/05, 19/06, and 98/15.
- Criminal Code of BiH: Official Gazette of BiH, Nos. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, and 40/15.

- Criminal Code of Brčko District of BiH: Official Gazette of Brčko District, Nos. 10/03, 45/04, 06/05, 21/10, 52/11, 33/13, 26/16, 13/17, and 50/18.
- Criminal Code of Federation of BiH: Official Gazette of Federation of BiH, Nos. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16, and 75/17.
- Criminal Code of Republika Srpska: Official Gazette of the Republic of Srpska, No. 64/17.
- Criminal Procedure Code of BiH: Official Gazette of Bosnia and Herzegovina, Nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, and 72/13.
- Criminal Procedure Code of Brčko District of BiH: Official Gazette of Brčko District of BiH, Nos. 10/03, 48/04, 06/05, 12/07, 14/07, 21/07, and 27/14.
- Criminal Procedure Code of Federation of BiH: Official Gazette of Federation of BiH, Nos. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 09/09, 12/10, 08/13, and 59/14.
- Criminal Procedure Code of Republika Srpska: Official Gazette of the Republic of Srpska, No. 53/12.
- European Commission (2016): Bosnia and Herzegovina 2016 Report (SWD(2016) 365 final); https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_bosnia_and_herzegovina.pdf [14.01.2018].
- Eurostat (2017): Eurostat regional yearbook 2017 edition. Luxembourg; http://ec.europa.eu/eurostat/statistics-explained/index.php/Eurostat_regional_yearbook [09.01.2018].
- *Filipović, Lj.* (2009): Position of an Injured Party in Criminal Proceedings [Položaj oštećenog u krivičnom postupku]. Pravo i pravda 8/1, pp. 295–329.
- *Hanušić, A*. (2015): Enforcement of damage compensation claims of victims of war crimes in criminal proceedings in Bosnia and Herzegovina – situation, challenges and perspectives. Sarajevo.
- International Forum of Solidarity – EMMAUS [IFS-EMMAUS] (2015): Promoting a victim centered approach in trafficking in human beings cases: Legal analysis in Bosnia and Herzegovina. Sarajevo.
- *Jurčević, M.* (2008): Witness Protection in Criminal Proceedings, Past Experience and Identified Problems; http://www.tuzilastvobih.gov.ba/files/docs/prezentation_of_Mr._Jurcevic_Chief_prosecutor_of_BIH.pdf [04.03.2018].
- *Keller, J., Villettaz, P. & Killias, M.* (2002): Enquête de victimisation en BosnieHerzégovine 2001. Rapport de récherche. Institut de policie scientifique et de criminology. Université de Lausanne.
- *Killias, M., Maljević, A. & Lucia, S.* (2010) Imported Violence?Juvenile Delinquency Among Balkan Youths in Switzerlandand in Bosnia-Herzegovina. Eur J Crim Policy Res (2010) 16:183–189.
- Law on Mediation Procedure: Official Gazette of BiH, No. 37/04.
- Law on Protection of Witnesses under Threat and Vulnerable Witnesses: Official Gazette of BiH, Nos. 3/03, 21/03, 61/04, and 55/05.
- Law on Protection of Witnesses under Threat and Vulnerable Witnesses of the Federation of BiH: Official Gazette of the Federation of BiH, No. 36/03.

- Law on Protection of Witnesses under Threat and Vulnerable Witnesses of Brčko District of BiH: Official Gazette of Brčko District of BiH, Nos. 11/03, and 8/07.
- Law on Witness Protection of Republika Srpska: Official Gazette of Republika Srpska, Nos. 21/03, 61/04, and 55/05.
- Law on Witness Protection Program of BiH: Official Gazette of BiH, No. 36/14.
- *Lilyanova, V.* (2015): Bosnia and Herzegovina: Political parties. European Parliamentary Research Service; http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/568324/EPRS_ATA(2015)568324_EN.pdf [12.01.2018].
- *Maljević, A., Šućur Janjetović, V., Budimlić, M., Jović, N., Miodragović, N., & Vujović, S.* (2017) Međunarodna studija o samoprijavljenom prestupništvu djece u Bosni i Hercegovini: Izvještaj za stručne radnike iz oblasti zaštite djece. CPRC, Sarajevo.
- *Nettelfield, L.J.* (2010): Research and repercussions of death tolls: The case of the Bosnian Book of the Dead, in: P. Andreas & K.M. Greenhill (eds.), Sex, Drugs, and Body Counts: The Politics of Numbers in Global Crime and Conflict, Ithacas, pp. 159–187.
- *Pašić Kreso, A.* (2017): Education of the population in BiH [Obrazovanost stanovništa u BiH], in: I. Cvitković (ed.), Demographic and ethnic changes in BiH, Academy of Sciences and Arts of Bosnia and Herzegovina, pp. 93–125.
- Service for Foreigners' Affairs (February 7, 2018). Complex Situation in BiH Regarding Issue of Illegal Migration; http://sps.gov.ba/saopstenja-en/complex-situation-in-bih-regarding-issue-of-illegal-migration/?lang=en [10.03.2018].
- *Sito-Sučić, D. & Robinson, M.* (February 15, 2013): After years of toil, book names Bosnian war dead; https://www.reuters.com/article/us-bosnia-dead/after-years-of-toil-book-names-bosnian-war-dead-idUSBRE91E0J220130215 [27.2.2018].
- The Federal News Agency [FENA] (July 10, 2017): Avdagić: Broj predmeta upućenih na medijaciju mogao bi biti znatno veći; http://www.fena.ba/article/955994/avdagic-broj-predmeta-upucenih-na-medijaciju-mogao-bi-biti-znatno-veci [11.03.2018].
- United Nations Department of Economic and Social Affairs, Population Division (2013): World Population Prospects: The 2012 Revision. https://esa.un.org/unpd/wpp/publications/Files/WPP2012_HIGHLIGHTS.pdf [28.2.2018].
- United Nations Development Programme [UNDP] in BiH (2013): *National Human Development Report 2013*; http://www.ba.undp.org/content/bosnia_and_herzegovina/en/home/library/poverty/rural-development-in-bosnia-and-herzegovina--myth-and-reality.html [11.01.2018].
- United Nations Development Programme [UNDP] in BiH. Introduction of Victim/Witness Support Services Project - Function of the project; http://www.ba.undp.org/content/bosnia_and_herzegovina/en/home/operations/projects/crisis_prevention_and_recovery/introduction-of-victim-witness-support-services-project.html [04.03.2018].
- United Nations Office on Drugs and Crime [UNODC] (2010): Background Research on Systems and Context: Justice and Home Affairs Statistics in the Western Balkans. https://www.unodc.org/documents/southeasterneurope/CARDS_Background_Study_final.pdf [01.03.2018].

- *Uzelac A., Knežević, G., Austermiller, S., Hadžić, M., Ribica, J., Živanović, A., Mrdović, F., Skoko, B. & Buševac, L*. (2009): Paths of Mediation in BiH. Sarajevo.
- *Zwierzchowski, J. & Tabeau, E*. (February 1, 2010): The 1992–95 War in Bosnia and Herzegovina: Census-based multiple system estimation of casualties undercount; http://www.icty.org/x/file/About/OTP/War_Demographics/en/bih_casualty_undercount_conf_paper_100201.pdf [27.2.2018].

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 243-250
ISSN 1512-5505

THE ITALIAN LAW ENFORCEMENT SYSTEM USED TO PROTECT CULTURAL PROPERTIES, WITH PARTICULAR REFERENCE TO DATABASES AND MASS MEDIA

Dalma LUKÁCS

Abstract

The basic pillar of the protection of cultural goods is the database which I present in this paper. Leonardo and iTPC can be considered as the next-generation database of stolen cultural properties, what the international law enforcement agencies do not have. During the the research, I have used the methods of interviews and the experiences gained during my study trip in Italy. Modern technology, and through this, mass media is essential to enhance the protection of cultural properties.

Key words

digitalization, database, Italy, Carabinieri TPC, illicit trade of cultural property, cultural heritage, iTPC

1. Introduction

The modern era has many advantages in the fight against the illegal trade in cultural goods. One of the most important and essential milestones for the police is the database. There are exists many databases which can be nationally and internationally as well. The best known is the Interpol Works of Art (WOA)[1], which is used in most countries, although the Italian 'LEONARDO',[2] developed by the Italian Comando Carabinieri per la Tutela del Patrimonio Culturale (Carabinieri TPC) which has the most data of stolen works of art. The advantage of this database is that civilians can use it, of course, only a particular segment. Based on the databases, we can extract different data, such as statistics (but we have to count on latency), which type can be the following segments:

- What are "most favorite" works of art?
- What are the most vulnerable countries?
- Where can the destination market be located?

1 Interpol WOA's database: https://www.interpol.int/notice/search/woa (29.12.2017)

2 Carabinieri TPC's database: http://tpcweb.carabinieri.it/SitoPubblico/search (29.12.2017)

From the source and the destination country, the routes could be established, but the latency (already mentioned) must be counted here as well.

2. WHY IS THE DATABASE IMPORTANT?

The effectiveness of investigations of stolen objects can be enhanced if police identification of stolen and circulated objects. Thus, in order to facilitate this, the database should include images, as well. Police in many countries strongly recommend to private collectors, museums, and ecclesiastes to make an inventory in case someone steals their cultural properties. It should be noted, in any case, that the police officer is not an expert on cultural goods and therefore cannot be expected to determine the age and origin of the objects during the investigation. If the owner has at least a picture of the stolen object, the investigator will be able to identify the item and forward it to other law enforcement agencies, such as Interpol. Thus, the database must have both pictures and the text data of the objects during the investigation, which facilitates the search of the subject as well as international investigation and cooperation with other agiencies, and plays an important role in communication. Some databases have a cross-border function, so many law enforcement professionals can manage the same database (record, share, delete) from another country. These include the Works of Art database. International co-operation is also crucial in the fight against the illicit trade of cultural properties, because we can talk about a cross-border organized criminal sector and need to be stopped by an alliance of countries, good communication and cooperation on a common platform that can be the database.

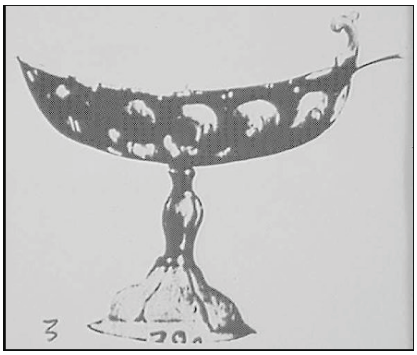
3. WHAT IS THE DATABASE CONSIST OF?

One of the most important thing is that, what type of data we enter into the database. These data can be image and text attributes. The most important criteria for entering text data are:

- type
-size
- artist / creator
- period
- techniques
- materials made of
- previous holders
- Have any injuries
- its weight, etc.

Of course, not all of these points will be answered, but these are the most important and available in most law enforcement databases. These points should also be taken into account when creating a home catalog. One of the biggest drawbacks to databases is that if the owner has a picture of the subject, it can be seen in the background of old, black and white or just a family

photo.[3] Because of such opportunities, it is not surprising that we can also find in the largest databases of art objects where couples, tourists, or families are included in cultural assets.[4]



1. picture: nave
Source: Carabinieri TPC database, code: 08259{3}

2. picture : jug
Source: Carabinieri TPC database, code: 23626{9}

The first has a poor image quality, while Figure 2 shows a jug decorated with colorful scenes. While the ornamental motifs can be seen in the jug, observing the form of the ship in the shape of a ship - personally - I think I can discover a flower like a statue. Colors are also very important in the description, but these boat-shaped statues are not visible. Even if it is decorated with colorful precious stones, or if it is chiseled, we can't see it because of the poor quality. This example also demonstrates the importance of higher quality images in the database in the progress of the investigation.

4. THE NATURE OF THE DATABASE

The database of stolen objects is a relevant database for the police, as in most cases museums or private collectors indicate their economic loss to the authority. It would be more complicated to run a database of counterfeits because many similar data (such as the same-looking painting) would come back with huge amounts of data. Another useful database (as I men-

tioned) would contain private collections. However, this latter set of data would be at private collectors, museums, and ecclesiastes who own these objects.[5]

In addition to statistics, there are many other options available to the police to use the data on stolen items in the database. Most of the archaeological findings found on the black market come from museums, private collections, churches, or illegal excavations. If the policeman finds an object (without any kind of paper) at the border in a vehicle and during the subsequent investigation neither the object is found in the Interpol database, nor on the basis of any other announcement, it is very likely that it is possible to find that the object is illegal. This is also associated with the fact that there is no inventory number on the subject. In addition, online interfaces are just as much an opportunity as a threat. Tracking sales and purchases on the Internet helps you draw different relationships and networks. However, law enforcement agencies can interact with a number of major web sites by requesting data from sellers and buyers through Interpol. Of course, you can only ask for this if you have a suspected suspicion of a crime.

5. LEONARDO

The Leonardo database was created by the Carabinieri TPC department, which has unique technological developments around the world. The Carabinieri Unit for Defense of Art was established on May 3, 1969 (Rush-Millington, 2015, p.15), nearly fifty years ago. In Italy, the Guardia di Finanza and the aforementioned body are relevant to the fight against illicit trafficking in works of art. After the Second World War, a separate unit took part in the negotiations on the return of cultural goods brought from Italy to Italy, including the Guardia di Finanza (Lukács, 2018, p. 300). However, over the years, their activities in the field of cultural goods have been limited to the economic aspect. Carabinieri's special department took over most of the tasks and developed its complex system, which, in addition to the operational units, also carries out educational, mass media, and manages the database of stolen objects, named Leonardo.

2004/42. Article 85 of the Italian Government Decree states that the Ministry has established a database of data on stolen cultural goods. The "cardboard archive" was created in 1969, where each object had a cardboard with known data and, at best, a black and white image. However, this old method, known in Hungary, was followed in 1980 by the first telematics implementation. This meant that only text data contained data on local PCs. In 1990, the second telematics implementation was carried out at the Headquarters; servers have been created to store the image. In 2000, they developed a thoughtful version of a computer server that was able to store text data in addition to images. In 2006, the last and current changes were made. A separate server for entering images and text data was created for the Carabinieri TPC. In 2011, within the framework of the PON project,[6] a module was developed to support the security of Italian archaeological sites. In 2015, a new, improved version of the database, LEONARDO, was launched.

---

5 In many cases, they do not dare to make a home catalog because they are afraid to get out to others about what they have. However, it also happens that they do not understand why the police want them to be recorded. However, this should not be accounted for by the police, but merely to keep a home catalog at home, in order to facilitate the investigation during possible theft. Thank you Béla Vukán for your information.

6 Il Programma Operativo Nazionale.

The database contains Italian and foreign descriptions and photographs. There is no limitation period in LEONARDO, so from the outset every item is included. There are 1,226,674 pieces in the database, of which 627,693 images, 64,111 registered home burglaries (5311 foreigners) and 6.246,604 devices. It should be mentioned that foreign cases are only included in the database if they concern Italy or Carabinieri TPC. Thus, in the Hungarian context, until 04/04/2017, 403 items in the LEONARDO database do not give a complete picture of the figures, as I have already mentioned only those data that are relevant to Italy or the Carabinieri TPC are included in the database. . The Italians are very proud of their database as they are the first in the world to have the largest data collection, for example, there are only 94,000 images in the second-rank Interpol database.[7] On the Carabinieri TPC website, you can access the database, search and analyze statistics.[8]

What elements does this database contain, what else does it contain? The Leonardo database is able to compare text to image with text search. This means that if a photograph is uploaded to the database, the system determines whether the object is in the database, ie stolen, compared to the images it knows. This was done to eliminate the time-consuming and inaccurate search for text search. However, we cannot go without this negative side. Not all cases can be eliminated by the program because in many cases the missing objects are of poor quality black-and-white images, and in case of vases and other spatial objects it is necessary to take pictures from all sides in order to find the results in the database.

Az Interpol például még nem rendelkezik a Carabinieri által kidolgozott újítással. Ahogy a legtöbb adatbázisnál, úgy náluk is a szöveges bevitel a jellemző. Ám tételezzük fel, hogy nem művészettörténész, képzőművész vagy régész végzi az adatbázisok kezelését. Egy laikus számára nem egyértelműek az adatok, így más attribútumokat vihet fel a rendszerbe, mint amelyekre valaki más a későbbiekben rákeres. A következő példa egy rendészeti szervnél fordult elő, miközben az adatbázisuk működését mutatták be nekem. Tudtuk, hogy a két lopott Van Gogh festményt felderítették Olaszországban, azonban ebből az adatbázisból még nem távolították el a két képre vonatkozó adatokat. A rendészeti szakember úgy keresett rá az egyik festményre, mintha nem tudná a festő nevét és címét. Azért is fontos ez, mert ahogy már szó esett róla, a rendőrök nem művészeti szakemberek. A keresőbe jelen esetben a tájkép, tíz ember és tíz hajó szerepelt. Eredményként azonban számos megfelelést adott ki a rendszer, kivéve azt, amit kerestünk. A későbbiekben kiderült, hogy azért, mert aki rögzítette az adatokat a rendszerbe, teljesen más attribútumokat tartott fontosnak, így például a tenger szó szerepelt és a csendélet a jelzők között. Ezen nehézségek kiszűrésére lenne alkalmas a Carabinieri TPC-nél alkalmazott Leonardo vagy a civil lakosságra szabott, továbbgondolt változata, az iTPC.

6. ITPC

The civil version of the Leonardo database described above has been created as an application. You can download the application to your smartphone, laptop, or tablet. Its main function is that if you want to buy an art object, you can check in the database whether it is stolen. To do this, you need to create a picture of the object you want to buy and upload it to the database through the application. Here it looks for the same shapes and points as the picture and then

7 Datas were valid until 04 June 2017.

8 Thankto the Carabinieri TPC for the help and informations.

publishes the result. In addition to this feature, many interesting features can be read on the app, including Carabinieri's publications, from which you can read about discovered artifacts. In practice, however, the site often freezes and does not allow objects to be loaded. However, the principle and the idea are a unique and very good initiative, but they still need IT developments.

7. THE IMPORTANCE OF MASS COMMUNICATION BY LAW ENFORCEMENT AGENCIES

Why is it important to inform the crowd? The help of the civilian population can be decisive, for example, in the expansion of the database or in the detection of stolen objects. This function is also intended to be loaded by iTPC to filter out stolen objects through the application at the auctions and other fairs, as police expertise is finite.

share work and place great emphasis on mass media and education. The division of labor is the harmony between the various bodies: polisia, Carabinieri and Guardia di Finanza, as well as between the departments established within them.

Although Guardia di Finanza also publishes books on discovered cultural goods (La Guardia di Finanza, 2003; La Guardia di Finanza, 2016), they are not so significant. In this area, the Carabinieri TPC celebrates a new edition of the discovered items each year. The Italian mass media, as well as scientific publications, also include thematic educational books, such as the book on ancient eating habits, which present the habits of that time through discovered objects (La Guardia di Finanza, 2016). In addition, historical articles (Lukács, 2018) about the formation of the organization and their operation (Rush-Millington, 2015) and their most important tasks (Carabinieri TPC 2016) were published, including their foreign missions (Pasqualini, 2001; Pasqualini 2002). publications were published. Some of the studies and articles are also uploaded to the iTPC application mentioned above. In addition to publications, a press conference and exhibitions are organized for the public. In primary and secondary schools, students are taught how to learn about cultural heritage protection at an early age and what to do if they find a work of art.

In addition to education, the police should use the online interface to be the most important way to communicate. The Z generation requires interactive information and the ability to use online. Although the Carabinieri TPC has no Facebook and Instagram pages, however, the Carabinier itself has a single, general operation that shows every segment of the organization's operation. Thus, exhibitions related to artistic protection,[9] as well as entries promoting their activities, help them to get to know them all over the world, to track their work and to get to know them a little. This has many advantages, as people turn to them with confidence both in their home country and abroad.

In my opinion, the initiative is already on track with the Carabinieri TPC, but it is still lagging behind at international level. Going further in technology, the Google Arts & Culture app has many advantages. Although not a law enforcement software, it is important to know it, as some of its points could be adapted to the law enforcement sphere. Through this application,

[9] The pictures include the restoration of damaged monuments in earthquake-stricken areas by the Carabinieri TPC staff, as well as helicopter aerial surveillance at archaeological sites, and a 1918 and 2018 image of the Carabinieri TPC staff in Jerusalem.

we can view the paintings of over a thousand museums in the world in high resolution (Kennicott, 2011). Nowadays, there is a popular option for application downloaders: museums can be "roamed" in an online 3D version. In addition, the user, if requested, will search for the figure in the painting that best resembles the figure and give it in percent gold. This principle is also important because iTPC does not give the option in percent, just whether there is a hit in the database or not. Why would a percentage definition be important in the light of cultural goods?

8. DETERMING (%) OF DATABASE IN ART OBJECTS

In the past, I have outlined how to build a database of stolen cultural goods, what types they have, and how the Italian Leonardo database is built, structured, and communicated. However, it has not been a case of an offense. About the transformations. Typically, the perpetrators attribute large paintings, then divide them and sell them in several smaller pieces on the market, or paint a part of the picture. The Carabinieri TPC staff also said during the interviews that these paintings are easy to spot. In many cases, each figure looks toward a particular point on the painting, which is hidden from us because there is no shape at that point on the image. But there was a case where the limbs of the figures were missing from the painting. In this case, the more sophisticated offender can cover the unwanted parts of the canvas. In this case, the above-mentioned percentage determination would be useful, which would filter out the paintings that were subsequently repaired and repainted. Without this, however, you might not find the current database match because it is not 100% identity. In addition, the already mentioned: the existence of high quality photos would also contribute to the success of investigation and database management.

9. CONCLUSION

In order to curb the illegal trade in cultural goods, a well-structured database of images of appropriate quality is essential. In addition, the database manager must have the appropriate competencies. The Italian LEONARDO database, which is the only one in the world today, is available in the civil sphere through its iTPC application. With the help of technological developments, a new form of mass media appeared alongside the old type: education and publication. The next phase of the database development could be a database of three-dimensional objects, where there would be no problem with the image at which the subject was photographed. To do this, the three-dimensional scanning method would be essential. An important criterion is that the objects should not be damaged, so chip and other marking techniques, such as micro-precision and nanotechnology-based methods (Kármán- Kiss, 2011, p.209) raise ethical problems. For this reason, three-dimensional scanning and the associated database would be an innovation that would facilitate the work of the police.

BIBLIOGRAPHY

- Andrew Wilson: *How your photos can help preserve threatened heritage sites for the future.* Independent. 2016. szeptember 28. https://www.independent.co.uk/life-style/gadgets-and-tech/how-your-photos-can-help-preserve-threatened-heritage-sites-for-the-future-a7332656.html (2019.01.02)

- Comando Carabinieri Tutela Patrimonio Culturale- Attivitá Operetiva 2016. 35. In: http://www.reportdifesa.it/wp-content/uploads/2017/04/Attivit%C3%A0-Operativa-2016.xs_.pdf (2018.09.11.)
- Guardia di Finaza: *Symposium: a tavola tra mito e cultura*. Recuperi archeologici della Guardia di Finanza, Roma, 2016.
- Kármán Gabriella- Kiss Anna: *A hamis és meghamisított festmények azonosítása*, Kriminológiai Tanulmányok, 2011/48, p 196-212.
- Laurie Watson Rush- Luisa Benedettini Millington: The Carabinieri Command for the Protection of Cultural Property. Saving the World's Heritage. The Boydell Press, Woodbridge, 2015.
- La Guardia di Finanza a tutela dei Beni Culturali: *L'Arte Ritrovata*, Academia Internazionale ARCO- Roma, 2003.
- Lukács Dalma: Recenzió - Luciano Luciani: A Guardia di Finanza munkássága a nemzeti művészeti örökségek védelmében az első és második világháború után. In: Czene-Polgár Viktória - Zsámbokiné Ficskovszky Ágnes (szerk.): Innováció, elektronizáció, tudásmenedzsment. Tanulmánykötet. A Magyar Rendészettudományi Társaság Vám- és Pénzügyőri Tagozata. Budapest, 2018. (ISBN: 978-615-80567-3-1) 299-304.
- Maria Gabriella Pasqualini: Missioni dei Carabinieri all' estero. 1855 - 1935. Rome, 2001
- Maria Gabriella Pasqualini: Missioni dei Carabinieri all' estero. 1936 - 2001. Róma, 2002.
- Philip Kennicott: *National Treasures: Google Art Project unlocks riches of world's galleries*. The Washington Post. 2011. február 2.

Databases:

- LEONARDO: http://tpcweb.carabinieri.it/SitoPubblico/search (29.12.2017)
- Interpol Works of Art: https://www.interpol.int/notice/search/woa (29.12.2017)

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 251-268
ISSN 1512-5505

MEASURING ORGANIZED CRIME IN THE WESTERN BALKANS: THE UNODC APPROACH

Research Note

Almir MALJEVIĆ

Summary

The aims of this paper is to examine the availability of statistical data on crime, and specifically on organized crime (OC). When it comes to organized crime, definitional questions make the task of identifying the proper data and assessing its availability for collection and analysis particularly complicated. Despite these definitional issues, the statistical framework took a holistic approach in measuring both the who and the what of organized crime. The concept of OC was divided into five dimensions: state response, enablers, OC activities, organized criminal groups (OCGs), and economic value (see Figure 2). Within those five dimensions, 19 sub-dimensions, and 364 unique indicators were identified that could contribute to measuring OC. These 364 indicators became a "wish list" against which availability of data was assessed. In order to more accurately capture instance of crime linked to organized crime, a number of indicators required disaggregation between total number of persons/cases regarding a particular criminal activity and the same criminal activity that involved organized criminal groups. For this reason, indicators within the framework often appear in pairs, such as, "total number of cases of trafficking in persons" as well as "total number of cases of trafficking in persons involving an organized criminal group". The paper discusses how availability of data can elucidate important factors about countries' capacities to measure patterns and trends of OC and finally, present some practical solutions to improve the availability of this data.

Key words

Organized crime, data, assessment, Western Balkans, indicators

1. INTRODUCTION[1]

The question of the existence of organized crime (OC) has long been settled, yet the scope and patterns of the problem and its effects on society are questions that still call for a solid answer. Particularly in the region of the Western Balkans, evidence-based findings indicate that OC activities are particularly significant in a number of areas, such as drug or firearms trafficking, and that some factors, such as corruption and poor economic performance, enable organized crime. However, due to the lack of advanced statistical and analytical tools to monitor levels, trends and patterns of OC, it has not been possible to understand whether progress is being made in the fight against OC or, on the contrary, organized criminal groups maintain or even increase illegal activities. In this context, UNODC, under its project "Measuring and assessing organized crime in the Western Balkans: Supporting evidence-based policy making," (MACRO), set out to develop a framework for a standardized, comprehensive and replicable measurement of organized crime with statistical data as its base.[2]

Although data is the basis of measuring any phenomenon, when it comes to organized crime, definitional questions make the task of identifying the proper data and assessing its availability for collection and analysis particularly complicated. There is no universally accepted definition of "organized crime", and the definitions that do exist often focus on groups and fail to capture what is commonly meant by the term, which can be either a particular type of criminal organization or organized crime activity, often referred to interchangeably. The United Nations Convention against Transnational Organized Crime offers a definition of "organized crime groups", encompassing those engaged in a wide range of profit-driven criminal enterprises. [3] The United Nations Crime Trends Survey used by UNODC to collect data on homicide related to organized crime largely follows this definition.[4] Another view sees organized crime as a set of serious criminal activities providing illegal goods and services for profit.[5] The distinction between the different concepts of organized crime regarding criminal organizations (who) or profit-making criminal activities (what)[6] is reflected in previous analyses by UNODC[7] making a distinction between territorial and trafficking groups.

However, despite these issues, progress can and should be made in the measurement of organized crime. This Research Brief will describe the crucial first steps toward the development of the framework used for MACRO: identifying the data that could be relevant to measuring organized crime and assessing its availability. The assessment's main goal was to aid the development of a standardized, comparable set of indicators on which to base custom-made regional data collections that could be replicated to assess trends as well as the impact of policy or operational interventions. However, the data assessment was also undertaken to evaluate data reporting systems on organized crime, to identify gaps in the information on OC that would be better suited to other types of data collection, and to identify areas that required capacity building in the statistical services in order to improve the quality and availability of data.

2. METHODOLOGY

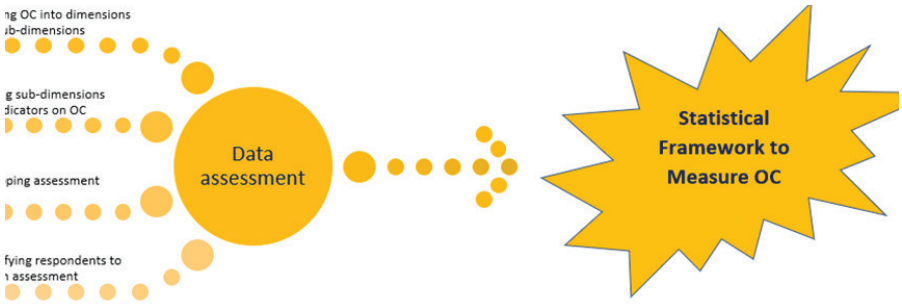
---

[1] This paper was developed by the UNODC Research and Trend Analysis Branch under the overall coordination of Angela Me and in collaboration with Kristiina Kangaspunta and Tejal Jesrani, within the MACRO project. The publication was written by the author, as an output defined as Research Brief under the title "Measuring Organized Crime: Assessment of Data in the Western Balkans.

2.1. Dimensions, sub-dimensions and indicators of the statistical framework

Developing a methodology to measure such a complicated set of crimes necessitates several preparatory stages (see Figure 1): structuring the dimensions and sub-dimensions of the framework; selecting a group of relevant possible data points or indicators within those sub-dimensions; developing tools to record and analyze this information; identifying relevant respondents at the national level to inform on data collection processes and availability of the selected data points or indicators; undertaking the actual data assessment; and most importantly, analyzing the results and finalizing the framework for data collection.

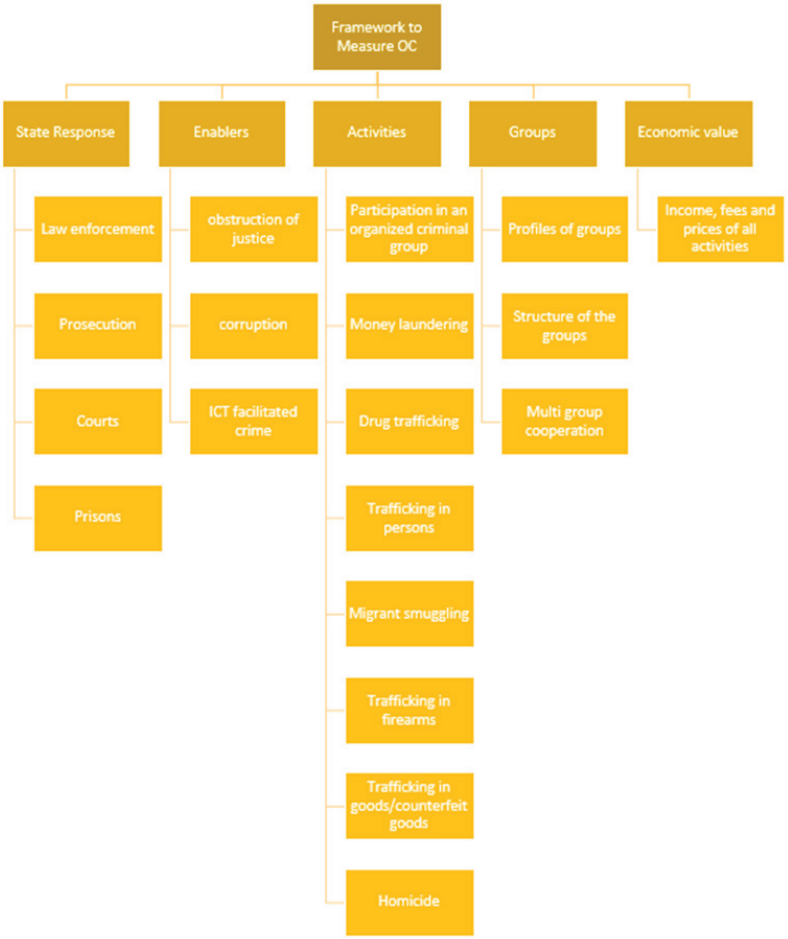
Figure 1: Development of a framework to measure organized crime



In the present case, structuring the dimensions and sub-dimensions of the theoretical framework was inspired by the model developed by Transcrime in 2012, which divided the concept of organized crime into five dimensions, related sub-dimensions, and within those, indicators for measuring organized crime.[8] For the purpose of the current work, five dimensions of state response, enablers, OC activities, OC groups, and economic value were used (see Figure 2). Those dimensions were then split into 19 sub-dimensions based on the stage of the criminal justice process (with regard to state response), the type of activity or the type of information requested.

Figure 2: Dimensions and sub-dimensions of the Framework to measure organized crime

[8] Transcrime- INEGI Centre of Excellence (2012), A framework for the quantification of organized crime and assessment of availability and quality of relevant data in three selected countries of Latin America and the Caribbean.



Elaborating the sub-dimensions of the framework required identifying criminal activities on which to focus. It was decided to focus on criminal activities that are most commonly associated with organized crime. .[9] This encompassed all the criminal offences included in the UN Convention against Transnational Organized Crime,[10] namely, participation in an organized criminal group, money laundering, corruption and obstruction of justice. Criminal justice data on cases of participation in an organized criminal group, as stipulated in Article 5 of the UN Convention against Transnational Organized Crime is a logical place to start when considering which data may be relevant to measuring and assessing organized crime. However, it would not be sufficient to only consider cases of participation in an organized criminal group as that particular crime may not always be charged due to lack of evidence or other prosecutorial decisions or, even if charged, may not be preserved in the statistical records of a case that involved orga-

[9] See UNODC*, The Globalisation of Crime*. Vienna: UNODC, 2010.

[10] General Assembly resolution 55/25 (2000).

nized crime, for reasons that will be discussed later in this brief (see Section 4.3.2). On the other hand, it would not have been sufficient either, to only collect information about cases that have been traditionally associated with organized crime, such as drug trafficking, as not all of them are committed in the context of organized crime.

The framework needed to capture crimes committed in the context of organized crime. A number of indicators within the statistical framework required disaggregation or differentiation between total number of persons/cases regarding a particular criminal activity and the same criminal activity that was carried out by organized criminal groups. Accordingly, indicators for each crime type appear in pairs, e.g., "total cases of trafficking in persons," as well as, "total cases of trafficking in persons linked to active organized criminal groups." Adding this disaggregation not only allowed for specificity in measuring OC involvement, but also for comparisons between OC and non-OC involvement within crime types and comparisons of OC involvement between crime types.

The criminal offences included in the three Protocols[11] to the Organized Crime Convention were also included among the sub-dimensions of the theoretical framework, namely trafficking in persons, smuggling of migrants and trafficking in firearms. In addition, drug trafficking as well as drug production and manufacturing were included, as well as trafficking in counterfeit goods, other goods and finally, cybercrime. Homicide was also included in order to serve as a proxy for the level of violence used by organized criminal groups. As the use of violence is more often associated with hierarchical, structured, Mafia-type OCGs, as opposed to more loosely organized criminal networks,[12] homicide data could serve as an indicator of which structures are predominant in the Western Balkan region. For each of these crimes, already existing UNODC data collection efforts were consulted to harmonize, supply previously submitted information, and prevent duplication of requests to the beneficiaries of the project wherever possible.[13]

The sub-dimensions were then divided into 364 unique indicators in the framework. These indicators comprised a sort of "wish list" of data against which assessment would take place. In order to standardize the assessment process, data assessment guidelines were formulated.[14]

2.2. Institutions

Regarding the selection of institutions to provide information about data availability, the internal constitutional structure of a given country/territory and the specific competences of the institutions were considered carefully. The institutions primarily seen as potential statistical data providers about OCG and their activities were the law enforcement (including border police and customs offices), prosecutors, courts (and where possible judicial and prosecutorial councils) and prisons. In addition to these, particular attention was given to the national statistical offices, as these are the institutions in charge of collecting, processing and reporting on crime related data collected from the above-mentioned data providers. It was also seen as crucial to include various agencies that deal with or could potentially be in position of collecting organized crime and criminal justice related data such as Financial Intelligence Units, agencies that deal with proceeds of crime, various ministries (justice, for example), anti-corruption agencies, and centers for protection of victims of trafficking. In the context of the MACRO project, both the institutions and the persons were selected with the assistance of and in coordination with

the members of the MACRO National Technical Groups. [15]

2.3. Data availability assessment

The assessment took place via structured interviews with selected officials from national criminal justice institutions that collect data on crime, in particular to elicit information regarding what kind of organized crime data was collected as well as what was done with it.[16] During November and December 2017, 140 interviews with representatives of 57 institutions in 6 countries/territories of the Western Balkan region took place. The team conducting the interviews consisted of the UNODC project team member, UNODC National Project Officer in a given country and an expert on organized crime.

[15] National technical group (NTG) is a group formed by respective governments in the region, that have the main task to coordinate the collection of standardised data from all relevant institutions and check their completeness and consistency. The NTG is composed of representatives of the institutions dealing with organized crime cases. Representative of the national statistical office is usually the president of the NTG. NTG meets on a regular basis, twice a year, in order to review undertaken activities and assist the UNODC team in the implementation of activities.

[16] See Annex B, Data Assessment Guidelines for more information.

Figure 3: Number of assessment interviews

	Albania	Bosnia and Herzegovina	Kosovo (UNSCR 1244)	Montenegro	North Macedonia	Serbia
Period	20-22.11.	13.11.-26.12.	29.11-1.12.	4-6.11.	24 - 28.11	10-13.11.
Institutions	9	15	9	8	11	7
Persons interviewed	23	28	22	18	38	17

Most of the interviewees worked in the analytical unit of a given institution, i.e. the unit processing data received through various types of forms and records. Nevertheless, very often, the team had a chance to talk to those who deal with OC on an operational level and who fill in various forms and records with regard to the cases they had worked on. Occasionally, decision makers of a given institution (minister, director, etc.) were interviewed as well.

The duration of the interviews varied, ranging from 30 minutes to 4 hours. On average, the interviews lasted 90-120 minutes depending on the number of persons present at the meeting, but also on the position of the institution within the anti-OC framework and the number of records the institution possessed.

3. THE OUTCOMES

The results of the data availability assessment were summarized in national reports (data availability assessment reports) which enabled the finalization of the statistical framework to measure and assess organized crime as well as a regional table that compiled the national information by the availability status of data in each country. The availability status was divided into three categories: readily available, not readily available or not available.

3.1. The data availability assessment report

The reports described the process of data registration, collection and analysis of each interviewed institution, with information on the main registries used, the flow of the data (from initial recording to the final statistical processing), and the content (which information is collected, i.e. what is contained in the registries/book of records). At the same time, information gaps that would be better suited to other types of data collection (such as qualitative interviews) were identified. These gaps also pointed out areas that required capacity building in the statistical services in order to harmonize statistical methods and standards with international good practices.

The assessment reports represented a baseline/snapshot of the data availability and quality to inform the statistical framework and design the data repository. The data repository was consequently customized to each beneficiary to reflect their individual data availability and needs, while ensuring a good level of regional comparability and comprehensiveness.

Each report contained a color-coded table of the availability status of the indicators. Cells were colored green to indicate that the data was readily available, with the name of the responsible agency noted in the cell. Cells were colored yellow to indicate that the data was not readily available but could be made available given extra time and effort (usually implicating manual extraction of the data from files, forms or registries). Finally, cells were colored red to indicate that the data were simply not available (and were better suited to other types of data collection, such as qualitative, and the provision of technical assistance).

Figure 4: Regional table of data availability

Crime	INDICATOR	Albania	Bosnia and Herzegovina	Kosovo	Montenegro	North Macedonia	Serbia
Total	Total number of people arrested	Police	Police	Police	Police	Ministry of interior/police	Police
Organized crime	Total number of people arrested for participation in an organized criminal group	Police	Police	Police	Police	Ministry of interior/p	Police
	Total amount of assets seized by type of asset	Police	Agency for Management of Seized Property	Police/Prosecutorial Co			Managing Confiscated Assets
	Total amount of assets confiscated by type of asset	Police	Agency for Management of Seized Property	Police/Prosecutorial Co		Ministry of interior/p	Managing Confiscated Assets
	Total amount of assets seized by type of asset linked to active organized criminal groups		Agency for Management of Seized Property	Police/prosecutorial co	Special prosecutor's office		Managing Confiscated Assets
	Total amount of assets confiscated by type of asset linked to active organized criminal groups		Agency for Management of Seized Property	Police/prosecutorial co	Special prosecutor's office	Ministry of interior/p	Directorate for Managing Confiscated Assets
Homicides	Total number of people arrested for intentional homicides	Police	Police	Police	Police	Ministry of interior/p	Police
	Total number of people arrested for intentional homicides linked to active organized criminal groups		Police	Police	Police	Ministry of interior/p	Police
	Total number of people arrested for attempted homicides linked to active organized criminal groups		Police	Police	Police		Police
	Total number of intentional homicides for which the offender has been identified by the police (clearance rate)	Police	Police	Police	Police	Ministry of interior/p	Police
Money Laundering	Total number of people arrested for money laundering	Police	Police	Police	Police	Ministry of interior/p	Police
	Total number of people arrested for money laundering linked to active organized criminal groups		Police	Police	Police	Ministry of interior/p	Police
Human Trafficking	Total number of people arrested for human trafficking	Police	Police	Police	Police	Ministry of interior/p	Police
	Total number of people arrested for human trafficking linked to active organized criminal groups		Police	Police	Police	Ministry of interior/p	Police
Smuggling of migrants	Total number of people arrested for smuggling of migrants	Police	Police	Police	Police	Ministry of interior/p	Police
	Total number of people arrested for smuggling of migrants linked to active organized criminal groups		Police	Police	Police	Ministry of interior/p	Police
	Total number of people arrested for facilitating illegal migration	Police	Police	Police	Police	Ministry of interior/p	Police
	Total number of people arrested for facilitating illegal migration linked to active organized criminal groups		Police	Police	Police	Ministry of interior/p	Police

3.2. Regional table

Based on the designation of the availability status of the individual indicators, a regional table was created, featuring all indicators, divided into dimensions (with their sub-dimensions) and all countries/territories covered by the assessment. This table provided an opportunity to draw conclusions about the availability of indicators at the regional level. In order to finalize the regional statistical framework to measure OC, the "green" and "yellow" indicators were included in and form the framework for measuring and assessing organized crime in the Western Balkan region.

4. DATA AVAILABILITY FINDINGS

The assessment of data against the statistical framework of OC showed that while in general, the majority of the indicators were available, most of the data in the "wish list" specifically on OC and on crime disaggregated by OC involvement was either not readily available or not available at all. More specifically:

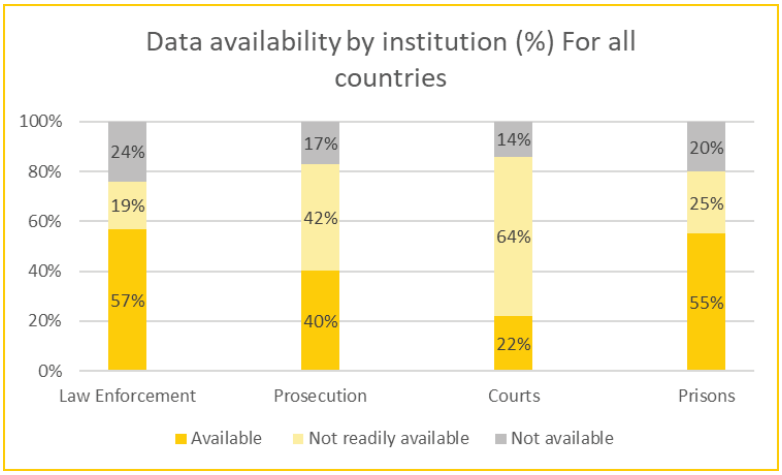
- **Most countries do not have statistical systems in place to record OC.** Regarding the dimensions of organized crime groups and economic value, there are not currently systems in place to be able to record, report and analyze this information, with the exception of one interviewed institution which kept a sophisticated database on all active organized criminal groups.
- **Available data varied greatly among different crime types.** Within different sub-dimensions of the framework, particularly among different crime types, availability of data varied greatly. This reflects common problems related to data collection on international crime statistics including imprecise definition of terms, incorrect classification, confusing coding structures, differences in the units of count and procedural differences. It also emphasizes that the main aim of crime and criminal justice statistical systems in the assessed countries/territories is not to assist in understanding criminal phenomena, but to record their actions for administrative purposes. However, it was particularly striking that, when a specific crime phenomenon had received increased attention from the international community and had been the subject of global or regional data collection efforts, the availability of data regarding that criminal phenomenon was significantly better. In other words, the availability of specific types of crime data is often dependent on what kinds of requests are received, and particularly when they are received with sustained regularity.
- **Even when data on crime is available, linkages with OC are not**. With regard to the dimensions of state response, enablers and OC activities in the framework, data regarding instances of crime was largely available. However, instances of crime linked to OC was not readily available. For instance, data could be collected on the total number of cases of trafficking in persons but not on the total number of cases of trafficking in persons involving an organized criminal group. This information may be collected by agencies in various forms (books or hard copy criminal justice records), but it is not entered into electronic databases. As a result, it becomes a considerable strain on time and human resources to access it.
- **The flow of cases through the criminal justice system is difficult to follow.** The inability to trace cases with a consistent identifying number from investigation, to prosecution to adjudication hampers efforts to understand how cases develop as they progress through the criminal justice system and what kinds of factors can lead to successes or failures in prosecutions and convictions of organized crime cases.
- **The principle offence rule can obscure organized crime involvement.** The principal offence rule, used to record data, may obfuscate the instance of crime committed in the context of OC, as very often multiple offences and those with lesser penalties are not captured in the statistical data recording systems. This is of particular relevance in the case of OCGs that, as a rule, commit multiple criminal offences.

4.1. State response

Regarding the dimension of state response within the statistical framework, the system does capture a large amount of information. On average, about 80% of the "wish list" indicators could, in theory, be obtained from the criminal justice system.

The institutions assessed to provide the most easily available data are the law enforcement agencies and prisons (see Figure 5). Courts and prosecutors are in the possession of a lot of information in their records (not strictly court verdicts or decisions, but also indictments and evidentiary materials). Yet, very few of the indicators were assessed as being readily available since this information is not a part of regular reporting systems. These reporting systems, as elaborated earlier, are designed not to help understand crime, but to provide evidence for efficiency of the system. Since, not all of the data that is being recorded is transferred to the databases or being used for regular statistical reporting, if the data were requested, it is not likely that the extra human resources needed to report on this data will be expended.[17]

Figure 5

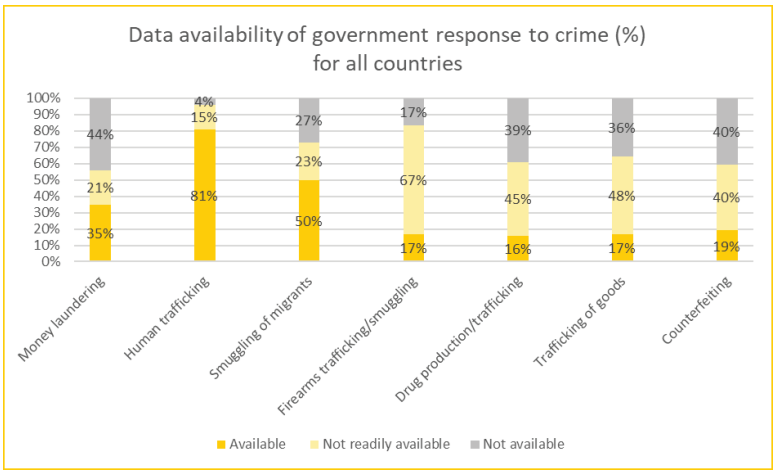


With regard to collection and reporting on crime related data, the assessment interviews confirmed that it is not possible to trace a case through the criminal justice process, from investigation to prosecution to adjudication with one unique identifier. While this does not affect the availability of data per se, it severely hampers efforts to directly measure case attrition and analyze what factors lead to successes or failures in prosecutions and convictions of organized crime related cases. For example, when a law enforcement agency investigates an organized criminal group which consists of 10 people and deals in drugs, it subsequently completes the investigation and submits the report to the prosecutor. At a later stage, the prosecutor may discover that what was assumed to be one group is actually split into two groups: 6 persons who deal drugs and 4 persons who launder the money. This new information however, will not affect the data recorded by the police, nor will it change anything in the data submitted to the repository for purposes of analysis. On the other hand, a traceable case number would enable a more transparent and deeper analysis of the patterns and trends related to organized crime.

4.2. Criminal activities

The assessments revealed that data availability significantly differs depending on the type of criminal activity in question. Whereas a majority of the indicators on trafficking in persons were available, very few indicators on firearms trafficking, drug trafficking, smuggling and trafficking of goods or counterfeit goods were readily available. The assessment revealed that quite a lot of information is being recorded regarding trafficking in firearms, yet very little of that information is used for regular reporting.

Figure 6



One of the reasons so many indicators are available for trafficking in persons could be that across the region, national institutions to monitor and combat trafficking are commonplace. Trafficking in persons has received considerable and sustained attention in the region, so countries/territories have faced various requests for data on the state response to this crime from domestic and international governmental and non-governmental organizations. Over time, forms and data recording for the state response to trafficking in persons were upgraded so that today it is available. It appears that the more often data on a particular criminal activity is requested from the region, the more likely it is that the institutions will upgrade their systems of data recording, statistical processing and reporting. It may be the case that if data on OC and OCGs were requested more often, it might bring more attention to the systems in place in countries/territories to record, process and report data on OC and OCG.

Furthermore, the "principal offence" rule, a rule that defines how simultaneously committed criminal offences are recorded, seems to hamper proper understanding and assessment of organized crime in the region. The application of the principle offence rule results in a situation in which only the most serious offence is recorded for statistical purposes. Other offences, although available as information in case files, remain outside of the statistical reports. For example, an OCG of 10 persons are involved in drug trafficking; three of them subsequently are involved in money laundering; and two of them, in the course of the criminal operations,

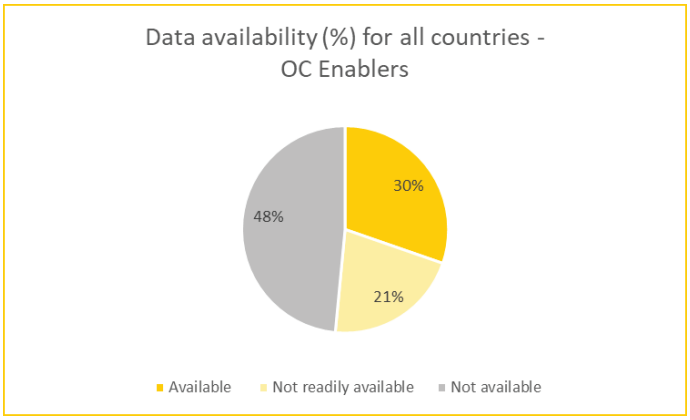
bribe police officials. All these activities are, beyond any doubt, related to or committed within the context of organized crime and each one of these 10 persons participated in several punishable criminal offences. However, statistically, only the most serious offence will be recorded. For some of them it might be "participation in an organized criminal group", for another "drug trafficking", and for the others "money laundering" or "bribery".

Which of these will be recorded depends on the sentences prescribed for all offences. In the case of OCGs, that as a general rule commit multiple offences simultaneously, this poses a serious problem for the recording and reporting of data on instances of crime linked to organized crime. Obviously, over a certain period of time, the total number of OC related offences will be significantly different from reality.

4.3. Enablers

Enablers is a dimension that has three distinct sub-dimensions: corruption, obstruction of justice, and the use of technology for the commission of crimes by OCGs. At first glance, it seems that most of the data, almost 80%, on enablers is available. Deeper analysis of the results of the data availability assessment, however, suggest that the situation differs with regard to the sub-dimensions of the component.

Figure 7

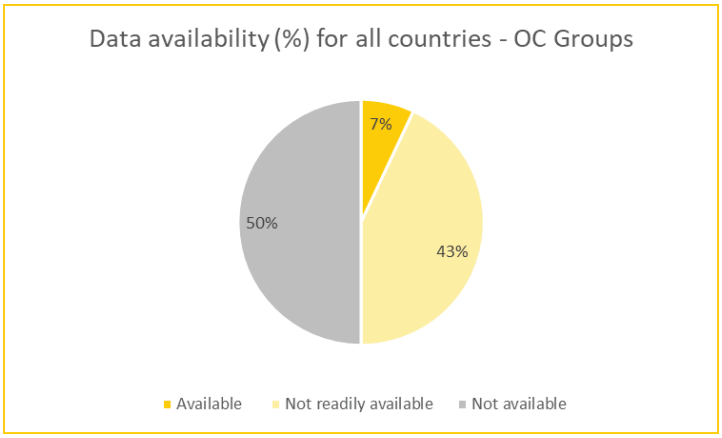


For example, with the exception of Albania, other countries/territories can provide almost all information for indicators related to corruption. At the same time, all countries/territories can provide data on indicators related to the obstruction of justice. A set of indicators that could be seen as the most problematic is the one related to the use of technology for the commission of crimes by OCGs. As above, this is probably due to a lack of requests received for the information, resulting in data that is collected, but not preserved in statistical reporting.

4.4. Data on organized criminal groups (OCGs)

Regarding the indicators defined for organized criminal groups, the general conclusion is that very little information is easily available. In principle, data for only half of the OCG related indicators is being recorded, and a significant portion is not readily available (see Figure 8).

Figure 8

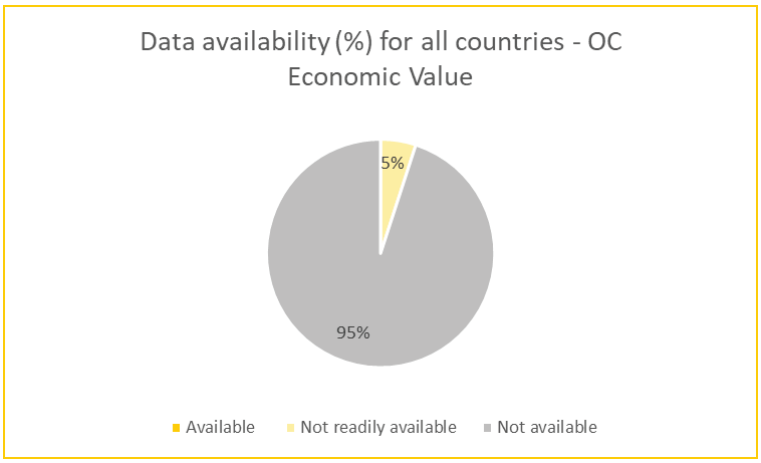


With one exception, data on the number of recorded organized crime groups active in the country in the latest available year is missing across the region. The Ministry of Interior of Republika Srpska, Bosnia and Herzegovina, maintains a very sophisticated registry on activities of fighting organized crime that is a regional good practice.[18] However, with this one exception, disaggregation of OCGs by criminal activity in which they are involved is also missing and even this database is not linked to other criminal justice data such as investigation, prosecution or court records. Across the region, there is usually information about the total number of persons arrested for trafficking in persons, but it is not known how many of those were in relation with OC. Or, data on the amount of assets seized in a drug dealing case is available. Yet, data on which of those assets are linked with OC is not possible to collect. This information is potentially available in the records of prosecutors' offices or judicial and prosecutorial councils. However, it would require additional resources (time and human), to manually extract the files and analyze which cases are related to OCGs. Therefore, it can be concluded that with above-mentioned exception, the data as it is does not provide a picture of OC in any given country/territory.

4.5. Economic value

The results of the data assessment showed that data regarding the economic value of organized criminal activities, (see Figure 9) is not available at all. None of the criminal justice agencies, or any other institution interviewed seemed to have systems to capture the economic value associated with the activities of OCGs, e.g., approximate income (for offender in case of trafficking in persons) by one victim per day; or an average price at the retail level by type of firearm and ammunitions; or an average price at the retail level by type of drug trafficked.

Figure 9



5. CONCLUSIONS AND POLICY IMPLICATIONS

The question of the existence of organized crime has long been settled, yet the scope and patterns of the problem and its effects on our society are questions that still call for a solid answer. Policy makers, practitioners and the international community would benefit from an adequate and viable framework that will assist in understanding organized crime. In the context of the MACRO project, UNODC has elaborated such a framework with statistical data at its base. As a preliminary step towards the development of the framework, a thorough and comprehensive data assessment related to OC data availability at the national and regional level was carried out for the very first time.

The data assessment detailed in this Research Brief made clear that although there is a large amount of data available regarding some dimensions of organized crime, most of it is not stored in a way that facilitates efficient collection and analysis. Other dimensions of organized crime, such as information about groups and economic value, is non-existent in the statistical systems. Within the MACRO project, this lack of data has been adequately compensated for. Regarding the lack of data related to organized criminal groups which would assist in understanding modus operandi, internal structures, and economic value of OC activities, the project has undertaken a series of qualitative information gathering efforts in the form of in-depth interviews. These interviews will add the viewpoints of expert practitioners, prisoners convicted of crimes most often associated with organized crime,[19] as well as victims of trafficking and smuggled migrants to the analysis of these dimensions of the framework.

Regarding the large amount of data that was found to be not readily available (yellow colored cells), the data collection conducted under the MACRO project nevertheless requested these indicators from the beneficiaries in an attempt to fully exploit the availability of data. It is clear

[19] Participation in an organized criminal group, trafficking in persons, smuggling of migrants, trafficking in firearms, manufacturing of drugs, drug trafficking, trafficking in goods and trafficking in counterfeit goods.

from preliminary data analysis that some, although not all, of the data that was characterized as "not readily available" has been received. These measures, however, will only solve the issue of understanding OC in the Western Balkan region in the short term and are not sustainable to measure organized crime patterns and trends over time. For a long-term solution, the following actions are recommended, some relatively minor and some requiring more time and resources, that could considerably increase the amount and quality of OC data.

5.1. Improving existing statistical systems to measure organized crime

Institutions in the region should improve data processing procedures, so that the data collected through various hard copy forms and books of records are more readily available to domestic institutions and policy makers for the purpose of creating and implementing evidence-based policies. Thereby, vastly increasing the availability and quality of data. This will not only make the domestic institutions better informed of the situation with OC, but also simplify their procedures to respond to various requests for data that are, as reported, continuously coming from various interested parties.

In order to more efficiently disaggregate instances of crime related to organized crime, a couple of actions are recommended. First, the use of the principal offence rule and any other counting rules that may obfuscate the total number of OC related offences should be reconsidered. Secondly, the International Classification of Crime for Statistical Purposes (ICCS) should be implemented, and particularly the use of its event disaggregations (see Figure 10), should be introduced in order to efficiently "tag" the instance of crimes that are organized-crime related.

Figure 10

EVENT DISAGGREGATIONS				
At – Attempted/completed	**SiC** – Situational context	**Geo** – Geographical location of the crime	**Rep** – Reported by	**DaT** – Date and time
1. Attempted 2. Completed 3. Not Applicable 4. Not known	1. Organized-crime related 2. Gang related 3. Corporate crime related 4. Intimate partner / family related 5. Terrorism-related 6. Civil unrest 7. Other crime 8. Not applicable 9. Not known	1. Required geographical division of country (1st,2nd, etc. levels) 2. Extraterritorial 3. Not Applicable 4. Not known	1. Victim 2. Witness (non-victim) 3. Police 4. Other law enforcement 5. Criminal justice institution 6. Not known	**Date format:** dddd/mm/yyyy **Time format:** 24:00

Source: ICCS, Version 1.0.

Once introduced, these would help to enrich the analysis and understanding of organized crime. This would, obviously, require modification of the recording systems by law enforcement and other criminal justice agencies. However, this would lead to a better understanding of crime, organized crime included, and would help law enforcement agencies, other criminal justice institutions and policymakers create better policies and strategies to counter organized crime.

In line with good practice described by the United Nations Manual for the Development of a System of Criminal Justice Statistics and as recommended by the CARDS project in 2010,[20] institutions that collect data on the criminal justice response to crime should consider harmonizing their case identification systems so that cases can be traced throughout the criminal justice system with an integrated file number (IFN). This will aid in efforts to understand how cases have developed from investigation to prosecution to adjudication and which factors lead to successes or failures in responding to different forms of crime, particularly organized crime. In this respect, a pilot test in one of the MACRO beneficiaries could be considered, consisting of a tripartite working group with experts from the police, prosecution and court systems in order to consider whether and how an IFN system could be introduced and extended to all criminal justice institutions.

5.2. Developing new statistical systems to measure organized crime

New statistical systems, such as the registry on activities of fighting organized crime, developed in Republika Srpska, Bosnia and Herzegovina, should be implemented regionally in order to collect, store and analyze data on organized criminal groups' structures and profiles, as well as on the economic value of their activities.

The Western Balkans is a region with very high levels of uniformity in statistical systems. For this reason, regional cooperation in harmonizing systems to collect, analyze, report and share data on OC and OCGs should be developed and supported. Good practices implemented in one country or territory should serve as models for adoption in other jurisdictions.

5.3. Other methods to measure organized crime

Multiple systems estimation (MSE) methodology to capture hidden victims of trafficking in persons has already been implemented in Serbia[21] and is currently ongoing in Albania. If feasible, other Western Balkans countries and territories should consider implementing this method to estimate the total number of victims of trafficking in persons in their jurisdictions, as well as gain insight into the breakdown of age, gender, nationality and forms of exploitation of this hidden group.

Administrative sources (such as police or judicial statistics) cannot provide a sufficiently reliable and comprehensive analysis of crime on their own. Victimization surveys should also be implemented to help governments and the general public understand organized crime, its impact on society and how better to address it.[22]

REFERENCES

- Aebi, M. F. (2008). 9 Measuring the Influence of Statistical Counting Rules on Cross-National Differences in Recorded Crime. Available at https://www.researchgate.net/publication/237832736_9_Measuring_the_Influence_of_Statistical_Counting_Rules_on_Cross-National_Differences_in_Recorded_Crime
- BKA (2017). Organisierte Kriminalität Bundeslagebild, available at www.bka.de
- Europol (2017) EU Serious and Organised Crime Threat Assessment (SOCTA), available at https://www.europol.europa.eu/socta/2017/
- Europol (2018). Internet Organised Crime Threat Assessment. Available at https://www.europol.europa.eu/activities-services/main-reports/internet-organised-crime-threat-assessment
- Fijnaut, Cyrille, European Union Organized Crime Policies (2014). In Paoli (ed), Letizia, The Oxford Handbook of Organized Crime, New York: Oxford University Press.
- Paoli, Letizia and Tom Vander Beken (2014) Organized Crime. A Contested Concept. In Paoli (ed), Letizia, The Oxford Handbook of Organized Crime, New York: Oxford University Press.
- Transcrime-INEGI Centre of Excellence on Statistical Information on security, victimization, government and justice, "A framework for the quantification of organised crime and assessment of availability and quality of relevant data in three selected countries of Latin America and the Caribbean.", 2012
- UNODC, Manual on Victimization Surveys. Vienna, UNODC, 2009. Available at https://www.unodc.org/documents/data-and-analysis/Crime-statistics/Manual_on_Victimization_surveys_2009_web.pdf
- UNODC, The Globalisation of Crime. Vienna: UNODC, 2010. Available at https://www.unodc.org/unodc/en/data-and-analysis/tocta-2010.html
- UNODC, Research Brief: Measuring Organized Crime: Assessment of Data in the Western Balkans, Vienna, 2019 (due).
- UNODC, Research Brief: Monitoring Target 16.2 of the United Nations Sustainable Development Goals, A multiple systems estimation of the numbers of presumed human trafficking victims in the Netherlands in 2010-2015 by year, age, gender, form of exploitation and nationality. Vienna, 2017. Available at https://www.unodc.org/documents/research/UNODC-DNR_research_brief.pdf
- Van Dijk, J. (2007), Mafia markers: assessing organized crime and its impact upon societies. Trends in Organized Crime, 10, 39-56.
- Vander Beken, T. (2004a). Risky business: A risk-based methodology to measure organized crime. Crime, Law and Social Change, 41, 471-516.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 269-285
ISSN 1512-5505

HUMAN TRAFFICKING AND MIXED MIGRATION FLOWS IN KOSOVO

Elmedin MURATBEGOVIĆ
Muhamed BUDIMLIĆ
Haris HALILOVIĆ

Abstract

The paper resulted in the research that will be disseminated to stakeholders and raise awareness regarding recent changes in Trafficking in Person (TIP) trends in Kosovo since the closing of the border along the Western Balkan migration route and be able to develop their own interventions according to the new highlighted trends.

This paper is based on desk review of BH TIP capacities in available key documents and current researches and qualitative survey conducted through interviews using qualitative questionnaire developed by authors of this paper. An online search was performed for all available documents related to trafficking in people.

Key informants were selected, according to the areas of their expertise. Those were experts from following agencies/organizations: National coordinator's office for the fight against trafficking in human beings, Prosecutors' office of Bosnia and Herzegovina, Service for Foreigners, NGO IFS EMMAUS, and Immigration Centre. Key informants were asked to talk about their respective roles in counter TIP activities, about their perception of the established counter human trafficking system, indicators of human trafficking and link with mixed migration flows, to list examples of good practices and barriers for better identification of victims and potential victims of trafficking.

Limitations of this paper are based on the number of the interviewed key informants and duration of the interviews. More comprehensive and objective findings would be created from interviews with more key informants and preparation time for key informants (key informants were not provided with the questionnaire before the interview).

Significant percentage of migrants and refugees transiting may be vulnerable to potential exploitation and abuse along the route. That being said, to date, only few victims have been identified among migrants and refugees in Kosovo.

Given the findings of the paper, the following actions should receive particular attention so as to further improve the fight against human trafficking in the country:

The results should allow a critical analysis of the needs and gaps to be addressed in order to offer appropriate support to professionals from different fields and disciplines in improving the quality of Counter Trafficking in Person (TIP) trends in Kosovo.

Key words

Kosovo, migrants, refugees, crisis, trafficking, capacities

1. INTRODUCTION

Kosovo is transitional country with economic opportunities and living standard below the level of the EU countries, and as such the countries in the region are just transitional countries for the migrants on its route to neighbouring high-income EU countries. By transition trough the region the migrant population became sensible to the local socio-economic situation in the transiting countries. Kosovo, as a post-war country in transition with close proximity to the European Union, complex political structure, underdeveloped economy, high number of refugees and internally displaced persons, young migration management structure, porous borders and limited resources, has been struggling with the phenomenon of human trafficking for almost two decades now. The migratory movements through Kosovo occurs against a background of ongoing challenges related to countering trafficking in persons (TIP). Kosovo has youngest population in the region with average age of 30,2 years. The unemployment rates is 27,5%.

The paper resulted in the research that will be disseminated to stakeholders and raise awareness regarding recent changes in Trafficking in Person (TIP) trends in Kosovo since the closing of the border along the Western Balkan migration route and be able to develop their own interventions according to the new highlighted trends. It would further inform all subsequent project activities to ensure that activities address the current context in Kosovo given the recent rapid changes.

Research is based on desk review of available key documents and current researches and qualitative survey conducted trough interviews using qualitative questionnaire developed by first author with the main stakeholders in Kosovo (the experts from two Centre for protection of victims and prevention of THB - PVPT), Hope and Home for Children, Kosovo Judicial Council, Ministry of the Internal Affairs – Office of the National CT Coordinator, US Embassy; Terre des Hommes. An online search was performed for all available documents (policies, strategies, system, academic papers, reports, and evaluations) related to trafficking in people in English, Serbian, and Albanian language. Relevant IOM publications were also reviewed. TIP Reports and GRETA reports were used as a starting point. Information collected through the desk review and key informants' interviews was compiled according to areas listed in the contract. First author developed a questionnaire to be used during interviews.

The questionnaire appeared to be too long and too comprehensive for allocated time of the interview. Therefore, the key informants were asked to talk about their respective roles (and the role of their agency/organisation) in counter TIP activities, about their perception of the established counter human trafficking system, indicators of human trafficking and link with mixed migration flows, to list examples of good practices and barriers for better identification

of victims and potential victims of trafficking, current characteristics of human trafficking in their countries (type of human trafficking, means of recruitment and transportation, national/international, characteristics of victims, risk groups) etc. In short, the key informants were asked to answer to questions from all domains listed in questionnaire.

Limitations of this paper are based on the number of the interviewed key informants and duration of the interviews. More comprehensive and objective findings would be created from interviews with more key informants and preparation time for key informants (key informants were not provided with the questionnaire before the interview). Additional limitation refers to the fact that the compiled data were not shared with key informants, so that they could re-validate the information related to their respective organisations.

2. OVERVIEW OF THE KOSOVO CURRENT COUNTER TIP SYSTEM

2.1. Policy and Legal framework

National strategy and Action plan against trafficking in human beings in Kosovo 2015-2019 (previous one was the National Strategy and the Action Plan 2011-2014). The aim of the strategy is coordination of prevention actions and combating THB with the aim of lowering the number of cases in Kosovo to minimum and coordination of quality services for VoTs, by aiming return of their dignity and prevent re-trafficking; Criminal Code (articles: 171. Trafficking in persons, trafficking-related crimes: 172. Withholding identity papers of victims of slavery of trafficking persons, 169. Slavery, slavery-like conditions and forced labor, 231. Sexual services of victim of trafficking); Law on prevention and combating trafficking in human beings and protection of victims of trafficking (2013) (Kosovo is one of the rare countries in the region that has specific trafficking law).

This law defines authorities and their responsibilities; Standard operating procedures for trafficked persons in Kosovo (amended in 2013); Minimum standards of care for victims of trafficking (2010); Administrative instruction No. 01/2014 for early identification of victims of THB by consular services, border police and the Labour inspectorate, approved by the Government of Kosovo on 21 March 2014.;

The position of the National Coordinator in CT is the key position of the National Authority against THB. It is a body within the MIA and the NC is at the same time the deputy minister of the MIA. The National Authority against THB holds regular meetings and brings together and coordinates the work of all the stakeholders, including government and non government institutions, IOs etc.

2.2. Counter TIP system

National coordinator: in 2015 Deputy Minister of Ministry of the internal affairs was appointed. The new (old) Coordinator took over the responsibilities with the new government consolidated, in October 2017. The National Anti-trafficking Authority is composed of: the National Anti-Trafficking Coordinator (NATC) (Deputy Minister of Internal Affairs) and its Secretariat with a mandate to coordinate, monitor and report on the implementation of policies against trafficking in human beings as well chairing the Inter-Ministerial Working Group (IMWG). The Inter-Ministerial Working Group is composed of two representatives of central institutions

in the field of anti-trafficking state response. Local NGOs and international partners are also members of IMWG. Ministry of Internal affairs is mandate to perform activities related to crime prevention, crime investigation, victims' protection, and offenders' arrests. It is also mandated to perform administrative duties concerning foreigners (Department of Citizenship, Asylum and Migration).

2.3. Care for victims and potential victims

The Ministry of Labour and Social Welfare (MLSW) is mandated to provide social services in Kosovo, including managing the shelters for victims of trafficking. Victims' Advocacy and Assistance Office was established within the Chief State Prosecutor's Office with a mandate of providing legal counselling and assistance to victims. There in one state's and two NGO's shelters for human trafficking victims. The Kosovo Judicial Council and the Prosecutorial Council are responsible for the selection and recruitment of judges and prosecutors and reforms in their respective fields. In addition to these, following ministries are also members in IMWG: Ministry of health, Ministry of culture, youth and sports, Ministry of education, science and technology, and Ministry of local government administration (SOP Kosovo, 2016). Victims may use a helpline (0800 11 112) for "self-identification". Annual reports are not available on the Internet.

There should be an anti-trafficking web page: www.antitrafikimi.com but it is not active.

Table 1. – TIP tier ranking by year (TIP Reports KOSOVO)

2010	2011	2012	2013	2014	2015	2016	2017
2	2	2	2	2	2	2	2

2.4. Partnership

Kosovo signed cooperation agreements with Albania and Montenegro. Kosovo has concluded police cooperation agreements with Austria, Sweden, Croatia, Albania and Macedonia; agreements on combatting trafficking in human beings with France and Macedonia; a security cooperation with Germany; and an agreement to combat organised crime and irregular migration with Hungary. Kosovo has customs cooperation agreements with ten countries (TIP report, 2017).

According to Kosovo Police officials, the information exchange is done through INTERPOL channels and Police attachés accredited in Kosovo. There are three Kosovo police liaison officers accredited in Austria, France and Turkey (also planned in Germany and Belgium). Non-membership of Kosovo in international organisations such as INTERPOL, EUROPOL, FRONTEX and SELEC, and the failure to sign the conventions such as Police Cooperation Convention, remain a challenge.

Key informants from the Ministry of Internal Affairs named International Law Enforcement Cooperation Unit (ILECU) as the main mechanism for information sharing.

Standard Operating Procedures (SOPs) for Transnational Cooperation and Case Management for the protection of victims and potential victims of trafficking with a special focus on children between Albania, Kosovo and Montenegro, were endorsed at a trilateral meeting between the National Anti-trafficking Coordinators of the three countries held in Budva, Montenegro 31 October – 2 November, 2016. Because of political reasons, there is a lack

of direct communication with Interpol and Europol.There are memoranda of understanding between state agencies and civil organisations. Key informants expressed satisfaction with cooperation at the national level. For NGOs, there are no official mechanisms in place for sharing information at regional level.

2.5. Indicators for TIP

"Indicators list for early identification" is one of the activities listed in Action plan 2015-2019, as well as training of multidisciplinary teams for implementing indicators.

Indicators are listed in the Administrative instruction No. 01/2014 for early identification of victims of THB by consular services, border police and the Labour inspectorate. New set of indicators for early identification (Administrative instruction on early indicators for THB) is in a draft phase. Some key informants say that lists of indicators are not distributed at the local level.

2.6. Good practices in the identification of and care for trafficked persons

Good practice in care for victim is a referral of identified victim (or PVoT) to the state shelter where risk assessment is conducted. A victim's risk can be assessed as high, medium or low. High risk victims are accommodated in state's shelter while medium and low risk victims are referred to NGO run shelters.

Awareness raising activities that are performed during October (marking EU Anti-Trafficking Day), and not only on 18 October, can also be listed as an example of a good practice.

Project on early identification of potential victims of trafficking, implemented by PVPT (Centre for protection of victims and prevention of THB) could be seen as an example of good practice. It aims to raise capacities of teachers in primary schools for identification of risk factors for human trafficking among students.

2.7. Current obstacles to the implementation of good practice procedures and partnerships

According to the Kosovo progress report, administration of justice is slow and inefficient, and there is insufficient accountability of judicial officials (Kosovo Repport, 2016). The judiciary is still vulnerable to undue political influence and rule of law institutions suffer from lack of funding and human resources. Prosecution services are understaffed and lack training. The investigative capacity of the police is generally good but the use of intelligence-led joint investigations remains limited.

Corruption is stressed as prevalent in many areas and a very serious problem. A stronger political will to tackle this matter in a comprehensive manner is necessary (TIP report, 2016). Governmental corruption is also recognised in TIP report as a systemic risk for effective dealing with HT, given that it creates an environment that enables some trafficking crimes (TIP report, 2017).

At sectorial levels, it is observed that judges impose lenient sentences on convicted traffickers, and prosecutors continue to downgrade trafficking cases to a lesser crime (TIP report, 2017). It is important to note that prosecutors and judges do not have specialisation in trafficking (TIP report, 2017).

Different reports suggest that the police are the most effective criminal justice agency in this field. Still, more proactive and intelligence led policing is recommended.

Law enforcement statistics does not allow any specific picture about human trafficking cases – they are not disaggregated to demonstrate different criminal offenses (TIP report, 2017).

There are two recommendations at the system level – 1. authorities should consider establishing a fully-fledged post of National Coordinator supported by an office which is commensurate to the tasks at hand, and 2. authorities should consider the designation of an independent National Rapporteur or another independent mechanism for monitoring the anti-trafficking activities of State institutions (GRETA Report, 2015).

Lack of effective early identification programmes, lack of financial resources for NGO-run shelters, lack of reintegration services are recognised by key informants as the main blocks for full implementation of anti-trafficking efforts.

3. KOSOVO - TIP LANDSCAPE

3.1. Existing data on TIP activity outcomes

Kosovo is a source, transit and destination country for trafficked women and children (Kosovo 2016 report), although National strategy refers to Kosovo as origin and transit country as stated in Progress Report for Kosovo from 2013 (National strategy 2015-2019). Sexual exploitation, forced labour and exploitation of children for begging are listed as main exploitation types, highlighting women and children as vulnerable population. Domestic trafficking for sexual exploitation is recognised as a problem (TIP report, 2017), (National strategy against trafficking in human beings 2015-2019).

Criminal groups from Kosovo also force women from Albania, Moldova, Romania, Serbia, and other European countries into prostitution. Victims from Kosovo are forced to prostitution and labour through Europe. Trafficker methods include false promises of marriage or employment offers in cafes, night clubs, and restaurants (TIP report, 2017). Sexual exploitation happens in private homes and apartments, night-clubs, and massage parlours. Main type of exploitation for children (from Kosovo and Albania) is forced begging which is often recognised as child abuse and neglect instead of child trafficking (KIPRED, 2015).

3.2. Profiles of individuals, vulnerable to exploitation and abuse

Kosovo is a source, transit and destination country for trafficked women and children, although National strategy refers to Kosovo as origin and transit country, as stated in Progress Report for Kosovo from 2013 (Kosovo Report, 2016), (National strategy 2015-2019). National strategy against trafficking in human beings recognises women and children as the most vulnerable groups for human trafficking. According to identified cases, children used as dancers and escorts are vulnerable to sex trafficking while economically marginalised Roma, Ashkali, and Egyptian communities are vulnerable to forced begging and sex trafficking (TIP report, 2017). High unemployment (especially for young people), school dropout, domestic violence, and gender discrimination are push factors that can make Kosovo young people more vulnerable to human trafficking.

3.3. Patterns of TIP recruitment and transportation (recruitment, transportation)

Several key informants mentioned increase in cyber recruitment practices (use of social networks). The main types of recruitment involve false promises of marriage and false promises of employment. No major changes are visible in transportation manner

3.4. Key emerging forms of exploitation

Sexual exploitation, forced labour and exploitation of children for begging are listed as main exploitation types, highlighting women and children as vulnerable population. No significantly new trends were mentioned in interviews.

- Domestic trafficking for sexual exploitation is recognised as a problem (National strategy 2015-2019), (TIP report, 2017).

  Criminal groups from Kosovo also force women from Albania, Moldova, Romania, Serbia, and other European countries into prostitution. Victims from Kosovo are forced to prostitution and labour in Europe. Trafficker methods include false promises of marriage or employment offers in cafes, night clubs, and restaurants (TIP report, 2017). Sexual exploitation happens in private homes and apartments, night-clubs, and massage parlours.
- Main type of exploitation for children (from Kosovo and Albania) is forced begging which is often recognised as child abuse and neglect instead of child trafficking (TIP report, 2017).

  Key informants provide following picture of the current human trafficking: 90% of cases include internal trafficking, mostly of Albanian origin. Sexual exploitation is the main form of exploitation, as well as labour exploitation.
- One key informant stated that pornography is a new form of exploitation.

  Sexual exploitation occurs mostly in bars. There is a trend of moving exploitation sites to more private locations (private houses) or to small gas stations in rural areas. The last 2 years suggested evident increase in minor female victims. Illegal migrants are mostly exploited for sexual purposes. The main types of victim's control are threats of physical violence toward victim or his/her relatives, blackmails and sexual violence.

4. CURRENT CAPACITIES AND GAPS

4.1. Description of gaps in resources for the identification and referral of potential Victim of Trafficking (VoTs) within the mixed migration flows

According to the European Commission report "The Department of Citizenship, Asylum and Migration (DCAM)" in the Ministry of Interior is in charge of overall coordination of migration policy (Kosovo report, 2016). The Directorate for Migration and Foreigners in the border police deals with irregular migrants. Kosovo has a reception facility for irregular migrants in Vranidoll / Vrani Do, which can host 70 persons, including appropriate accommodation of vulnerable groups. Measures are in place to prevent the infiltration of people-smugglers in the centre and there are no reported cases of attempts. In 2015, 12 people were arrested on charges of migrant smuggling and irregular migrants were intercepted, mostly from Albania."

Special challenge (according to key informants) is related to large number of unaccompanied children among illegal migrants. Key informants have not seen any impact of the closure or altering migration routes by state and EU.

Some key informants think that national coordinator role should be strengthened – current situation is that the national coordinator is Deputy Minister of Ministry of the internal affairs by default which is not adequate (according to key informants) because countering human trafficking may not be a priority for national coordinator and national coordinator is very important for advocating counter-trafficking activities at the national level and budgeting.

Description of gaps in resources for identification and referral of potential VoTs within the mixed migration flows, as well as the primary obstacles and barriers to systematic identification of and provision of assistance to Vot and potential VoT.

It is noted in some reports that "several police officers, labour ministry employees, and other governmental officials have been charged with or convicted of trafficking crimes"(TIP report, 2017). Cases like that downgrade the overall state response to the human trafficking and send very negative message to victims.

Some key informants think that specialisation of prosecutors and judges would be very important since human trafficking cases are occasionally downgraded to a less serious crime. There is a perception of some key informants that judiciary professionals are not taking seriously these cases. They also question the duration of trials and negative consequences for victims. US Embassy proposed specialisation of judges and development of sentencing guidelines in human trafficking cases.

Lack of funds is recognised as a challenge for implementation of "Standard Operative Procedure (SOP)" and identification and assistance to victims and potential victims.

4.2. Specific gaps in resources for the identification and referral of potential VoTs within the mixed migration flows

All individuals travelling in an irregular fashion are exposed to hardship and danger. However, some categories of individuals are of special concern as they are particularly vulnerable. This chapter speaks about some of different categories of vulnerable individuals in mixed migration flows. Many of these categories are complex to identify and require specialised determination processes.

The key role of frontline officials is to provide immediate protection and assistance to migrants they think are in vulnerable situations, and refer them to appropriate authorities for further screening and support. The categories covered below include a wide range of vulnerable individuals within mixed migration flows. First line officials need to be aware they also may encounter vulnerable individuals who do not fall under those categories but who need assistance, including elderly migrants, migrants with disabilities or serious health conditions, pregnant women, migrants in need of family unification, and others (Addressing the challenge, 2016).

People who migrate regularly, with valid travel documents, may also fall victim to traffickers, but the irregular situation of many migrants in irregular movements makes them particularly vulnerable. Unaccompanied children, stranded migrants, refugees and asylum seekers and stateless persons among mixed migration flows are particularly susceptible.

Many individuals who travel as part of mixed migration flows, may be unaware that they may become victims of trafficking, assuming that they are merely smuggled to another country. Smuggled migrants voluntarily enter into arrangements with migrant smugglers but may subsequently become victims of crimes, including kidnapping, extortion, rape, assault and trafficking in persons.

Some smugglers may put migrants into exploitative situations on the basis of paying off their smuggling debts. Because of all of this, we have created a special set of feedback for the National TIP Coordinators in order to find out about the new forms of TIP within the migration crisis. We set the next question, What they think about cases in their countries (see Table 2)

- Migrants reported to have paid smugglers to be hidden from the public spaces, but they were then forced to remain in a closed space against their will.
- Migrants having worked or provided services for someone during their journey without receiving the expected or any remuneration in return.
- Migrants have been forced to work or perform activities against their will
- Migrants reported having been approached with offers of an arranged marriage (for the respondent or for a close family member)
- Migrants REPORTED that they experienced physical violence
- Migrants were offered money in exchange for blood, organs or body parts
- Migrants FORCED to give blood, organs or body part
- Migrants threatened with sexual violence?

Table 2: FORMS OF EXPLOITATIONS in the mixed migration flows

RKS	
… were held against their will	**No**
……no of cases within FMS2017 Survey	**-**
… have worked without getting the expected payment	**No**
……no of cases within FMS2017 Survey	**-**
… were forced to work	**No**
……no of cases within FMS2017 Survey	**-**
… offers of an arranged marriage	**No**
……no of cases within FMS2017 Survey	**1**
... experienced physical violence	**No**
……no of cases within FMS2017 Survey	**-**
... cash in exchange for blood, organs or body parts	**No**
……no of cases within FMS2017 Survey	**-**
… FORCED to give blood, organs or body part	**No**
……no of cases within FMS2017 Survey	**-**
... threatened with sexual violence	**No**
……no of cases within FMS2017 Survey	**-**

UNACCOMPANIED AND SEPARATED CHILDREN IN MIGRATION

The UN Committee on the Rights of the Child has identified a number of protection gaps in the treatment of such children, including that unaccompanied and separated children face greater risks of, inter alia, sexual exploitation and abuse, military recruitment, child labour (including for foster families) and detention.

In many countries, unaccompanied and separated children are routinely denied entry to or detained by border or immigration officials. In other cases, they are admitted but are denied access to asylum procedures, or their asylum claims are not handled in an age and gender-sensitive manner. Some countries impede separated children who are recognised as refugees from applying for family reunification.

Many such children are granted only temporary status, which ends when they turn 18, and there are few effective return programmes.

The vulnerable situation of migrant unaccompanied and separated minors worldwide, and the threats they face need to be addressed, particularly with the significant increase in their number in the current 'refugee crisis'. The 2016 State of the Union speech called for a strong and immediate protection of unaccompanied and separated minors, in line with the EU's historical values.

In our Report we have created a special set of feedback for the National TIP Coordinator in order to find out about the new problems of unaccompanied and separated children in migration within the migration crisis (see Table 3)

Table 3: UNACCOMPANIED AND SEPARATED CHILDREN IN MIGRATION (UASC) - EFFECTIVE SYSTEM

UASC - EFFECTIVE SYSTEM IN COUNTRY	**RKS**
Does Your State take measures to have an effective system of guardianship which takes into account the specific needs and circumstances of unaccompanied and separated children in migration in order to protect and promote their rights and secure their best interest	Yes
Are separated children, present in their jurisdiction effectively provided with guardianship (alongside legal assistance) and representation, promptly after identification as an unaccompanied child	Yes
Representation and guardianship - Is there a requirement to ensure that the child is represented throughout the entire process	Yes
Child is represented by Social Welfare Service?	Yes
Are there any exceptions regarding children based on age	No
Is s/he always informed in a language s/he can understand?	Yes

An age assessment is a procedure organised by a public body to determine the chronological age of an individual lacking legal documents. Being considered an "undocumented migrant" by the administration and not an "unaccompanied child" may have serious consequences. If the age assessment concludes that the individual is 18 years of age or older, s/he will not benefit from the protective regime afforded to child asylum-seekers which includes lodging, access to healthcare and education and legal provisions limiting the recourse to detention. Incorrect age assessments often result in children being wrongfully detained or made homeless. Negotiating who should benefit from the rights afforded by childhood on the basis of arbitrary measurements is inacceptable (Feltz, 2015).

To ensure the highest degree of protection of the rights of the child during age assessment, it is necessary to approach every step from the perspective of the best interests of the child, including his or her own particular circumstances. They must be a primary concern, even over the State's political interests. As we can see, in the Kosovo there are no statutory procedures, protocols, guidance or recommendations issued on age assessment procedures by different authorities. In addition, the concern relates to the fact that domestic courts have not examined the application of age assessment procedures in individual cases (see Table 4).

Table 4: UASC - AGE ASSESSMENT PROCEDURES in Kosovo: **statutory procedure**

Age assessment procedures: **STATUTORY PROCEDURE**	**RKS**
Is there any statutory procedure, protocol, guidance or recommendations issued on age assessment procedures by different authorities?	No
Have domestic courts examined the application of age assessment procedures in individual cases?	No

Every country is free to choose the method used to scrutinise the age of an individual. The most common are wrist/carpal x-rays, followed by dental examinations and dental x-rays.

To a lesser degree, collar bone and hip x-rays as well as physical development assessments are also used.

When it comes to the methods used to determine the age of unaccompanied children in migration in Kosovo, we can see the prevailing "social oriented" methods: Documents submitted or obtained during the process, Estimation based on physical appearance, Age assessment interview, Social services assessment and Psychological evaluation.On the other hand, other methods are completely unknown to the countries of WB. (see Table 5).

Table 5: UNACCOMPANIED AND SEPARATED CHILDREN IN MIGRATION - AGE ASSESSMENT PROCEDURES IN KOSOVO

AGE ASSESSMENT PROCEDURES	**RKS**
Documents submitted or obtained during the process	Yes
Estimation based on physical appearance	No
Age assessment interview	Yes
Social services assessment	Yes
Psychological evaluation	No
Dental observation	No
Physical development observation	Yes
Carpal (hand/wrist) x-ray	No
Collar bone x-ray	No
Dental x-ray (wisdom/front teeth)	No
Sexual maturity observation	No

The European Union has competence to deal with 'legal migration' (e.g. people coming to Europe on invitation of a specific employer, family reunification, etc.) and hence to lay down conditions

of entry and residence of third-country nationals. The EU is also competent to prevent and reduce 'irregular migration' according to article 78 and 79 of the Treaty on the Functioning of the EU (TFEU). This means that the EU is competent to legislate on common standards concerning age assessment. Article 25 of the Directive on common procedures for granting or withdrawing international protection ("Asylum Procedures Directives") authorises the use of medical examination in order to determine the age of an unaccompanied minor in European Law. It does not specifically deal with the different existing methods, but lays down rights and safeguards for the child: to be provided with legal and procedural information free of charge, to have a representative appointed, personal interview(s) conducted by a qualified professional, a presumption of minority, the use the least invasive method, informed consent, the fact that no decision of non-minority can be based solely on a refusal to undergo medical examination, and finally the protection of the best interests of the child. Consequently, the Commission will be very interested to receive NGO observations that expose systematic violations of these safeguards.

An incorrect age assessment can have grave consequences by denying vulnerable UASC the services that they are entitled to and putting them at risk. For example, young girl, claimed asylum as a child in some countries. After an age assessment was requested, the Local Authority wrongly assessed her to be 23 when she was 15 years old and thus she was denied adequate protection which resulted in her being sexually abused. This theoretical case demonstrates the potential human cost of inadequate practice.

Therefore, it is very important for the procedures to proceed as soon as possible and to be result in a formal decision. (see Table 6 & 7).

Table 6: UNACCOMPANIED AND SEPARATED CHILDREN IN MIGRATION - AGE ASSESSMENT PROCEDURES IN KOSOVO

UNACCOMPANIED AND SEPARATED CHILDREN IN MIGRATION – When age assessment procedures begin:	**RKS**
Upon arrival/interception on the territory	No
Within a week	Yes
Within a month	No

Table 7: **UNACCOMPANIED AND SEPARATED CHILDREN IN MIGRATION - AGE ASSESSMENT PROCEDURES IN KOSOVO**

UNACCOMPANIED AND SEPARATED CHILDREN IN MIGRATION – Does age	**RKS**
assessment result in a formal decision	No

5. CONCLUSION AND RECOMENDATION

No revisions are needed since new indicators were drafted (Administrative instruction on early indicators for THB), and current indicators relevant to migration flows are included in Administrative instruction No. 01/2014 for early identification of victims of THB by consular services, border police and the Labour inspectorate.

If we think of Recommendations for national stakeholders to adapt existing systems to meet identified changes to TIP trends in the country/region, as well as to target capacity building

activities for different actors working to identify and refer victims and potential victims of TIP to respond to new and emerging trends.

No major changes in TIP trends were observed in the last three years. There is a constant need for capacity building activities, especially at the operational level in local communities for better identification of victims and potential victims of TIP.

There are certain recommendations that could be issued for general strengthening of the current anti-trafficking system:

- development of standardised statistics about human trafficking and illegal smuggling cases / criminal offences
- creation of unified data base at the national level
- strengthening of rehabilitation and reintegration programmes for victims
- enable stable financial functioning of shelters
- specialisation of prosecutors and judges
- continuous multi-agency and multi-disciplinary education/training for professionals at the local level
- greater involvement of the local authorities in prevention activities
- initiate more intensive cooperation with academic community in order to create evidence-based activities
- with regard to child begging (mostly from Roma population), it could be useful to include Roma community in development of preventive programmes
- strengthening cooperation of relevant stakeholders in countering human trafficking and migrant smuggling at national and international level.
- organisation of regular international meetings of representatives of key stakeholders (local offices of international organizations)

New potential TIP indicators for identification and referral

LABOUR EXPLOATATION - Trafficking for labour exploitation has been on the rise in recent years, and additional actors would need to be operationally involved in the national and transnational referral mechanism; INCOMPLETE REFERRAL MECHANISMS - Referral mechanisms in practice have not reached a critical mass, and hence the existing guidelines are not yet widely known, understood, shared and accepted by each professional group/actor involved in the process of victim identification, referral and assistance; INADEQUATE NUMBER OF LOCAL COMMISSIONS FOR COMBATTING HUMAN TRAFFICKING - Local commissions for combatting human trafficking and illegal migration can be regarded as an example of good practice, especially along the migration routes which is a new potential for indicators and identification/referral; SOS PHONE - In a many countries of WB there is no SOS phone for migrants in country; PROSECUTORS DO NOT APPLY SAME STANDARDS, and do not have same skills and experience in cases involving trafficking, which may cause certain level of victims discrimination due to inappropriate level of protection and support ; POLICE OFFICERS LACK EXPERIENCE AND TRAINING TO RECOGNISE POTENTIAL VOTS within the mixed migration flows, which occurs in many forms, including through labour exploitation primarily. Also, trafficking within the mixed migration flows cases have not been a familiar form of trafficking for judiciary; VERY WEAK SYSTEM FOR

DEALING WITH UNACCOMPANIED AND SEPARATED CHILDREN. Standard operating procedures for dealing with unaccompanied and separated children, Standard Operative procedures for the treatment of vulnerable categories of foreign persons when introduced and implemented could have new potential for identification/referral.

There has no statutory procedure, protocol, guidance or recommendations issued on age assessment procedures for UNACCOMPANIED AND SEPARATED CHILDREN IN MIGRATION by different authorities:

- Domestic courts have no examined the application of age assessment for UNACCOMPANIED AND SEPARATED CHILDREN IN MIGRATION procedures in individual cases.
- When it comes to the methods used to determine the age of unaccompanied children in migration in WB countries, we can see the prevailing "social oriented" methods: documents submitted or obtained during the process, estimation based on physical appearance, age assessment interview, social services assessment and psychological evaluation. On the other hand, other much more sophisticated methods are completely unknown to the countries of WB.
- Age assessment of unaccompanied and separated children in migration does not result in a formal decision.

INADEQUATE COOPERATION BETWEEN PUBLIC AND PRIVATE SECTOR IN PREVENTION of trafficking and sexual exploitation of minors through travel and tourism industry as well as with associations of employers is new potential for development of indicators for identification/referral; INADEQUATE NUMBER OF DAY CENTRES FOR STREET CHILDREN - Day centres for street children are recognised as an example of good practice and if accompanied with Psychosocial work on the street could be new potential for development of indicators for identification/ referral

Recommendations

- To TREAT TRAFFICKING IN A MORE COMPREHENSIVE FASHION and thus expand beyond sexual exploitation in order to encompass new forms, namely criminal schemes of child begging and workers exploitation, whereas the latter are deceived by false promises and deprived of all human rights and decent treatment.
- To intensify and to IMPROVE LEGALLY BINDING FORMAL INDICATORS FOR EARLY IDENTIFICATION OF VICTIMS and distribute them to all institutions dealing with victims in order to develop harmonised implementation of those indicators especially regarding the potential victims among illegal migrants and asylum seekers, as well as standard operative procedures.
- To STRENGTHEN THE SPECIAL TREATMENT OF CHILDREN VICTIMS. Children are considered to be vulnerable witnesses. This entitles them to increased protection. Children cannot be questioned more than twice during the entire investigation of a case and should not be exposed to any direct contact with the suspected perpetrators. Further, children can give testimony only in the presence of a parent or a legal guardian and a child psychologist. Such testimonies are recorded to avoid interviewing children more than once. During court proceedings a judge is entitled to hold a part of the session in camera, if this is in the best interests of a child, upon request of a prosecutor

or a lawyer of a victim/witness.

- To ensure that proper RISK ASSESSMENT is conducted before RETURNING CHILDREN to their parents, or to their countries of origin, taking into account the best interests of the child;
- To conclude and to effectively implement agreements for intensifying cooperation in the fight against trafficking and for the IMPROVEMENT OF IDENTIFICATION, REFERRAL, AND ASSISTED VOLUNTARY RETURN, OF POTENTIAL VICTIMS AND VICTIMS OF TRAFFICKING, children specially, among countries in the region. By those agreements to unify the procedures for identification, notification, referral and voluntary assisted return of victims, and introduce standard operating procedures for transnational cooperation and case management for the protection of victims of trafficking with a special focus on children.
- To IMPROVE THE COOPERATION BETWEEN GOVERNMENTS AND CIVIL SOCIETY ORGANISATIONS. NGOs are still considered as service providers rather than equal partners in the process of human trafficking suppression, prevention and especially in victim assistance where NGOs carry the largest responsibilities, and yet are not supported sufficiently by the government.
- To strengthen professional capacities of competent authorities aimed at PROACTIVE IDENTIFICATION OF VICTIMS OF HUMAN TRAFFICKING, ENSURING THAT LAW ENFORCEMENT OFFICERS, labour inspectors, social workers and other officers apply a pro-active approach and undertake intensified actions aimed at detecting and saving potential victims from trafficking, particularly the most vulnerable ones.
- To improve REINTEGRATION of victims of trafficking into society by ESTABLISHING LONG-TERM PROGRAMMES by ensuring that relevant actors take a proactive approach and increase their outreach work to identify victims of trafficking, including by continuing to pay attention to children in street situations.
- To raise awareness and KNOWLEDGE ON TRAFFICKING AMONG GENERAL PUBLIC and professionals as well as to develop evidence based policy aimed at suppressing trafficking since trafficking has developing further in the region, by altering its trends and patterns. Thus, it is required to conduct comprehensive public campaigns targeting general public and also specifically tailored campaigns targeting vulnerable groups. Those actions, serving as deterrents must coincide with implementation of other widespread actions aimed at improving general living conditions and standards of vulnerable groups including women, children, minorities, refugees and internally displaced persons.
- To ACKNOWLEDGE CORRUPTION AND ITS IMPACT TO TRAFFICKING and to explore the role of corruption in trafficking and its impact on trafficking augmentation and to develop mechanism to suppress corruption associated with trafficking.
- To ENHANCE THE WORK AT IDENTIFICATION OF VICTIMS, INCLUDING THOSE AMONG MIGRANTS, REFUGEES, ASYLUM SEEKERS, AND UNACCOMPANIED CHILDREN migrants involved in begging including the establishment end enhancement of mobile identification units ant their proactive work among vulnerable groups under risk of trafficking.

- To STRENGTHEN IDENTIFICATION OF VICTIMS IN DESTINATION COUNTRIES among migrant population since victims are not aware of their position during entire migration route, and they are not willing to expose themselves as potential victims. They are focused on getting to destination country.
- To IMPROVE THE COOPERATION AMONG THE AUTHORITIES WITHIN THE CONCEPT OF INTEGRATED BORDER management and system of comprehensive migration management, particularly aimed at improvement of recognition and identification of human trafficking victims within the categories of vulnerable migrants and asylum seekers.
- To ENABLE VICTIMS TO EXERCISE THEIR RIGHT TO COMPENSATION by guaranteeing them effective access to legal aid, strengthening the capacity of law practitioners to help victims to claim compensation and incorporating the issue of compensation in the training programmes for professionals.
- To DEVELOP STANDARDISED STATISTICS about human trafficking and illegal smuggling cases throughout the region.
- To STRENGTHEN SOCIETAL RESPONSE in combatting victimisation of Roma children since the existing practice of some professionals downgrade victimisation of Roma children to tradition and customs in Roma community.
- To ensure GREATER INVOLVEMENT OF THE LOCAL AUTHORITIES in prevention of trafficking including increasing proactive approach and outreach work to identify victims of human trafficking, particularly among migrant workers.
- To take additional measures to GUARANTEE THE APPLICATION OF THE NON-PUNISHMENT PROVISION, including by adopting a specific legal provision and/or the development of guidance for relevant professionals on the scope of the non-punishment provision.
- To continuously implement activities in COOPERATION WITH TOURISM SECTOR so as to promote responsible tourism and prevent child sex tourism.

LITERATURE

- Addressing the challenge of mixed migration: protection and assistance in mixed migration (2016) http://www.refworld.org/pdfid/5804d4204.pdf
- Feltz, V. (2015). Age assessment for unaccompanied minors, MdM International Network Head Office, https://mdmeuroblog.files.wordpress.com/2014/01/age-determination-def.pdf
- Government, Republic of Kosovo (2014). Administrative instruction No. 01/2014. for early identification of victims of trafficking with human beings from consular services, border police and the labor. (available at: http://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=10279)
- GRETA (2016). Report on the compliance of Kosovo with the standards of the Council of Europe Convention against Trafficking in Human Beings. GRETA (2015)37
- http://kosovo-eubarometer.com/en/indicator
- IPA II 2014-2020. Strengthening Kosovo institutions in effective management of migration, asylum and fight against trafficking with human beings.
- Izvještaj civillnog društva o praćenju primene Kosovskog programa i akcionog plana za borbu protiv nasilja u porodici 2011-2014, Nacionalne strategije i akcionog plana za borbu protiv trgovine ljudima 2011-2014 i Zakona o zaštiti od nasilja u porodici (2012). Priština (annual report for 2011)
- KIPRED (2015). EU uslovi za Kosovo: borba protiv trgovine ljudima. Dokument Politike No. 2/15 – Jun 2015. Prishtina: KIPRED i Peć: Syri i Vizionit
- Kosovo 2016 report (European Commission, 2016 Communication on EU Enlargement Policy, {COM(2016) 715 final) (https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_kosovo.pdf
- Kosovo 2016 report (European Commission, 2016 Communication on EU Enlargement Policy, {COM(2016) 715 final) (https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_kosovo.pdf
- National strategy against trafficking in human beings 2015-2019
- OSCE (2007). A legal analysis of trafficking in persons cases in Kosovo. (Available at: http://womensnetwork.org/documents/20130715123127239.pdf
- SOP- Office of the National Anti-Trafficking Coordinator (2013). Standard Operating Procedures for Trafficked Persons in Kosovo. (contains contact list of national and international contacts)
- UNICEF (2004). Trafficking in children in Kosovo: A study on protection and assistance provided to children victims of trafficking. Pristina: UNICEF Kosovo Office
- Vlada Republika Kosova (2013). Državna strategija za migraciju i plan delovanja 2013-2018. Priština: Vlada Republike Kosovo

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 287-297
ISSN 1512-5505

CORRELATION BETWEEN AGGRESSION TOWARDS ANIMALS AND AGGRESSION TOWARDS PEOPLE BASED ON RESEARCH RECORDS

Joanna NARODOWSKA

Abstract

In the English-language literature, it is indicated, that the perpetrators of domestic violence very often use violence against animals. At the same time, there is no Polish research confirming or falsifying the hypothesis of the existence of such correlation. Therefore, the main aim of this work is an attempt to define, on the basis of the results of the author's research, is there any relationship between the phenomenon of aggression towards animals and propensity to be aggressive towards people. The subject of analysis is the content of the court records in criminal cases concerning the Article 35 of the Act on the Protection of Animals. The research included criminal proceedings instituted against persons accused of a prohibited act in the form of animal killing or cruelty to animals. On the basis of the established criteria, there were selected criminal cases in which there may have occurred the relationship between the use of aggression by perpetrators towards animals and people. The personal and cognitive data of the selected perpetrators as well as psychiatric opinion allowed the author to present the characteristics of the examined population and identify factors that could have played an important role in the genesis of acts of aggression.

INTRODUCTION

The issue of violent crimes towards people is a characteristic area in criminological research. At the same time, studies concerning violence towards animals are rather marginalized in the Polish criminological literature compared to major research on violence. The problem belongs to the research area of "green criminology" which, in Poland, is a relatively new perspective in criminological inquiries. The term "green criminology" was used for the first time by the British criminologist, M. J. Lynch in the early 1990s (Lynch, 1990), and, at present, the achievements of internationally-renowned criminologists concerning crimes against environment are significant. What should also be noted is the activity of the so-called Green Criminology Working Group, bringing together eco-criminologists from all over the world.

A possible correlation between aggression towards people and towards animals was first discussed in English-speaking criminological literature. The first scholarly mention with reference to this subject matter is attributed to J. S. Hutton. This author, based on the research carried out in the United Kingdom, observed that a disclosure of animal abuse can provide a tool for early identification of violence towards family members (Hutton, 1983).

The leading researchers in this subject matter include: F. R. Ascione (Ascione, 2007, Ascione 2005, Ascione & Arkow, 1999, Lackwood & Ascione, 1998), L. Merz-Perez, K. M. Heide (Merz-Perez & Heide, 2004), A. J. Fitzgerald (Fitzgerald, 2005), Ch. Blazina, G. Boyraz, D. Shen-Miller, (Blazina, Boyraz, & Shen-Miller, 2011), E. Gullone, P. Arkow (Gullone & Arkow, 2012). The authors of the above-mentioned publications demonstrated that violence towards animals is a specific path leading to violence against people. This form of violence is not only a demonstration of personality deficits, but also a symptom of severe disorders in the family, in particular, of a violent nature. The English-speaking literature indicates that violence towards animals can be a precursor of the gravest crimes involving violence, e.g. rape, paedophilia, assault or murder. However, it is relations between violence against animals and domestic violence that are most frequently observed. Those perpetrators use violence against pets as so-called substitute objects. American criminologists formulated the notion of "a triad of family violence", which includes violence against partners, children and pets (DeGue, 2011). It is also worth mentioning a publication edited by J. Maher, H. Pierpoint, and P. Beirne, presenting various forms of aggression against animals (Maher, Pierpoint & Beirne, 2017).

The results of research carried out in three countries, the USA, Canada and Australia, should also be quoted here. Although the selection of research samples and research methods applied differed in individual countries, the results led to similar conclusions. It was found that in between 11.8% and 39.4% of women affected by domestic violence (the subjects of the study) reported that the perpetrator threatened to harm or kill their animal "companion". Between 25.6% and 79.3% of women claimed that the perpetrator killed or mistreated their pet. Additionally, the research shows that between 18% and 48% of those women delayed their escape or decided not to leave an abusive partner due to fear for their pets (Gullone & Arkow, 2012).

METHOD

It should be emphasized that there is no Polish research confirming or falsifying the hypothesis of the existence of a correlation between aggression towards animals and people. Therefore, the main aim of this work is an attempt to define, on the basis of the results of the conducted research, is there any relationship between the phenomenon of aggression towards animals and propensity to be aggressive towards people. Moreover, the author formulated the following research problems:

- have the perpetrators of the crimes of cruelty to animals been previously convicted, in particular, for the crimes of aggression?
- to what kind of crimes, it was related to in such cases?
- is it possible to specify the common features that characterize the perpetrators who use violence against animals and people?
- which factors played a leading role in the criminogenesis of aggressive crimes?

The court records containing the data of criminal convictions are of key importance for criminological investigations and allow determining the extent and dynamics of a particular crime (Błachut, 2007). The research method, which was applied in the work, consisted in researching documents. The subject of analysis was the content of the court records in criminal cases concerning the act of cruelty to animals which is penalized in the Article 35 of the Polish Act on the Protection of Animals. The research was conducted in one of the District Court in Poland (Olsztyn city). The time range of the research included 10 years, *id est* since the entry into force of the mentioned Act until the end of the research. The authors researched all criminal proceedings finished with the final judgment, which were instituted against persons accused of a prohibited act in the form of animal killing or violence against animals. The research included 59 criminal proceedings instituted against 61 persons.

In order to select the cases confirming or falsifying the existence of a correlation, there were applied three main criteria:

- legal classification of the act – in the same criminal proceeding the accused was tried for the act of aggression towards animals and other aggressive crime;
- previous conviction of the accused of any aggressive crime;
- correlation of aggression towards animals and people revealed on the basis of evidence collected in the criminal proceeding.

On the basis of the established criteria, a further analysis concerned 23 criminal cases, in which 21 perpetrators were convicted (therein two perpetrators were convicted twice of cruelty to animals) and in which there might have occurred the correlation between the use of violence by perpetrators against animals and people. This represents almost 40% of all examined cases regarding violence against animals. Data collected for the purposes of criminal proceedings have provided basic information concerning gender and age of perpetrator, his/her education, marital status, employment, prior criminal history, legal qualification of committed crimes and the statement whether perpetrator was under the influence of alcohol or drugs at the time of committing the crime. On the basis of personal and cognitive data of the perpetrators convicted of animal abuse, as well as forensic and psychiatric opinion drew up for the purposes of criminal proceedings, the author presented characteristics of the studied population and identified factors that could have played an important role in the genesis of acts of aggression (risk factors).

In remaining 34 criminal cases concerning animal abuse, there was no correlation between aggression towards animals and people, so they were not included in the further research. However, it cannot be excluded that these offenders might have committed the aggressive crime at the later date. Nevertheless, verifying this statement was impossible within the methodology which was applied for the purposes of research. It should be highlighted that presented research is a preliminary study on the subject of correlation between aggression towards animals and people. In order to present holistic approach to this phenomenon, it is necessary to extend the research sample (population of perpetrators, including juvenile offenders).

RESULTS

The criminological literature provides the view that sex is the most significant factor predestining aggressive behaviour, both from the biological and psychological perspective. This feature

affects three areas of behaviour, i.e. aggression, dominance and hostility. The share of female offenders in the total number of perpetrators is referred to as feminisation of crime. It is estimated that this indicator amounts to about 10% of total crimes committed in Poland (Grzyb & Habzda-Siwek, 2013, Kędzierska, 2005). In the examined population, up to 95.2% of offenders were men. This means that almost total masculinisation of these types of crimes is observed. Additionally, the results provide more proof that aggressive crimes are characteristic of the male sex. There was only one case recorded of a woman who satisfied the criteria assumed for the paper. Due to circumstances of the act (particular cruelty) and the history of drug rehabilitation and suicide attempts undertaken declared by the perpetrator, expert psychiatrists were appointed. The analysis of the life course and the mental state of the woman demonstrated her social adaptation disorders. The lifestyle led by the perpetrator was not without effect on her mental condition, since the source of her income was prostitution. The causes of aggressive behaviour of the perpetrator can be seen in the deficit caused by her alcohol addiction and her life experience. The woman came from a large, dysfunctional family. Her father was an alcoholic who mistreated his family.

Criminological research shows that young offenders are the most criminogenic age group and the highest intensity of committed crimes falls for the period before the age of 25 or 30. This regularity is particularly evident for aggressive crime perpetrators (Błachut, Gaberle, & Krajewski, 2001). However, as results from the conducted research, perpetrators of aggressive crimes against animals do not fit into the general age profile of perpetrators of violent crimes. In this specific case, the criminal activity is distributed equally and it is not the highest among the youngest perpetrators.

Among the examined criminal proceedings, cumulative legal qualification with aggressive violence was applied in 60% of cases. At the same time, it was found that more than a half of them concerned domestic violence. Other prior aggressive crimes most often committed by perpetrators included: abuse and damage to health, threats, robbery, assaults or animal abuse. The lowest percentage of crimes concerned assaults on a public authority officer, intimidating witnesses and insults, committed in individual cases. It should be also observed that the analysis of the material collected for the criminal procedure purposes, first of all from witness testimonies, showed that perpetrators who had not been previously sentenced for aggressive crimes, had displayed aggression against animals and physical and verbal aggression towards the nearest members of their family in the past. In view of the relations between the victims and perpetrators, the fact of committing a crime was not reported to law enforcement authorities. Animal abuse was often aimed at exerting influence on the mental sphere of the nearest persons, and the animal was treated as the "substitute object". This allows to claim that the "dark number of crimes" in this area is high.

A disturbed structure of personality is indicated as a risk factor for aggressive behaviours. People with sociopathic personality can demonstrate, among others, the following symptoms: proneness to conflict, aggression, impulsiveness, excessive irritability, disrespectful attitude towards obligations, inability to love, emotional poverty, absence of the feeling of guilt and a tendency to commit criminal acts. Additionally, antisocial personality is often accompanied by other psychopathological categories, e.g. alcoholism or drug addiction (Hołyst, 2009). It was possible to obtain a broader spectrum of knowledge about perpetrators in those criminal cases in which court-appointed experts prepared forensic-psychiatric opinions. In view of the partic-

ular cruelty of animal abuse or other circumstances revealed in the course of the proceedings (e.g. alcoholism, suicidal attempts, nature of previously committed criminal acts), the court had doubts concerning the sanity of more than half of the perpetrators. Dissocial personality disorder was diagnosed for eight of them. Typical features of the perpetrators showing social adaptations disorders included: irresponsible attitude, emotional instability and irritability, lowered thresholds triggering frustration and aggressive behaviours, limited ability to use life experience, disregard for norms and social coexistence rules, limited professional and social efficiency, activity oriented towards reaching immediate aims, lack of stronger emotional bonds with the environment, deepening social destruction, concentration on alcohol drinking, neglecting alternative interests and spending free time.

The research demonstrated that as many as 80% of perpetrators in a given population were under the influence of alcohol when committing an animal abuse crime. The literature provides that a link between alcohol addiction and the occurrence of aggression and violence can be observed in various relations: addiction can cause increased aggression in a given person and lead to the use of violence towards members of a family; a high level of emotional tension and aggressiveness is a cause of alcohol abuse, which leads to the coexistence of alcoholism and aggression; mental disorders cause an increase in the aggression level and alcohol abuse, or alcohol is a cause of mental disorders, accompanied by aggressive behaviour (Cierpiałkowska, 2003). People addicted to alcohol can behave in an unpredictable way, as they have no inner restraints and cannot control their emotions. The effect of alcohol leads to breaking down barriers and releasing urges. It should be mentioned that the research conducted by the Institute of Psychology and Sobriety reports that up to 80% of women living in a relationship with an alcohol addict are victims of various forms of aggression and violence (Cichy & Szyjko, 2015). It was also observed that growing up in a dysfunctional family with an alcohol abuse problem can lead to the emergence of psychopathological features in adult children of alcoholics (ACA). If those children also experienced violence in their childhood, it is highly probable that they will use violence in the later periods of their life (Tsirigotis & Gruszczyński, 2003).

AGGRESSIVE BEHAVIOURS IN THE CONTEXT OF CRIMINOLOGICAL THEORIES - CASE STUDIES

The psychological theories explaining the genesis of aggressive behaviour include the so-called frustration-aggression theories, proposed, among others, by J. Dollard, N. E. Miller and D. Berkowitz. The crime-inducing factors evoking an aggressive state in the examined perpetrators include a difficult financial situation related to unemployment or the loss of a job, conflicts between members of family, caused by e.g. division of the property, divorce, alcohol addiction, marriage failure, partner abandonment or conflicts with neighbours. The situation caused a state of frustration, which led to aggression. The perpetrators often demonstrated transferred aggression oriented towards the object that was not the direct source of their frustration, i.e. animals belonging to a family member. Criminal cases in which the anger felt by the perpetrator contributed to committing an aggressive crime can be shown as examples. In the first case, the perpetrator was sentenced for inhumane killing of an animal (dog) by throwing it over a balcony. The animal belonged to his children. His behaviour was caused by the anger caused by the fact that their children received low grades at school. The perpetrator addressed his aggression towards the animal, which he treated as a functional substitute of the frustration

source. The second case concerned a criminal recidivist in domestic violence and cruelty to a dog belonging to family members. Another conviction released a feeling of anger in the perpetrator. He decided to "punish" his wife for giving incriminating testimony, again addressing his physical aggression towards family members and the animal.

Aggression can also be a consequence of frustration caused by inhibited realisation of the so-called pleasure principle. Freud's instinct theory assumes that a human being is driven by two basic instincts: life and love – Eros, and death – Thanatos (Fraud, 1927). Sexual drive can act as aggressive behaviour catalyst. A criminal case concerning a perpetrator who upon hearing his wife's refusal to have sexual intercourse decided to "punish" her can be provided here as an example. Making a statement, he admitted that he had been under the influence of alcohol and could not control his instincts. The situation evoked his feeling of anger, which he diffused on the "substitute object" – an animal belonging to his wife. In another animal abuse case, the perpetrator, jealous of his partner, abused her mentally and physically for a longer period. In the perpetrator's opinion, the partner cheated on him and did not reciprocate his feelings to a satisfactory degree. For fear of her own and her child's life, the woman, under the pretext of paying a visit to her family abroad, left her partner, but left an animal (dog) in the apartment. Not being able to contact the partner, the perpetrator vented his anger on objects belonging to her and on the animal. He inflicted cruelty to the dog by kicking it, locking it without food and pulling out its claws. Unrequited feelings and rejection were a driving force for his aggressive behaviour. The desire for revenge for being abandoned causes anger which intensifies emotional tension. Along with the occurrence of stressful heartbreak, the need to get even for suffering emerges in the perpetrator's mind (Lew-Starowicz & Pikulski, 1990).

The aggression theory developed by A. H. Buss, a co-author of the aggression questionnaire for measuring aggressive tendencies, is another approach worth mentioning here. According to A. H. Buss, aggression is a habit of abuse and may become a permanent human personality feature (Buss & Perry, 1992). Based on the research material, it was established that in 52.4% of perpetrators, the use of aggression can actually be such a permanent character feature. The use of violence towards family members and an animal over a longer period of time can be treated as demonstration of this feature. It was reflected in the alleged acts described in the indictment. The perpetrators were most often accused of many years' of psychological and physical abuse towards their closest persons and animals. At the same time, it is observed that tolerance for victimisation demonstrated by family members has an effect on developing the habit of aggressive behaviour. Studies on aggressive behaviour have confirmed that over time, the victims of aggressive acts become accustomed to aggression and their response to such acts becomes weaker.

Structural and social learning theories seem particularly important among sociological theories explaining aggressive behaviour. The first group includes the theory proposed by E.G. Sutherland based principally on the thesis that criminal behaviour is a normal, learned behaviour which is acquired in the socialisation process, just like other behavioural patterns. The individual is more inclined to commit criminal acts after excessive exposure to patterns accepting law infringement (Sutherland, 1939, Sutherland & Cressey, 1970). Theories of social learning by A. Bandura and R. H. Walters assume that internalization of criminal behaviour takes place as a result of observation, i.e. social modelling. The individual learns aggressive behaviours by his or her own direct experience or by adopting the behaviour of others (Bandura, 1977). In the course of the research, it was found that perpetrators who demonstrate a tendency to aggres-

sive behaviours very often experienced aggression of their family members or were witnesses to aggressive behaviours in their immediate surroundings. More than 60% of perpetrators subjected to psychiatric examination admitted that at home, their parent abused other household members. Aggressive behaviours were assimilated in the socialisation process at the early stage of life by future offenders committing aggressive crimes. It is observed that those people, despite unpleasant childhood experience, followed the deviant patterns in their own families. This concerns not only the use of aggression towards family members, but also alcohol abuse.

Another theory that gained popularity in the late 1990s was the control theory formulated by T. Hirschi, claiming that crime results from the absence of bonds between the individual and such groups as a family, school or peer group (Hirschi, 1969, Hirschi, 1983). In turn, the self-control theory, created in cooperation with M. Gottfredson, assumes that criminal behaviours are closely related to the level of self-control, which is a learned phenomenon. It was observed that individuals demonstrating low self-control are usually impulsive, of low sensitivity, inclined to use violence and taking risk, oriented towards reaching immediate aims, of low verbal intelligence level (Gottfredson & Hirschi, 1990). It was found that offenders examined in the research, with diagnosed dissocial personality, demonstrated a low level of self-control. According to forensic psychiatric opinions, they revealed behavioural issues in the adolescence period, among others, by presenting a disrespectful attitude to school duties, truancy, drinking alcohol and being runaways. It should be noted that in the case of perpetrators of animal abuse, no decrease in criminal behaviour is observed with age.

It was found that perpetrators of animal abuse, who at the same time demonstrate a tendency to show aggressive behaviour towards people, often point to circumstances which, in their opinion, justify their crime. In criminology, such an attitude is explained using the concept of neutralisation techniques developed by G. M. Sykes and D. Matza (Sykes, & Matza, 1957). This concept assumes that the individual internationalizes values and norms functioning in the society, but at the same time, assimilates certain techniques of neutralization, through which he/she justifies his/her criminal behaviour. In the examined population, the perpetrators most often explained their behaviour by the fact that the animal was aggressive, which evoked the necessity to take defensive measures. In their belief, it was a circumstance justifying their deed and precluding their responsibility. At the same time, the testimonies of witnesses (usually also victims of domestic violence) gathered for the purpose of the criminal proceeding showed that the animal instinctively tried to defend the member of the family to whom the physical or verbal aggression was directed.

The life course theories also seem to be particularly relevant for explaining aggressive behaviours. Those theories refer to individual periods of human life, determined by specific events. Pioneers in the life course research, W. Thomas and F. Znaniecki, focused on human biography in categories of cultural values and patterns. It was found that an asocial attitude is developed as a result of distortions in subsequent stages of human life. Those theories were also used to analyse criminal careers of individuals (Toroń, 2013). In the opinion of D. P. Farrington, a person demonstrating a tendency to asocial behaviour descends into crime as a result of interactions with the environment where the opportunity and patterns required for committing the crime exist (Farrington, 1994). It is observed that the life course of the examined perpetrators was affected by family environment factors. The perpetrators assimilated values and attitudes functioning in the family, such as aggressive behaviours. In this context, it seems justified to claim

that the socialisation process in dysfunctional families is distorted by wrong personal patterns passed down by parents and it affects the later biography of the individual. The individual, by observation (as a witness to domestic violence) or personal experience concerning the acts of aggression, transfers family behaviours from the childhood to his/her own family. The tendencies to demonstrate aggression can also emerge in adulthood. The causes can include the so-called marital pathologies, e.g. divorce, separation and conflicts with partners. The situation between partners can inhibit aggression (successful life) or stimulate it (conflicts). In criminology, the circumstances directly or indirectly conducive to committing a crime are called criminogenic risk factors. Perpetrators who were convicted for animal abuse and abuse towards a close person argued that their aggressive behaviour was driven by family conflicts. This is explained by M. Wolfgang's concept, which assumes that violence occurs most frequently in the nearest social relations and aggression is caused by growing conflicts between the perpetrator and the victim (Wolfgang, 1975). In their testimonies, the perpetrators explained that the so-called turning points in their life path also included life failures, such as the breakdown of marriage, disease, parents' death in childhood or parents' alcoholism. It should also be emphasized that 81% of the perpetrators examined in the study were habitual criminals. It shows that the lifestyle they demonstrated was related to development of a non-conformist attitude.

CONCLUSIONS

The subject matter of aggressive crimes towards people and animals is an interdisciplinary issue covering areas of criminological sciences, sociology, psychology as well as medical and veterinary sciences. For this reason, the author had to decide which issues should be exposed and which should only be indicated. This paper does not claim to be a complex analysis of the phenomenon, but only intends to draw attention to its key issues. It should be emphasized that the conducted research is only of a pilot study. Any in-depth analysis of the phenomenon discussed requires extending the research, as well as the need to check later criminal records of all perpetrators sentenced for animal abuse. The results of international studies quoted in the introduction demonstrate that aggression often escalates and cruelty to animals precedes aggression towards people.

The research conducted for the purpose of this study made it possible to verify the research hypotheses posed in the introduction and to formulate conclusions. The main research hypothesis put forward by the author, concerning the existence of a correlation between aggression towards animals and aggression towards people, was confirmed. Confronting the specific hypotheses presented in the introduction to the research process with the above presented results of own research, the following theses can be proposed:

- perpetrators of animal abuse were in most cases habitual criminals committing aggressive crimes;
- perpetrators previously punished for aggressive crimes most often committed a domestic violence crime;
- it is possible to specify common features characterizing perpetrators committing acts of aggression towards animals and people;
- both psychological (endogenous) and sociological (exogenous) factors play a dominant role in the criminogenesis of perpetrators committing crimes under the analysis.

The paper can also contribute to the scientific and social discussion on formulating a successful strategy to counteract this social pathology. The preventive aspects of the phenomenon can be proposed as the particular direction of further analyses and research inquiries, since etiologic and phenomenological issues seem to be examined to a satisfactory extent. To summarize, it can be claimed that the aim of the research, namely, the scholarly analysis of links between the tendency to use aggression towards animals and aggressive behaviour towards people, has been achieved. When estimating the actual level of aggressive crimes against animals and people, a "dark number" of such cases should also be taken into account. In view of the relations between the victims and the perpetrators, the fact of committing the crime is not reported to law enforcement authorities. However, analyzing the testimonies of the victims in criminal cases covered by the research, who decided to report domestic violence, it should be believed that the number of undisclosed crimes in this area is high. It results from the conducted research that causes of aggression towards various types of victims (people and animals) are often the same. It should also be emphasized that revealed correlations between aggression towards people and animals are particularly visible in the case of domestic violence and the attacked animals are "strange" to the perpetrator. This allows the claim to be formulated that animal abuse is an element of a criminological image of a domestic violence crime. Therefore, the findings in this regard confirm the results of international research. However, extracting conclusions that could be applied to the wider community of perpetrators of animal abuse in Poland requires extending the research sample to the whole country, as well as verifying the subsequent criminal records of all perpetrators examined in the research, who have been convicted of cruelty to animals (Narodowska, 2018). The results of foreign research, cited in the introduction, indicate that aggression often escalates and the animal abuse precedes aggression towards people.

REFERENCES

- Ascione, F. R., & Arkow, P. (Eds.). (1999). *Child Abuse, Domestic Violence and Animal Abuse. Linking the Circles of Compassion for Prevention and Intervention*. West Lafayette: Purdue University Press.
- Ascione, F. R., (2005). *Children and Animals. Exploring the Roots of Kindness and Cruelty*. West Lafayette: Purdue University Press.
- Ascione, F. R., (2007). *The International Handbook of Animal Abuse and Cruelty. Theory, Research and Application*. West Lafayette: Purdue University Press.
- Bandura, A. (1977). Social learning theory. Englewood Cliffs, NJ: Prentice-Hall.
- Błachut, J. (2007). *Problemy związane z pomiarem przestępczości*. Warszawa: Wolters Kluwer.
- Błachut, J., Gaberle, A., & Krajewski, K. (2001). *Kryminologia*. Gdańsk: Wydawnictwo Arche.
- Blazina, Ch., Boyraz, G., & Shen-Miller, D. (Eds.). (2011). *The Psychology of the Human-Animal Bond*. *A Resource for Clinicians and Researchers*. New York: Springer.

- Buss, A. H., & Perry, M. (1992). The aggression questionnaire. *Journal of Personality and Social Psychology, 63*, 452-459.
- Cichy A., & Szyjko, C. T. (2015). *Zagrożenia dla bezpieczeństwa w obliczu przemocy domowej*. Warszawa: Akademia Obrony Narodowej.
- Cierpiałkowska, L. (2003). Zachowania asertywne i agresywne w rodzinach z problemami alkoholowymi. In M. Binczycka-Anholcer (Ed.), *Przemoc i agresja jako zjawiska społeczne* (pp. 256-267). Warszawa: Polskie Towarzystwo Higieny Psychicznej.
- DeGue, S. (2011). A triad of family violence. Examining overlap in the abuse of children, partners and pets. In Ch. Blazina, G. Boyraz, & D. Shen-Miller (Eds.), *The Psychology of the Human-Animal Bond*. *A Resource for Clinicians and Researchers* (pp. 245-262). New York: Springer.
- Farrington, D. P. (1994). Human development and criminal careers. In M. Maguire, R. Morgan & R. Reiner (Eds.), *The Oxford handbook of criminology* (pp. 511-584). New York: Oxford University Press.
- Fitzgerald, A. J. (2005). *Animal Abuse and Family Violence: Researching the Interrelationships of Abusive Power*. Lewiston, NY: Edwin Mellen Press.
- Gottfredson, M. R., & Hirschi, T. (1990). *A general theory of crime*. Stanford, CA: Stanford University Press.
- Freud, S. (1927). *The ego and the id.* London: Hogarth.
- Grzyb, M., & Habzda-Siwek, E. (2013). Płeć a przestępczość. O problemie dysproporcji płci wśród sprawców przestępstw z użyciem przemocy. *Archiwum Kryminologii, 35*, 95- 135.
- Gullone, E., & Arkow, P. (2012). *Animal Cruelty, Antisocial Behaviour and Aggression. More than a Link*. Basingstoke: Palgrave Macmillan UK.
- Hirschi, T. (1969). *Causes of delinquency*. Berkeley: University of California Press.
- Hirschi, T. (1983). Crime and Family. In J. Q. Wilson (Ed.), *Crime and public policy* (pp. 53-68). San Francisco: Institute for Contemporary Studies.
- Hołyst, B. (2009). *Psychologia kryminalistyczna*. Warszawa: LexisNexis.
- Hutton, J. S. (1983). Animal abuse as a diagnostics approach in social work. In A. H. Katcher & A. M. Beck (Eds.), *New Perspectives on Our Lives with Companion Animals* (pp. 444-447). Philadelphia: University of Pennsylvania Press.
- Kędzierska, G. (2005). Kryminologiczna i kryminalistyczna analiza wybranych elementów udziału kobiet w realizacji przestępstwa. In G. Kędzierska & W. Pływaczewski (Eds.), *Kryminologia wobec współczesnych wyzwań cywilizacyjnych* (pp. 23-38). Olsztyn: KKiPK WPiA UWM.
- Lackwood, R., & Ascione, F. R. (1998). *Cruelty to Animals and Interpersonal Violence. Readings in Research and Application*. West Lafayette: Purdue University Press.
- Lew-Starowicz, Z., & Pikulski, S. (1990). *Zazdrość, seks, zbrodnia*. Warszawa: Wydawnictwo Prawnicze.
- Lynch, J. M. (1990). The Greening of Criminology: a Perspective for the 1990's. *Critical Criminologist, 2(3)*, 1-4.

- Maher, J., Pierpoint, H., & Beirne, P. (Eds.). (2017). *The Palgrave International Handbook of Animal Abuse Studies*. Basingstok: UK: Palgrave Macmillan.
- Merz-Perez, L., & Heide, K. M. (2004). *Animal Cruelty. Pathway to Violence against People*. Walnut Creek, CA: Altamira Press.
- Narodowska J. (2018). Korelacja pomiędzy agresją wobec zwierząt a agresją wobec ludzi w świetle badań aktowych. *Archiwum Kryminologii, 40*, 327-370.
- Sutherland, E. H. (1939). *Principles of criminology*. Philadelphia: J. B. Lippincott.
- Sutherland, E. H., & Cressey, D. R. (1970). *Criminology*. Philadelphia: J. B. Lippincott.
- Sykes, G. M., & Matza, D. (1957). Techniques of neutralization: A theory of delinquency. *American Sociological Review, 22*, 664-673.
- Toroń, B. (2013). *Przestępczość skazanych kobiet i mężczyzn w perspektywie biograficznej*. Kraków: Oficyna Wydawnicza Impuls.
- Tsirigotis, K., & Gruszczyński, W. (2003). Agresja u dorosłych dzieci alkoholików. In M. Binczycka-Anholcer (Ed.), *Przemoc i agresja jako zjawiska społeczne* (pp. 235-244). Warszawa: Polskie Towarzystwo Higieny Psychiatrycznej.
- Wolfgang, M. E. (1975). *Patterns in Criminal Homicide.* Philadelphia: University of Pennsylvania.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 299-305
ISSN 1512-5505

PROBLEMS OF CRIMES AGAINST HUMANITY AND TOOLS FOR DEVELOPMENT OF OFFICER'S SKILLS ON CONFLICT PREVENTION MISSIONS. GAP- GAMING FOR PEACE PROJECT

Alexandra NOWAK

Abstract

We are living in very diverse word. We meet a lot of people from different cultures and religions in our private life and on duty. The world is becoming more and more biased and radicalized. Gaming for Peace (GAP project) is a project funded through the European Commission Horizon 2020 Securities programme. GAP is developing a new curriculum in soft skills for instance communication, cooperation, empathy and understanding and gender awareness and cultural competency for personnel deployed in peacekeeping missions.

INTRODUCTION

The tragedy of our times is that new international and national conflicts are still breaking out in spite of close international cooperation of countries. And despite of the high involvement of United Nations, European Union, Council of Europe and other international organisations the world is becoming more and more biased and radicalized. Modern man must also cope many challenges associated with difficult situations resulting from national and international conflicts including the most serious type of crimes – the crimes against humans and humanity. Conflict area are especially in the most exposed to a high crime rate, acts of terrorism and crimes against humanity.

Especially law enforcement officers who serve on peacebuilding, peacekeeping or conflict prevention missions have to be good educated and prepared for any situations met on mission. Traditional training must be enhanced by soft skills training. Law enforcement officers should work well with others and achieve their goals with respect of human rights and ethics. Project *Gaming for Peace GAP* can be very helpful in training of soft skills in education for law enforcement missions. The presentation concerns description an idea of this project and its results.

PURPOSE

GAP is developing a new curriculum in soft skills e.g.: communication, cooperation, empathy and understanding of the position and priorities of personnel from different countries and organizations and understanding the roles of gender awareness and cultural competency. Police officers, soldiers, NGO staff generally speaking - personnel deployed in peacekeeping missions should be good prepared not only in the area of their professional tasks but also in the area of communication and understanding of the environment in which their acts.

The project collected deployment experiences from relevant civilian and military informants in Europe. These were used to develop a training game, to be used by those being deployed in Conflict Prevention & Peace Building (CPPB) roles. GAP volunteers were sourced from police, military and other relevant people with experience in CPPB

This curriculum was embedded in an immersive role-playing game with standardized metrics to measure learning outcomes. To ensure relevance for endusers, GAP was interviewing 168 personnel from enduser partners: 124 male and 44 female, 101 military (60%), 51 police (30%), 16 civilian (10%). This helped to identify best practices from stakeholder and end-user perspectives and requirements. Each interview took approximately two hours of discuss and answering for questions. Through these interviews, the researcher collected the experiences of police personnel who were deployed in Conflict Prevention and Peacebuilding (CPPB) missions and/or crisis management and peace operations. These experiences were used to develop the scenarios for a role playing game and the game will be used for training personnel for deployment in current or future CPPB missions.

Personnel deployed on Conflict Prevention and Peace Building (CPPB) missions, have to be equipped with the skills and knowledge to perform successfully from the start of their tour of duty. As was mentioned before within the training was emphasised the soft skills of communication and cooperation, empathy and understanding of the position and priorities of personnel in other organizations and roles in the field, and in gender awareness and cultural competency as a one of the most important factor of proper communication.

The EU has been involved in 34 CPPB missions in three continents since 2003, deploying 150,000 personnel from militaries, police, civilian and non-governmental organizations.

CPPB missions are diverse in terms of the range of organizations deployed and the local contexts. Therefore, the interviews were structured around such themes, with the interviewee being prompted to draw on their personal experiences and use examples to illustrate their points.

More over the trend in number and scale of missions is moving upwards, and the problems underlying these missions are becoming more complex and challenging for the EU to respond to strategically and operationally. Training large numbers of personnel from different organizations and nations is an enormous challenge, in terms of logistics and cost.

Using of modern educational device will help to achieve better skills of personnel for conflict prevention and peace keeping missions and their missions will be more efficient and effective and training before the mission may be more effective and cheaper.

On the beginning of the work the project's team had to establish to main problems:

- coordination between various organisations, including peace building stakeholders, policy makers and other international research projects past and current, to conduct

a rigorous assessment of current knowledge and existing training related to conflict prevention and peace building in order to capture current best practice.

- - identification of training needs, to develop an innovative base curriculum and tool for delivery and further development of that base curriculum through the design and play of a multiple player role playing game.

Through broad consultation and review of relevant documentation current gaps were identified in training for the soft skills needed to perform successfully in multicultural EU missions which manifest diverse understanding of operations, gender and culture. the project team determined that the best tool to improve the training would be a multiple player role playing game. It will be an efficient and effective means of developing and delivering a curriculum in those skills. What's more, this game will bring additional benefits:

- no limit on the number of personnel who can be trained.
- the game can be customized at low cost by different stakeholders.

Consortium of GAP

the consortium consists of many European entities, mostly universities and academies, and representatives of public administration:

Partner No. 1 – Trinity College Dublin, Ireland (The coordinator of the project)

Trinity College Dublin is Ireland's leading university (QS World University Ranking, THE World University Ranking, Academic Ranking of World Universities (Shanghai)). It is ranked at 71 in the World and 25 in Europe in the 2014 QS World University Ranking across all indicators. TCD is ranked in the top 100 universities in the world in 14 subject areas including Computer Science and Information Systems and Psychology.

Partner No. 2 – Future Analytics Consulting

Future Analytics Consulting (FAC) is an innovative, multidisciplinary SME which specialises in the areas of spatial planning, research and development, economic and socio-economic analysis. Founded in 2010, and benefitting from the extensive academic and commercial experience of its senior personnel, FAC has gone from strength to strength in the intervening period. Currently employing a multidisciplinary staff of 23, FAC continues to grow, expanding both its corporate expertise and its service offering.

Partner No. 3 – Haunted Planet Studios Ltd.

Haunted Planet Studios is a Limited company registered in Ireland (reg no. 482259). The company specialises inreal-world role-playing games with a strong narrative component and has a track record in innovative Serious Games for cultural heritage. Haunted Planet Studios has four staff members and has published four serious games based on its proprietary game engine so far

Partner No. 4 - Edward M Kennedy Institute for Conflict Intervention, National University of Ireland Maynooth, Ireland

Edward M Kennedy Institute for Conflict Intervention Ireland is a constitution part of Maynooth, University, Ireland. The Institute is largely funded through a grant from the Irish Government and the National University of Ireland. It has a high level of engagement with the

International community, including key practitioners and organisations active in the practice of conflict intervention.

Partner No. 5 – University of Ulster

Ulster is a university with a national and international reputation for excellence, innovation and regional engagement. We make a major contribution to the economic, social and cultural development of Northern Ireland and play a key role in attracting inward investment

Partner No. 6 – Police Service of Northern Ireland (PSNI)

The Police Service of Northern Ireland (PSNI) is the Law Enforcement Agency (LEA) in Northern Ireland with responsibility for policing and security. Established in 2001, it replaced the RUC GC as part of the overall Belfast peace agreement implementation.

Partner No. 7 – UpSkill Enterprise

UpSkill Enterprise Ltd brings together a dedicated team of learning and development specialists who have experience of working with a range of high profile clients on challenging assignments in the global market. Cofounded in Northern Ireland and England with access to an international team of associates, UpSkill prides itself on developing and implementing innovative and creative practical solutions and strategies for advancements in learning and development and professionalising workforce.

Partner No. 8 – Laurea University of Applied Sciences

Laurea University of Applied Science (Greater Helsinki region, Finland) is a research- and development-oriented UAS that focuses on service innovations, which produces high-quality professional competence. Laurea employs approximately 500 personnel and has about 8 000 students, of which 1 200 study in the adult education programmes (Master Degrees).

Partner No. 9 – Finnish Defence Forces International Centre

The National Defence University is a governmental institution part of Finnish Defence Forces, that is responsible for educating the future leaders of Finland's armed forces. Research at the NDU serves the purpose of developing military science as an academic field and responds to the three main tasks of the Finnish Defence Forces: a) National defence, b) Cooperation with other government authorities and c) International cooperation.

Partner No. 10 - National Defence University Warsaw

National Defence University is a public academic institution subordinate both to the Ministry of Defence and the Ministry of Science. It provides interdisciplinary education in the field of widely understood security and defence to both civilian and military students, along with serving as an expert body to a variety of security and defence institutions of the Republic of Poland. The University is the alma mater of Polish commanding and staff officers and civilian experts in national and international security matters.

Partner No. 11 - Enquirya

Enquirya is a SME located in Amstelveen (Netherlands), specialised in international evaluation, assessment and quality assurance in the field of security, civilian crisis management and civil

protection. Its mission is to support EU institutions, NATO and national organisations to deliver effective governance, strengthen their learning capacity and increasing the effectiveness of their capabilities.

Partner No. 12 - Police Academy in Szczytno

Police Academy in Szczytno is a public institution of higher education—a university of state services, within the meaning of the Act of 27 July 2005—Law on Higher Education (Journal of Laws No. 164, item 1365), supervised by the Ministry of the Interior, as well as a Police organizational unit within the meaning of the Act of 6 April 1990 on the Police. For several years, it has been a major educational and scientific centre of the Police.

Partner No. 13 - Bulgaria Defence Institute (BDI) "Professor Tsvetan Lazarov"

The Bulgarian Defence Institute "Professor Tsvetan Lazarov" is the main scientific research, experimental, engineering and expert structure of the Ministry of Defence of the Republic of Bulgaria. It performs nearly all of the Armed Forces' basic and applied research and technology development.

Partner No. 14 – Portuguese State Police (PSP)

The Public Security Police is a security force, uniformed and armed, with the nature of public service and endowed with administrative autonomy.

The mission is to defend the democratic legality, ensuring internal security and the rights of citizen s" (Constitution) *"(...) It is a police placed at the service of democracy and citizens (..)*

Partner No. 15 – Irish Defense Forces are the military of Ireland. They encompass the Army, Air Corps, Naval Service and Reserve Defence Forces.

The project team is completed by: Expert Advisory Board, End users Advisory Board and GAP Ethics Committee. Expert Ethics Committee ensuring the ethical treatment of peacekeepers participating in interviews and game testing for the project is of paramount importance. The Committee is also responsible for reviewing and approving the GAP dual use policy, which ensures that the GAP game my only be used for ethical purposes. The Ethics Committee provide on-going monitoring of these issues throughout the duration of the project.

THE ROLE OF POLAND IN THE GAP AND FINDINGS FROM POLAND

Polish police and military took part in Work Package No 3 and 5. The work consisted of identified best practices from stakeholder and end-user perspectives and requirements. The key stakeholders was surveyed/interviewed to examine their training, and the kind of processes and methods they are currently using and what they would like or need to use in the future.

In Work Package No 5 evaluated of the GAP application's constituent components in order to ensure that the game's operational, educational, technical and specialist content is robust and relevant to end users in operational context. Evaluated also the GAP application in order to prove the soundness of the application's system architecture and to validate the design of the user interface.

The most important objectives in the project for Poland was:

- develop a community of practice of key end users including peacekeepers, military, police forces, civil administration, NGOs
- generation of a variety of stakeholder and end-user perspectives to identify key skills and competencies that are not covered in established training
- examine the range of processes and methods used in practice to increase preparedness/performance with regard to soft skills
- identification of experiential 'soft skills' or competencies, focusing on those relevant to training for CPPB as driven by user experience
- identify operational context (resources and constraints), as it applies to different conflict resolution stakeholders. This will establish a set of operational criteria against which the role of the game can be evaluated
- gender analysis of end user composition and experience
- to carry out formative evaluation activities to guide development of the GAP application and methodology on an iterative basis in terms of functionality, content, usability and user experience
- to assess the operational suitability and role of the GAP application within organizational and inter-organizational contexts, representing the voices of different stakeholders
- to perform summative evaluation to inform guidelines and policy for the use of games in peace building and conflict resolution
- to explore the ethical aspects of gaming methodologies using the GAP platform and ensure ethics-by-design from concept to operational usage

The assumption of the project was that potential interviewees from Poland have previous experience of CPPB and/or crisis management and peace operations. Furthermore, it was important that interviewee must have been deployed in the field after January 1st 2003 and if relevant, retired not more than five years.

Information from interviews and statistic data:

- After all interviews average deployments of interviewee was: 1,67 per head
- Moreover soft skills were indicated as crucial for the performance of their tasks. The most useful on mission were: cultural competencies, understanding of another culture that prevails in the workplace, knowledge of foreign languages, the official language of the mission, and the ability to speak in the language of the local population
- Soft skills constituted only a small part of the training before mission.
- Self-education was an attempt to improve the training that police officers carried out before the mission
- Very helpful was the participation of "veterans" from previous rotations.
- Communication allows fulfilling organisational functions (planning, organising, motivating, controlling) and obtaining goals. It makes possible any cooperation.
- As for cooperation with the local population, the most important aspects were the understanding and respect for both sides of conflict.

- As for gender issues, opinions are divided. Some respondents express that women are needed in the police missions because it is easier to work with them (contact with local women, women search, negotiation support, etc.). Other respondents are convinced that women can go on mission but only on supporting positions: logistics, medical and psychological help, avoiding combat or command positions.

As members of the GAP team, we hope that end-users will be satisfied with the use of the role-playing game which is the result of the project.

The text above is based on documents and publications of the GAP project. It contains a description of project's goals, tasks and work borrowed from documents and project publication materials.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 307-316
ISSN 1512-5505

CRIMINAL CLIMATOLOGY AS A TOOL FOR IDENTIFYING CIVILIZATIONAL THREATS OF PATHOLOGICAL ORIGIN - FOR EXAMPLE, "WARS FOR WATER"

Wiesław PŁYWACZEWSKI
Joanna NARODOWSKA
Maciej DUDA

Abstract

The present study is devoted to the problems of climate change forensics. Within its framework, the issue of the so-called wars for water, i.e. various types of problems related to the claims of states, social groups and individuals for access to water intakes, was taken up. This is undoubtedly one of the innovative issues analysed within the framework of ecocriminology. The title issue is analysed from national, regional and global perspectives. The authors of the study analyse and synthesize the existing scientific achievements of ecocriminology, with particular emphasis on criminal problems related to various claims for water. It should be emphasized that research in this area has so far been undertaken almost exclusively within the circle of Anglo-Saxon criminology. The gap in Polish criminological literature is filled by representatives of the Olsztyn School of Ecocriminology. At the same time, the authors of the article try to answer the question of whether there are relations between climatic and weather phenomena and criminal and pathological behaviour.

INTRODUCTION

Pathological and also often criminal phenomena of climatic origin have been recorded in the area of criminological interest for a long time. Using the terminology proposed, among others, by H. Welzer, it can be described as "climate wars" (Welzer, 2015). In practice, they take the form of competition for land, access to supplies, food and, in particular, to water. It should be remembered that global demand for water has increased significantly. One of the main reasons for this is that the world population has grown from 3 billion in 1960 to almost 7 billion today. According to demographers, by 2050 the Earth will be inhabited by about 9 billion people. The demand for water in industry and households in the growing metropolitan areas, as well as the amount of water needed to irrigate the growing fields, is also growing at a dangerous rate. In addition, long periods of drought linked to climate change are becoming increasingly frequent.

In California, as a result of prolonged droughts, farm owners are forced to draw water from underground sources in order to maintain production continuity. However, increasingly often new water intakes are located in areas under strict environmental protection. As a result of these illegal investments, rivers are drying up and forests are dying out. For example, in the Huelva area, the river has lost almost half of its water in recent years due to illegally excavated wells. Some of these intakes draw water from a depth of 360 metres. This means that the existing underground sources are running out and their uncontrolled exploitation threatens to cause an ecological catastrophe (Becker, 2014). The fires that have caused huge losses in California in recent years have further exposed the problem of access to water intakes, this time associated with extinguishing fires in the affected areas.

THE CLIMATIC CONTEXT OF CRIMINOLOGY

Climate issues can be seen primarily in the research of those criminologists focusing the significant impact of environmental conditions on crime (White, 2008a, Levy & Paz, 2015, Sasaki & Putz, 2009). The clearest evidence of this philosophy of thinking can be found in sociological directions. It should be pointed out, however, that even representatives of criminal anthropology did not question the role of climatic factors in the aetiology of crime. C. Lombroso confirmed their importance, assuming that crime may also have an environmental and, therefore, climatic (weather) basis (Hołyst, 2009).

Undoubtedly, representatives of environmental criminology had a significant influence on the undertaking of criminological research relating to the relationship between climate and crime. The creation and development of this direction in the 1970s is primarily due to C.R. Jeffery and O. Newman. They put particular emphasis on the problem of the darker number and the geography of crime, which in criminology was a break with the existing research views which were oriented exclusively towards the perpetrator and the motives of his actions (Schneider & Kitchen, 2007). Newman considered that certain features of the land-use plan were conducive to committing crimes. According to him, the space should be characterised by territoriality, proper supervision, harmony and order, which ultimately leads to a greater sense of security (Newman, 1972). The increasing infiltration of some species of wild animals into urban space as a result of mass appropriation of habitats by man confirms that violent civilizational (environmental) and climatic changes imply new threats.

New Orleans, among others, became an intense area of research for criminologists related to the disorganization of social relations in large cities caused by a climate-based disaster. After the severe losses suffered by the city and its inhabitants as a result of Hurricane “Katrina”, not only Americans, but also the entire international community, was forced to reassess their perception of the problem of global warming (White, 2008a).

The above facts confirm that Newman may also be of particular importance for the development of research into so-called “climate crime”. Abstracting from its “urban” context, of course, the author points to a number of mechanisms giving rise to pathology, which can be successfully applied to the problem of so-called environmental crime. To some extent, the theoretical achievements of environmental criminology fit the new research direction: “green criminology” (South, 1998).

The contribution of green criminologists to an in-depth understanding of the climate-crime relationship is extremely valuable. It should be remembered that the term "green criminology" is associated primarily with the achievements of the British criminologist M. J. Lynch, who used it for the first time in 1990 (Lynch, 1990, Lynch & Stretesky, 2003). The achievements of the pioneers of green criminology made it possible to formulate basic tasks for this newly emerging sub-discipline of criminology. These include:

- confirming the existence of green crimes in any form, developing their typologies and identifying the differences between them,
- defining the framework for the different areas of interest of the new sub-discipline,
- exposing the problems of social diversity against the background of green crimes,
- evaluating the participation of the so-called green social movement in the implementation of social changes.

In the area of research interests in green criminology, there are four main categories of crimes related to human interference in natural land resources. These are: air pollution, deforestation, violation of rights and destruction of animal habitats threatened with extinction (Pływaczewski, 2010) and water pollution (Narodowska & Duda, 2013).

Undoubtedly, the most dangerous phenomena which threaten the natural resources of the environment and have a negative impact on the climate should be included:

- commercial logging of forests (especially primary forests),
- pollution of land, water and air through the activities of international corporations, as well as privatisation of these areas,
- poaching of endangered animals and unrestricted acquisition of protected species of fauna and flora and their derivatives, including industrial fishing,
- wars and armed conflicts in areas considered to be of particular natural value,
- unlawful use of valuable natural areas for investment purposes;
- mass tourism oriented towards the acquisition of rare animal species or their derivatives,
- established stereotypes related to the traditional perception of the environment as a space with unlimited resources,
- corruption among police officers, border services, nature park guards and health inspection staff,
- international conflicts between companies with rich natural land resources, leading to environmental crime,
- animal abuse,
- illegal trade in waste and other waste products (Pływaczewski, 2011).

Most of the presented criminal phenomena definitely have a transnational dimension, and thus fall within the framework of the eco-global criminology proposed by R. White (White, 2008b).

The presented list of research interests is systematically enriched with new categories of "green" crime. These include the problem (raised by R. Walters) of genetic modification of particular edible plants species (Walters, 2011).

A. Brisman and N. South propose a slightly modified perspective on green crimes. In their opinion, cultural aspects are extremely important for understanding the essence of these crimes, as well as the inclusion of green criminology as a separate field of research. These criminologists refer to this research perspective as "green cultural criminology" (Brisman & South, 2014).

It is also undeniable that in the area of criminological interests, especially in the area of green criminology, climate issues are beginning to play a significant role, which inevitably leads to the emergence in criminology of a new sub-discipline called "criminal climatology" or "climatocriminology" (Pływaczewski, 2017).

In addition, the global sourcing of food products by large multinationals often takes on the character of so-called "white collar crime" (Frank & Lynch, 1992, Salinger 2005).

Green criminology research is supported by the Green Criminology Working Group. Criminologists in this field focus, among others, on the problem of environmental damage perceived from the perspective of multinational industrial concerns. Undoubtedly, this damage, which often takes the form of major environmental disasters, is the main cause of forced migration.

One of the leading research problems in the field of green criminology is the issue of climate and ecological (environmental) refugees (Wortley & Mazerolle, 2008). This phenomenon, among others, is an effect of global warming, which is inextricably linked to the protection of the world's natural and cultural heritage (Pływaczewski & Gadecki, 2015).

In 2008, experts in green criminology pointed out that global temperature increases, rising sea and ocean levels and weather changes can lead to: wars over water resources, escalation of environmental refugees, increased tensions and ethnic conflicts, border closures and aggressive protests against the biggest polluters (Abbot, 2008).

CLIMATE CHANGE AND MIGRATION

According to the Intergovernmental Panel on Climate Change (IPCC), the number of climate refugees will exceed 250 million by 2050. This means that the international community must speed up work on determining the legal status of international climate refugees. Although this problem was raised at the Paris 2015 Climate Summit, this category of refugee has not yet been covered by the 1951 Geneva Convention. Another challenge for international law researchers will be to address a new issue arising from climate change, namely, the need to define a legal framework for territorial and state continuity. The problem is particularly acute for those countries that will cease to exist as a result of rising sea and ocean levels (de-territoriality). A second consequence of these processes will be the problem of the nationality of victims of climate change. For residents of some archipelagic countries, it is possible to accept passports from neighbouring countries. Such a fate probably awaits, among others, the citizens of Nauru, to whom Australia has guaranteed humanitarian and legal assistance in the event of the disappearance of that country. A similar declaration was made by the Fijian authorities, providing future care for the Tuvalu residents (Mazur & Szostak, 2008). Currently, in these territories, the problem of access to clean water is becoming a major existential challenge. This is because the rise in the level of oceanic waters causes the penetration of salt into intakes of drinking water. This may mean that, in the near future, island populations will be completely deprived of these basic sources of supply.

The serious consequences of cutting off access to water can be seen on the example of Syria. Experts believe that one of the main causes of the Syrian conflict was the dramatic water scarcity caused by decades of droughts. In their opinion, extreme climate change has forced millions of farmers to migrate from rural to urban areas. During the so-called "Arab Spring" these refugees were the social group most dissatisfied with the previous governments. As a result, some of them joined rebellious anti-government groups, while others, forced to flee their former homes, tried to migrate to Europe. According to data from the United Nations Office on Drugs and Crime (UNODC), the source of forced population movements in many countries on all continents is the unfair distribution of income derived from the exploitation of minerals and other natural resources in demand in the world (Fooner, 2013).

Climatologists have also signalled that some species of plants and animals are dying out as a result of global warming. At the same time, they point out that this phenomenon is the responsibility of large global corporations that emit greenhouse gases. Climatic exodus can affect not only people but also flora and fauna. Although there is a chance to move some communities and even whole nations to safe areas of our planet, the problem of conservation of wild species of fauna and flora for posterity still remains unresolved. Therefore, the prospect of the annihilation of these species as a result of the rise in the level of the Pacific Ocean waters is so real and imminent that the governments of some island states, such as Kiribati, Tuvalu, the Marshall Islands and the Maldives, are considering how to relocate not only their citizens, but also some of the so-called flagship specimens of the natural world. Countries at risk of sinking believe that they have become the victim of the reckless policies of large multinationals that deliberately violated global restrictions on greenhouse gas emissions (White, 2008a).

The undisputed effect of the melting of the Arctic and Antarctic ice caps is flooding urban areas and, as a consequence, an increasing incidence of climate (ecological) refugees. The effects of these catastrophes primarily affect the poor. This regularity was scientifically confirmed, among others, by John R. Logan based on the example of hurricane "Katrina", which destroyed New Orleans. Around 46% of the destroyed parts of the city were inhabited by the poorest citizens, mainly Afro-Americans (Welzer, 2015).

COMPETITION FOR WATER RESOURCES

Increasingly, access to water is the cause of escalating conflicts. In the face of rapid climate change, especially repeated droughts in Africa, water is becoming one of the most sought-after raw materials. In the near future, the management of water sources will be the subject of serious disputes, both between states and individual communities. The seizure and destruction of water intakes, as is often the case in Africa, is often treated by the warring parties as one of the methods used to weaken the opponent and force him to leave the disputed territories together with the civilian population living there. During the Darfur conflict, one of the forms of struggle was taking over, destroying and poisoning water intakes.

It should also be recalled that in the 1960s, the Israeli air strike after the Syrian attempt to divert the Baniyas River (one of the sources of the Jordan on the Golan Heights) and the Arab attacks on the Israeli National Water System project were the cause of the Six-Day War. Today, after years of drought and growing population, the Jordan River is once again becoming a

source of conflict between Israelis, Palestinians and Jordanians. According to the chronicles of global wars, out of 37 armed conflicts over water since 1950, 32 took place in the Middle East. Almost thirty of them concerned the Jordan River and its tributaries, which provide millions of people with water to drink, wash and irrigate crops.

Repeated practices in the world of mutual "diversion" and water theft are also nowadays a source of serious conflicts in other parts of the world. It is likely that the poor countries of Central Asia, a large part of whose territory is occupied by glaciers (Tajikistan, Kyrgyzstan), may in future cut off the supply of water to their oil-rich neighbours. This problem also arises in East Africa, as many countries in the region capture the waters of the few rivers on this continent, building dams and huge reservoirs. An example is the dispute between Namibia and Botswana over the waters of the Okavango River. Another area of conflict over water may be the borderland of Laos, Cambodia, Thailand and Vietnam. These countries rival each other in the development of their energy infrastructure. The border waters of the Mekong River are the main source of energy. The location of large water dams on this river limits the natural course of the river and, at the same time, adversely affects the development of aquatic organisms, which are the main source of supply for the coastal population. Equally symptomatic is the long-standing Egyptian-Sudan dispute over the use of Nile waters. All the more so as the Egyptians consider the Nile to be their sole property, and also holiness, while referring to their ancient Egyptian roots. Mutual claims to watercourses flowing from the Himalayas have also been filed by India, Pakistan and China.

The Turkish programme to build 22 dams and 19 hydroelectric power plants on the Tigris and Euphrates and their tributaries could also be a new source of conflict over access to water resources. These investments threaten the economic interests of neighbouring countries Syria and Iraq. These countries fear that Turkey's seizure of huge amounts of water will result in serious perturbations in access to water for their citizens. Not without significance is also the fact that as a result of the formation of artificial water reservoirs, valuable cultural and natural areas are flooded, including the city of Hasankeyf, which is famous for its priceless monuments.

A particular warning for modern civilization may be the example of Lake Aral. In 1960 the lake covered 68,000 km^2, in 2007 the area of the lake decreased to only 16,000 and is still decreasing. The cause of the ecological disaster of the Aral Sea was the transformation of the environment for the growing sector of cotton cultivation and processing. In the 1930s, a network of canals was built to supply water deep into the desert, but this was done against all the principles of hydrology. As a result, most of the water soaked into the soil or evaporated without reaching the target. The drying up of this water reservoir caused climatic changes, soil salinity and the extinction of many endemic animal species, including the Caspian tiger (Micklin, 2007).

THEFT AND DEVASTATION OF SEA COASTS - THE EXAMPLE OF "SAND GANGS"

A serious threat to the natural and natural environment of man, implying dangerous climate changes, is the phenomenon of robbery of the world's sand deposits. This raw material is the main component of concrete. As a result of the investment boom, the most valuable natural areas in many continents are being quickly appropriated, including the African coasts, especially the beaches of Morocco, Senegal, Benin, Liberia, Namibia and South Africa. The procedure of illegal extraction of sand is dealt with by organized gangs, which deliver this raw material

not only to individual customers, but also to enterprises, including large multinational corporations. It cannot be ruled out that part of the revenue from the sale of illegally harvested raw material may be credited to the accounts of rebel or terrorist organisations. It should also be noted that the scale of this phenomenon is so serious today that it may lead to environmental disasters. Gangs who illegally exploit unique lagoons in Nigeria, Benin and Senegal, among others, make vast areas of the coastline vulnerable to the destructive effects of the ocean (water erosion). In this way, the most valuable natural sites, habitats of rare animals such as sea turtles and valuable bird species, are devastated. It is also not insignificant that the illegal exploitation of the sand coasts threatens the livelihoods of those groups of people for whom access to the coasts and ocean resources is a prerequisite for survival. According to H. Welzer, the activity of gangs engaged in illegal exploitation of natural resources (in this case, sand) sooner or later condemns the local population to starvation and often forces them to leave their homes and become climate refugees. In extreme cases, this condition is conducive to social pathologies, including the development of crime in its various forms. One of them is the mass involvement of young people (often children) deprived of any prospects for life in criminal activity, which enables the functioning of various paramilitary and rebel organisations (the so-called folk militias).

CRIMINOLOGICAL AND LEGAL IMPLICATIONS OF THE PHENOMENON OF "WARS FOR WATER"

Rapid climate change is contributing to the further escalation of many dangerous phenomena. There is no doubt that one of them will be "wars for water". They will result in the emergence of inflammatory centres based on political, economic, cultural and demographic grounds. This situation will also foster the strengthening of organised criminal structures, which will violently seize water-rich areas and other raw materials to guarantee their survival. Other criminological phenomena accompanying the phenomenon of competition for water resources should be included:

- an increase in extreme and violent crime (rape, murder, looting of property, cult of physical strength),
- chaos, disorganisation of public life in target countries, collapse of existing social structures, creation of new areas of religious conflict,
- overcrowding of cities (there are already more than 21 cities with a population of more than 10 million people in the world),
- seizure of valuable natural areas, destruction of flagship species of fauna and flora,
- violation of humanitarian and sanitary law, new diseases (including mental illnesses due to social maladjustment),
- border closures,
- conflicts on climatic and ecological grounds.

Climate criminologists point to the existing links between the activities of individual economic operators and their environmental activities and crime (White, 2008a, Farell, Ahmed, & French, 2008). First of all, they argue that the current vision of criminal responsibility for the plundering of the Earth's natural resources is anachronistic. Therefore, they emphasize the need to define

- following the example of the crime of genocide - a qualified deed described as "ecocide". (ecocide), or as a "crime against the Earth". The authors of this legal structure recognise that the current forms of penalisation of environmental crimes to a negligible extent allow for the protection of the world's natural resources. At the same time, they add that in confrontation with the privileged position of large multinational industrial concerns (oil companies, wood and food companies) on the world markets, the current means of criminal justice are becoming ineffective, if not illusory (Pływaczewski, 2012).

The International Criminal Court (ICC) in The Hague, among others, recognises the need to distinguish acts against global natural resources, which are classified as violations of international law. ICC judges have announced that land seizures, environmental degradation and the illegal exploitation of natural resources will be treated and qualified as crimes against humanity.

CONCLUSIONS

There is no doubt that interest in criminal climatology, as a specific area of criminological research, will systematically increase, as the threats associated with climate change have nowadays become the most serious challenge for mankind. Undoubtedly, the achievements of Polish science, represented, among others, by the Olsztyn School of Ecocriminology, is a significant contribution to the development of ecocriminological thought.

It should be noted that conflicts over water also occur at the meeting point of different "water cultures", because water resources are perceived differently by different civilizations. Some cultures regard water as sacredness and treat its distribution as a necessary duty to protect life. Others consider water to be a commodity whose ownership and sale is a fundamental right of individuals. Conflicts arise when countries sharing international river waters use its resources in different ways. Disputes over water often also reflect the struggle for dominance in the region, and access to as much water as possible is considered to be a factor in demonstrating the position of the state. This is why countries aspiring to local hegemony are often involved in conflicts over water.

The United Nations Development Programme (UNDP) draws attention to the economic aspect of lack of access to water in theoretically abundant regions. In such countries, the cause of the water crisis are social inequalities and not a lack of physical availability of water. For example, Latin America has as much as 65% of the world's freshwater resources, but the average water bills are the highest among the countries of the Global South. Unsustainable water management related to progressive industrialization, urbanization, intensive development of agriculture and privatization of water are to blame. This situation creates numerous social conflicts.

In addition to the previously identified problems, new research challenges arise, directly or indirectly related to the problems related to access to water. These undoubtedly include:

- professionalisation of environmental and natural crime, increasingly taking the form of "white collar" crime,
- illegal lobbying and corruption activities supported and financed by large multinationals, particularly including the energy sector,
- the financing of false or biased environmental and climate protection expert opinions by multinational industrial companies,

- discrediting the activities of environmental organisations by negationists (entities questioning the phenomenon of global warming) (Klein, 2016, Popkiewicz, 2016),
- the establishment of criminal relations between multinational industrial concerns and the governments of so-called "failed states",
- the responsibility of states and their high representatives for global warming,
- crimes against life and health directed against environmental and natural environment activists (Pływaczewski & Duda, 2017).

REFERENCES

- Abbot, C. (2008). *An Uncertain Future: Law Enforcement, National Security and Climate Changes*. Retrieved from http://www.conflictrecovery.org/bin/Oxford_Research_Group-An_Uncertain_Future.pdf.
- Becker, M. (2014, December 11). Hitze und Trockenheit. Kalifornien erlebt schlimmste Durre der letzten 1200 Jahre. *Der Spiegel.* Retrieved from http://www.spiegel.de/wissenschaft/natur/kalifornien-erlebt-schlimmste-duerre-der-letzten-1200-jahre-a-1007877.html.
- Brisman, A., & South, N. (2014). *Green Cultural Criminology. Constructions of Environmental Harm, Consumerism, and Resistance to Ecocide. New Directions Critical Criminology*. London-New York: Routledge.
- Farell S., Ahmed T., & French, D. (Eds.). (2008). *Criminological and Legal Consequences of Climate Change*, Oxford-Portland Oregon: Hart Publishing.
- Fooner, M. (2013). *Interpol: Issues in World Crime and International Criminal Justice*. New York: Springer.
- Frank, N. K., & Lynch M. J. (1992). *Corporate Crime, Corporate Violence*. New York: Harrow & Heston.
- Hołyst, B. (2009). *Kryminologia*. Warszawa: LexisNexis.
- Klein, N. (2016). *To zmienia wszystko. Kapitalizm kontra klimat*, Warszawa: Wydawnictwo Literackie Muza.
- Levy, B. S., & Paz, J. A. (2015). *Climate Change and Public Health*. Oxford-New York: Oxford University Press.
- Lynch, M. J. (1990). The greening of Criminology: a perspective for the 1990's. *Critical Criminologist, 2*, 1-4.
- Lynch, M. J., & Stretesky, P. B. (2003). The meaning of Green: Contrasting Criminological Perspectives. *Theoretical Criminology, 7(2)*, 217-238.
- Mazur, N., & Szostak, V. (2008, December 16). Raj za chwilę zginie. *Wyborcza.* Retrieved from http://wyborcza.pl/duzyformat/1,127291,6061070,Raj_za_chwile_zginie.html.
- Micklin, P. (2007). The Aral Sea Disaster. *The Annual Review of Earth and Planetary Sciences, 35*, 47-72.

- Narodowska, J., & Duda. M. (2013). Zanieczyszczanie wód śródlądowych. In W. Pływaczewski & Sz. Buczyński (Eds.), *Gospodarka odpadami. Problematyka prawna i ekokryminologiczna* (pp. 125-141). Olsztyn: KKiPK WPiA UWM.
- Newman, O. (1972). *Defensible space: Crime prevention through urban design*. New York: Collier.
- Pływaczewski W., Duda, M. (2017). Dlaczego zginęła Dian Fossey? Prawne oraz wiktymologiczne aspekty zwalczania przestępczości wymierzonej w obrońców przyrody. In M. Adamczyk, J. Karaźniewicz, & K. Pruszkiewicz-Słowińska (Eds.), *Karnoprawne aspekty ochrony środowiska – wyzwania dla teorii i praktyki* (pp. 43-67). Olsztyn: WPiA UWM.
- Pływaczewski, W. (2010). *Nielegalny handel chronionymi gatunkami dzikiej fauny i flory. Przegląd Policyjny, 3(99)*, 39-61.
- Pływaczewski, W. (2011). Organizacje pozarządowe na tle problematyki nielegalnego handlu chronionymi gatunkami dzikiej fauny i flory. *Studia Prawnoustrojowe, 13*, 286-287.
- Pływaczewski, W. (2017). Wiktymologiczne implikacje zjawiska globalnego ocieplenia – przykład tzw. państw archipelagowych. In E. Zębek & M. Hejbudzki (Eds.), *Odpowiedzialność za środowisko w ujęciu normatywnym* (pp. 327-337). Olsztyn: WPiA UWM.
- Pływaczewski, W. (Ed.). (2012). *Prawnokarne i kryminologiczne aspekty ochrony środowiska*, Olsztyn: KKiPK WPiA UWM.
- Pływaczewski, W., & Gadecki, B. (Eds.). (2015). *Ochrona dziedzictwa kulturowego i naturalnego. Perspektywa prawna i kryminologiczna*, Warszawa: CH Beck.
- Popkiewicz, M. (2016). Panteon negacjonistów. *Dzikie Życie, 3(261)*, 8-10.
- Salinger, L. M. (Ed.). (2005). *Encyclopedia of White-Collar and Corporate Crime*, Thousand-London-New Delhi: Arkansas State University.
- Sasaki, N., & Putz, F. E. (2009). Critical Need for New Definitions of Forest and Forest Degradation in Global Climate Change. *Conservation Letters. A journal of the Society for Conservation Biology, 2 (5)*, 226-232.
- Schneider, R. H., & Kitchen T. (2007). *Crime Prevention and the Built Environment*. London: Routledge.
- South, N. (1998). A green field for criminology: A proposal for a perspective. *Theoretical Criminology, 2 (2)*, 211-233.
- Walters, R. (2011). *Eco Crime and Genetically Modified Food*. New York: Routledge.
- Welzer, H. (2015). *Clime Wars. What People Will Be Killed For In The 21ST Century*. Cambridge: Polity Press.
- White R. (Ed.). (2008a). *Climate Change from a Criminological Perspective*. New York: Springer.
- White, R. (2008b). *Crimes Against Nature. Environmental criminology and ecological justice*. Portland: Willan Publishing.
- Wortley, R., & Mazerolle. L. (2008). *Environmental Criminology and Crime Analysis*, London-New York: Willan.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 317-327
ISSN 1512-5505

CRIMES COMMITTED IN TIMES OF WAR, RECALLED IN POST-MEMORY

Fatima RODRIGUES

Abstract

Although war is a propitious context for different kinds of crime, criminology has underestimated its analysis. However, in recent years there has been a reversal of this trend, with a growing interest of criminologists in the phenomenon of war. This paper intends to make a modest contribution to broaden the debate regarding the criminological understanding of war through an exploratory analysis about how crimes, that have been committed in relation to the context of the Portuguese colonial war in Guinea-Bissau and the Algeria independence war from French rule, are remembered by the generations that did not live the conflicts directly, but who summon them in their narratives.

INTRODUCTION

Although war is a propitious context for different types of crime, criminology has underestimated its analysis. Many authors have already considered surprising the fact that criminology neglects the problematic of war.[1] However, in recent years there has been a reversal of this trend, with a growing interest of criminologists in the phenomenon of war.[2] In Portugal, for instance, a country that carried out a war for thirteen years (1961-1974), in three different African territories and involving more than one million Portuguese combatants, crimes that may have been committed in this context has not yet been the object of interest on the part of criminology.

This paper explores the relationship between crimes, resulting from colonial wars, and the ways they are recalled in post-colonial societies. The objective is to present an exploratory analysis about how crimes that have been committed in relation to the context of the Portuguese co-

1 In order to know approaches that have questioned why criminology has generated so few studies see, for instance, Ruggiero (2018), Carrabine (2016), McGarry & Walklate (2017), Jamieson (1998).

2 Through several investigations that seek to place criminology, more clearly, in relation to crimes committed in the context of war, such as Kramer & Jr (2005), Yacoubian (2000) and Walklate, Sandra & McGarry, Ross (2017).

lonial war in Guinea-Bissau (1963-1974) and the Algeria independence war from French rule (1954-1962) are remembered by the generations that did not live the conflicts directly, but who summon them in their narratives. This paper draws on exploratory research which forms part of a larger project entitled MEMOIRS – Children of Empires and European Postmemories[3] that studies contemporary Europe by analyzing the impact of colonial memories on the generation that came after the decolonization of Africa and the independence of the former colonies, held by Belgium, France and Portugal, of RDC, Algeria, Angola, Mozambique, Guinea-Bissau, Cape Vert and São Tomé and Príncipe. My article seeks, only, to understand how the narratives of the children and grandchildren of those involved in and affected by the colonial wars evoke crimes committed during the conflicts and to understand how those crimes work in the operations of remembrance of the wars. This exploratory analysis intends to make a modest contribution to broaden the debate regarding the criminological understanding of war in the scope of Narrative Criminology which understands narrative as an inescapable neglected field for understanding crime and justice [4]. This will be an approach in conjunction with memory studies that, since the end of the Second World War, have occupied a privileged place among the many approaches devoted to the analysis of crimes committed in, and after, war. This article is founded in the problematic of the post-memory, that is, according to Marianne Hirsch "the relationship of the second generation to powerful, often traumatic, experiences that preceded their births but that were nevertheless transmitted to them so deeply as to seem to constitute memories in their own right" (2008). This paper focuses on the post-memory of crimes allegedly committed in the contexts of the wars of independence in Algeria (1954-1962), Mozambique (1964-1974), Angola (1961-1974) and Guinea-Bissau (1963-1974).

In empirical terms, the work emerges from data collected in interviews with the children of subjects who lived, prior to independence, in the territories occupied by the French in Algeria and the Portuguese in Angola, Mozambique and Guinea Bissau. The paper analyzes how these children, who now live in France and Portugal, remember colonial crimes in their own narratives. Based on this study, which is still in an exploratory phase, the research more broadly aims to contribute to understanding the mechanisms through which these events are memorialized and how the forms in which they are remembered affect diverse aspects of social life in post-imperial societies.

To this end, this paper is organized into four parts:

- it begins by discussing crimes memorialized by the children of people who lived through the last phases of French colonialism in Algeria and Portuguese colonialism in Angola, Mozambique and Guinea Bissau;
- then it presents some data to contextualizes these crimes within the broader of post-memory;
- next it identifies and compares the post-memories of the children of veterans as they relate to the remembering of colonial crimes,

---

[3] MEMOIRS is funded by the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (no. 648624), hosted at the Centre for Social Studies (CES), University of Coimbra.

[4] About narrative criminology see, for example, Presser & Sandberg(eds.) (2015). Sandberg & Ugelvik, (2016) and Presser (2016).

- before ending with an exploratory theoretical reflection on the problematic of post-memory as a framework for understanding the crimes committed in the post-war context.

SOME IMPORTANT HISTORICAL CLARIFICATIONS

To begin with, it is important to note that the majority of crimes the interviewees identified, whether in the Portuguese or the French context, are not crimes committed in the context of war. That is, they are neither war crimes *per se* or other crimes committed during conflict. The crimes that crop up most frequently in the interviews in fact took place after the end of the wars: the imprisonment, torture and execution of local fighters who were recruited into the colonial armies during the wars of independence and who, after those conflicts, continued to live in their homelands.

Before analyzing the narratives about these crimes it is important to clarify an important point: they do not constitute a structural category of the assembled narratives collected in the interviews that were made in the context of the memoirs project, no matter whether the crimes took place during or after the conflict. The narratives I discuss here represent a specific case: the children of the sub-Saharan and Algerian veterans of the Portuguese and French armed forces respectively. Except in these cases, which form the central focus of this paper, the interviewees do not emphasize crimes committed in the context of the wars. When they refer to such crimes, it is in a superficial and general manner. In the Portuguese case, for example, few speak of the well-known massacre of Wiriyamo, committed by the Portuguese forces in Mozambique, or of the massacres committed by the United Peoples of Angola (UPA) in Angola. More often than not interviewees speak of slavery, exploitation, inequality and racism – phenomena related to colonialism as such – rather than about crimes committed during the wars. There are very few cases in which interviewees discuss rape, communal violence, forced displacement or torture committed by the colonial armies or by the armies of independence fighters. The war itself is not an important subject in their narratives. Many testimonies scarcely refer to the war. This is in spite of the fact that all these wars were very long and constituted the last gasp of colonial dominance in Africa, involved more than a million Europeans and Africans, and had disastrous consequences for newly independent states and old colonial metropoles alike.

This immediately raises questions for the problematic of post-memory. Namely, trying to understand absences, and their causes, within the narratives of the generation who did not live through the conflicts, but whose parents experienced them either directly or indirectly.

However, these crimes are a major topic in the narratives of the children of veterans of Algerian heritage. In relation to the Portuguese colonial wars, only the children of veterans of Guinean heritage refer to them, while the children of veterans with Mozambican or Angolan backgrounds do not. As I have already noted, the crimes discussed are those committed in independent Algeria and Guinea against local veterans who had fought for the colonial armies.

In order to help us understand these narratives about those crimes, this second part of the paper presents some general data on the recruitment of local soldiers in the colonial armed forces and about what happened to them after the independence of the territories where they were born.

In the colonial and independence wars of the twentieth century, the colonial armies, for various strategic reasons, integrated soldiers from the territories which were struggling for independence. We can see this, for example, in the cases of the so-called *jaunissement* of the French forces in Indochina between 1946 and 1954, the 'vietnamization' of the US military in Vietnam between 1963 and 1973, and the theory of *same element* used by the British forces in Malaysia. All these cases register the application of one of the basic theories of counter-insurgent warfare: to involve local populations through integrating them into the defence against independence movement, (Coelho, 2003, p. 182; Cann, 2005, p. 123).[5]

In the Portuguese case, and in general terms in Angola, Mozambique and Guinea Bissau, the use of local fighters tended to increase as the war went on. Towards the end of the wars, local recruitment constituted around half of the troops in the three territories.[6] In the Algerian war, it is not known exactly how many men were recruited locally into the French armed forces. This was because their contracts were often verbal so solid data does not exist to allow an accurate calculation. It is estimated, however, that during the war at least two hundred thousand (200,000) men of Algerian origin were recruited into the French army.[7]

With the independence of the former Portuguese African territories in 1974 and of Algeria in 1962, fighters of local origin became the subject of special attention. In their homelands these men were seen by the independence movements as collaborators with the colonial forces and traitors against independence. Therefore, in the treaties which transferred powers to the newly independent states, the former colonial states in a very limited way sought to guarantee the safety of these men after they departed.

Nevertheless, at the end of the wars many of these former fighters – whether in Algeria of Guinea Bissau – were persecuted, tortured and executed. It is worth noting that, for reasons I don't have time to fully explore, the same did not take place in either Mozambique or in Angola. Different contexts of conflict and post-conflict and very distinct[8] independence processes in these different countries played an important part.

In Angola the demobilization and integration of these old fighters after the war was peaceful. Given the ensuing civil war between UNITA and the MPLA many were immediately incorporated into the armies of the two opposing independence movements. In Mozambique the situation was different. Some former fighters were detained in what were called "re-education camps" where they, and others considered dangerous to the independence project, were subjected to processes of purification, after which they were freed and reintegrated into Mozambican civic life. The civil war in Mozambique, which began in 1977, also may have contributed in the sense that the old fighters were also integrated into the RENAMO and FRELIMO forces. In Guinea Bissau, on the other hand, the demobilization of African soldiers produced significant problems. This was where, after independence, former fighters recruited by the

---

5 That through various strategies such as the involvement of local authorities, psychological warfar, the creation of conflicts between the population etc..

6 To know the evolution of the local troop recruitment see in Guinea but also in Mozambique and in Angola see Correia, (2000) and Portugal. Estado-Marior do Exército (1988).

7 For more informations about this recrutement, consult Stora (2004).

8 The demobilization processes of African combatants depended on a combination of factors that varied across the three territories. To know these factors consult (Rodrigues, 2013).

Portuguese suffered most. Many of them fled to Senegal, particularly those who had belonged to the 'African Commandos.' Others were detained and, according to various witnesses, some were executed.[9]

The political strategy used in the negotiations ignored the colonial inheritance embodied in these men when the Portuguese state decided to leave its old African soldiers in their countries of origin after independence. As opposed to the Algerian case, the Portuguese state only brought a few dozens of their African soldiers who fought in the colonial army from Guinea to Portugal. They did so in the face of pressure from the Portuguese Commandos Association which denounced the persecution and shootings of the veterans. But for decades the topic has not been discussed. Only recently did the Portuguese Armed Forces (PAF) even recognise that these men died because of their association with the Portuguese African Commandos: in 2007 they put up two plaques dedicated to the dozens of old soldiers of the PAF who died in independent Guinea. And only in 2009 were their names added to the list of dead servicemen inscribed on the National Monument of Overseas Soldiers. But the Portuguese state, until this day, has not publicly addressed this history.

In the case of Algerian independence, those that suffered after the end of the war were the Harkis – a term that refers to the paramilitaries who fought in colonial Algeria. In the Algerian war the Harkis were a fragile and poorly funded pro-French military grouping. Their number increased greatly in the first part of the war and decreased rapidly as the end of French colonial dominance approached. At the end of the war in 1962, after the Front de Libération Nationale promised to pardon them, it was determined that these Algerian former fighters would stay in Algeria. However, shortly after the ceasefire in March 1962 the Harkis, by then already demobbed, began to be tortured and massacred. Faced with this situation some Harkis were offered the possibility of going to live in France under the auspices of the military.

However, the French policy was in fact to repatriate as few Harkis as possible. Only forty-two thousand and five hundred (42,500) Harkis and their families (a total of around eighty five thousand - 85,000 - people), were authorized to establish themselves in France. This was out of at least two hundred thousand (200,000). And unlike the 'Pieds-noirs' (French citizens born in Algeria) the Harkis were not considered as subjects of repatriation, but as refugees.[10] The great majority of Harkis had to return to ordinary life in Algeria. In France, former Algerian soldiers and their families were placed in military camps before being transferred to assigned places of work. Such measures were taken by the French State to avoid retaliation against their former fighters were, however, insufficient to protect them after the transfer of powers. It is estimated that sixty to seventy thousand (60-70,000) Harkis were executed after the Evian accords. Many

---

9 The persecutions and arrests were intensified especially since March 1975, which is related to political events that happened in Portuguese territory, and many of these men flee to Senegal. For the details of this situation, consult Bernardo (2007) and Dâmaso & Gomes (1996), Antunes (1995, p.699, p.705, p. 870) and Aguiar (1977, p.467- 468).

10 It is estimated that some 85,000 people have arrived in France between themselves and their families. Upon arrival, considered Algerian citizens in France, they had to apply for French nationality. In 1962, it was already stated in France that more than 10,000 Algerians were killed, but the number of deaths did not reach a consensus, and some even pointed to the possibility that 150,000 people had been executed (Stora, 1998: 200-210; Stora, 2004: 80-82; Charbit, 2006: 48-89; Hamoumou, 2004: 474- 495).

others were detained and incarcerated (Stora, 1998, p. 200-210; Stora, 2004, p. 80-82; Charbit, 2006, p. 48-89; Hamoumou, 2004, p. 474-495).

The torture and execution of the Harkis in Algeria was only recognised by the French State thirty-nine years after the end of the Algerian War when, in 2001, President Jacques Chirac affirmed that "France failed to save its children from savagery". In 2012 it was the turn of Nicolas Sarkozy to officially recognize the responsibility of the French government for the "abandonment" of the Harkis after the Algerian War. He declared "France should have protected the Harkis from history. It did not. France carries this responsibility in the face of history." In 2016 François Hollande attributed responsibility for the massacres of the Harkis to France when he said: "the recognition of French responsibility is a symbolic act that takes a step towards soothing the memories – all the memories of the Algerian war – all the wounded memories." Nowadays, under Emmanuel Macron, the debate continues along other lines: on the 23rd March 2018 the French government initiated a working group on the Harkis charged with proposing measures towards the "preservation of memory" and appropriate reparations for Harkis and their families.

In this way, while the French authorities' recognition that they had abandoned their former fighters of Algerian origin was long in coming, the acknowledgement has now become more outspoken, and is brought up whenever the Algerian War is discussed. On the other hand, in 2018 the history of the former African fighters of the FAP is still entirely unknown to the majority of the Portuguese public, and the execution of fighters of Guinean origin is only a circumscribed communal memory, shared almost exclusively by former Portuguese veterans and their Guinean counterparts who fought, side-by-side, in the war.

POST-MEMORIES OF CRIMES IN POSTCOLONIAL TIMES

The lament of the Guinean former FAP fighters living in Portugal is precisely to do with an absence of recognition. In this third part of my paper I will begin to delineate the contours of this absence. This section is dedicated to the post-memory of crimes committed against these former fighters in the post-war period. The executions of fighters of Guinean origin are not just remembered by the children of those who died – they dominate their narratives about the war and the colonial era. Beyond this affected group, however, no-one else, of those interviewed on the Portuguese side by the MEMOIRS project, made any reference to these crimes. The way in which these executions are remembered takes particular and distinct forms which differ from the French case. Though they never witnessed the executions, the childrens' post-memories of their parents' executions can be detailed, memorializing times and places, the forces and people involved in detentions and executions and the people who interceded to protect their parents. The children of the executed are sure that what happened was an act of vengeance on the part of the independence movements. These are stories heard from grandparents, mothers and neighbours in Guinea and from veterans of their parents' units in meetings remembering the war. They are family memories circulating in the private sphere; but they are shared, too, in a constrained public sphere, in veterans' meetings. In this sense they have a communal quality, circumscribed by groups of former fighters and their families.

Yet this post-memory is not made up of pre-ordained certainties that solidify in relation to the death of their parents. There lie many doubts, too: doubts that lead to questions for the Portu-

guese state. They do not directly accuse the state of having abandoned their parents, and nor do they make concrete claims upon it. But they indirectly pose many questions for the state: why did they leave them in Guinea at the end of the war? Why did they not pay war pensions to the mothers and wives of men who were shot for having belonged to the PAF?

More than this, as opposed to what happened in France with the children of the Harkis, their questions are not vocalized in the public sphere. They are, rather, spoken in the private sphere, directed at the particular histories of their own parents.[11] Up until today they haven't been able to organize themselves or create an association of the children of these veterans as the Harkis did in France. Thus they have not demanded answers from the Portuguese State.

In Portugal, then, the children of former fighters of Guinean origin raise a set of concerns in relation to the details of their parents' death and to how historical crimes are ignored by the Portuguese State. Yet in their narratives these claims are not self-evident. They constitute a post-memory made, above all, within the bosom of the family, in the private sphere, and also in a limited public sphere of veterans during reunions or ceremonies remembering the war. It is through the questions that these children raise, rather than claims on the State as such, that this post-memory reveals a need for recognition of what happened. It reveals, too, a lingering incapacity to transfer post-memory into the social sphere.

On the other hand, in the French case, the children of the Harkis mobilize politically through organising, and the demands that emerge from their post-memory are much more direct.

They recognize that the State has taken the Harkis who came to France after the War into its charge. And, while they accuse independent Algeria of betraying the promises that were made to the Harkis, they demand too that France recognizes that it abandoned those Harkis left in Algeria. In this way, these claims are not reduced to the particular histories of their parents, as in the Portuguese case; rather, they take on the form of the tragic collective history of all the Harkis. Their post-memory does not raise any kind of doubts. It is very precise about what happened, and very clear about the claims that emerge as a consequence. They describe the torture that was inflicted on veterans and their families in public squares; they describe the executions in the presence of children and wives. They describe the many humiliations and persecutions to which they were subjected. They demand that the history of the Harkis is treated within the history taught in schools. They demand that museums are established in their name. They demand ownership of the land on which stood the now dismantled camps in which the Harkis lived after their repatriation. In this way, in contrast to the Portuguese case, the post-memory of the children of the Harkis demands a place in public memory and demands its inscription in the cultural memory of the Algerian War in France.

Comparing these two cases we can argue that the post-memory of similar crimes mobilize different dimensions of recognition. In France, the memory of crimes committed against the Harkis belongs to the public sphere: not only has it been recognised by the French State but it has been the subject of both academic and political debates, and both scientific and creative work. The recognition demanded is inseparable from a resentment directed at the French authorities; a feeling that their parents in particular, and the Harkis in general, were not treated with the respect that they deserved, and that was owed to them. In a cultural and political con-

[11] They try to know what has happened to them, how they died, who killed them, where they were buried, who has attended these executions, who interfered and who tried to protect them.

text conducive to securing recognition, such resentment is at the root of the Harkis' struggles.

In Portugal the discourse of African former combatants is above all framed as a demand for equality, in particular equality before the law. Therefore they situate their aspirations in the context of legal relations, arguing that their parents and their families have not had access to the same rights as the Portuguese. In their narratives this elicits a whole range of questions. What is particularly noteworthy is an incessant quest to uncover what actually happened and a sadness and a resentment based in having been deprived of their parents' presence. This leads on to an apprehension that their own identities are incomplete as long as they don't know what happened to their parents, and as long as Portugal refuses to recognise it. But, as opposed to in the French case, the claims to recognition made by the children of executed African fighters did not reach the public sphere, in the sense of an organized struggle sustained by social movements.

What remains to be understood, and that my current research aims to establish, are the reasons why the post-memory of these crimes is held within private and community spheres in post-colonial Portugal.

CONCLUSION

Portugal, as opposed to France, seems to be confronted with a negation of these crimes[12]. This negation – a phenomenon that Stanley Cohen (2001) has minutely analysed – could be related to how the post-memory of these crimes struggle to reach the public sphere.

Post-memory, according to Hirsh, "describes the relationship of the second generation to powerful, often traumatic, experiences that preceded their births but that were nevertheless transmitted to them so deeply as to seem to constitute memories in their own right"(Hirsch, 2008, p. 1).

The research we are undertaking enables us to pose questions about the conditions that enable the crystallization of the post-memory of these crimes, and how they emerge as different kinds of claims.

Post-memory is the outcome of a process of transmission and, as Imre Kertész (2014) suggests when he responds to the question "who owns Auschwitz?", in the most traumatic situations, it follows the Duty of memory itself. Like Primo Levi, Kertész affirms that Auschwitz does not belong to anyone who lived through it, but to the generations that follow. But with one condition: that they stake a claim to its memory. For this memory to belong to subsequent generations they too must consider it their own, and stake their own claim to it (Kertész, 2014). Thus post-memory is not only a transmission, but it is a laying-claim, a conscious appropriation of the experience of those who went before. And it belongs to the generations that follow only if they lay claim to it. As Hirsh (2008) emphasises, post-memory involves a logic of apprehension, search, and decision. An attempt to understand what took place. It is not merely an inherited memory; it is a construction. There is a logic of decision; of searching within immaterial silences. Hirsh (2008) himself noted that, like memory, post-memory degrades in the present. It is less to do with the past as such than with its selective appropriation for the needs of the present.

---

12 This research will have to explore this dimension which crosses inescapably with Cohen's work on denial (Cohen, 2001).

For a post-memory to survive and do the duty of memory, it must take on form. Or perhaps it must pass through what Aleida Assman (2006) and Jan Assman (2008) call communicative memory. A memory that is not produced or preserved institutionally but lives in the daily interaction and communication through everyday relations that accrete a form of cultural memory. Or, perhaps, post-memory can crystallize as a kind of memory bank through literature, film, public discourse, museums and more. Everything suggests that this process is underway in France in relation to the Harkis. The same does not appear to be happening in Portugal, where the sharing of the post-memory of crimes against former fighters is still limited to the family, and to small groups.

What we can conclude, therefore, from this ongoing research is that the post-memory of crimes, and their successful diffusion, or otherwise, into the public sphere, depends on mechanisms of transmission. It also depends on events, modes of recognition, and, in all likelihood, on relations established not only during the war itself, but in the period that followed. Finally, in order to understand the post-memory of crimes committed in the course of the colonial wars, it is not enough to know the facts, and the claims that emerge from them. We must also identify the processes, mechanisms, situations and conditions upon which these facts have been constructed, and their social and political consequences in post-imperial societies. It is in this sense that the current research is conducted with the conviction that, through the exploration of the suggestions that we have just presented, that are located within the scope of the narrative of crimes committed in (post)colonial times and in the transmission of the memories that remain on them, this work could contribute to broaden the approach of the narrative criminology.

BIBLIOGRAPHY

- Antunes, J. F. (1995). A Guerra de África (1961-1974*)*. Vols. I e II. Lisboa: Círculo de Leitores.
- Assmann, A. (2006). Memory, individual and collective. In: GOODIN, Robert E.; TILLY, Charles (Ed.). *The Oxford handbook of contextual political analysis*. Oxford: Oxford University Press. p. 210-224.
- Assman, J. (2008). Communicative and cultural memory. In: ERLL, Astrid; NÜNNING, Ansgar (Ed.). *Cultural memory studies:* an international and interdisciplinary handbook. Berlin; New York: De Gruyter. p. 109-118.
- Aguiar, L. (1977). Livro Negro da Descolonização. Lisboa. Editorial Intervenção.
- Bernardo, M. A. (2007). Guerra, Paz e Fuzilamentos dos Guerreiros; Guiné 1970-1980. Lisboa. Prefácio.
- Cann, J. P. (2005). Contra-subversão em África: como os Portugueses fizeram a guerra em África 1961-1974. Lisboa. Prefácio.
- Carrabine, E. (2016). Picture this: Criminology, image and narrative. *Crime, Media, Culture*, *12*(2), 253–270. https://doi.org/10.1177/1741659016637640
- Charbit, T. (2006). Les Harkis. Paris: La Découverte.

- Coelho, J. P. (2003). Da violência colonial ordenada à ordem pós-colonial violenta. Sobre um legado das guerras coloniais nas ex-colónias portuguesas. *Lusotopie*, *10*(1), 175–193.
- Cohen, S. (2001). States of Denial: Knowing about Atrocities and Suffering (1 edition). Cambridge, UK : Malden, MA: Polity Press.
- Correia, P. P. (2000).A participação local no desenvolvimento das campanhas. O recrtamento africano.in A. Moreira et al (orgs.) Estudos sobre as *Campanhas de África (1961-1974)*. S. Pedro do Estoril: Edições Atena e Instituto de Altos Estudos Militares, 143-153.
- Dâmaso, E. & Gomes, A. (1996). "Falecidos por fuzilamento", *Público*, 30 de Junho: 47-53
- Hamoumou, Mohand (2004), «L'Histoire des harkis et Français musulmans: la fin d'un tabou», *in* Mohammed Harbi e Benjamin Stora (orgs.), *La Guerre d'Algérie*. Paris: Hachette Littératures, 455-495.
- Hirsch, M. (2008). The Generation of Postmemory. *Poetics Today*, *29*(1), 103–128. https://doi.org/10.1215/03335372-2007-019
- Jamieson, R. (1998). Towards a criminology of war in Europe. Em V. Ruggiero, N. South, & I. Taylor (Eds.), *The New European Criminology: Crime and Social Order in Europe*. Oxon: Routledge.
- Kertész, I. (2014). Who Owns Auschwitz? *The Yale Journal of Criticism*, *14*(1), 267–272.
- Kramer, R. C., & Jr, R. J. M. (2005). War, aggression and state crime. *British Journal of Criminology*, *45*(4), 446–469. https://doi.org/10.1093/bjc/azi032
- McGarry, R., & Walklate, S. (2017). The 'Criminology of War', what is it good for? Absolutely nothing! *British Society of Criminology Newsletter*, *80*, 42–47.
- Portugal. Estado-Maior do Exército. (1988). *Resenha Histórico-Militar das Campanhas de África*. vol.I. Lisboa: Comissão para o Estudo das Campanhas de África.
- Presser, L. & Sandberg, S. (eds.) (2015). Narrative Criminology: Understanding Stories of Crime. Edited by L. Presser & New York, University Press.
- Presser, L. (2016). Criminology and the narrative turn. *Crime, Media, Culture*, *12*(2), 137–151. https://doi.org/10.1177/1741659015626203
- Rodrigues, F. da C. (2013). A desmobilização dos combatentes africanos das Forças Armadas Portuguesas da Guerra Colonial (1961-1974). *Ler História*, (65), 113–128. https://doi.org/10.4000/lerhistoria.484
- McGarry, R. & Walklate, S. (2015). Introduction. Placing war within criminology. Em *Criminology and War: Transgressing the Borders* (Sandra Walklate, Ross McGarry). Oxon and New York: Routledge.
- Stora, Benjamin (1998), *La Gangrène et l'Oublie: la Mémoire de la Guerre d'Algérie*. Paris: La Découverte.
- Stora, Benjamin (2004), *Histoire de la guerre d'Algérie (1954-1962)*. Paris: La Découverte.

- Ruggiero, V. (2018). Fiction, war and criminology. *Criminology & Criminal Justice*, *18*(5), 604–616. https://doi.org/10.1177/1748895818781198
- Sandberg, S., & Ugelvik, T. (2016). The past, present, and future of narrative criminology: A review and an invitation. *Crime, Media, Culture*, *12*. https://doi.org/10.1177/1741659016663558
- Yacoubian, G. S. (2000). The (in)significance of genocidal behavior to the discipline of criminology. *Crime, Law and Social Change*, *34*(1), 7–19. https://doi.org/10.1023/A:1008312732333

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 329-336
ISSN 1512-5505

THE CASE FOR HELICOPTERS AND INTEGRATED COMMUNICATIONS IN BOSNIA-HERZEGOVINA: LESSONS LEARNED FROM THE FLOODS OF 2014.

Amer SMAILBEGOVIC
Nedzad KORAJLIC
Jasmin AHIC

Summary

Every year Bosnia-Herzegovina is affected by the various incidents of inclement weather, floods or other natural disasters requiring helicopter support and evacuation. Besides BH Armed Forces, the availability of multirole search-and-rescue helicopters is almost non-existent. Coupled with the aging of current communication systems and lack of integrated communications and other support systems, Bosnia-Herzegovina should seriously consider allocating the necessary resources to create a dedicated helicopter rescue force and improve the state and interoperability of its communications systems.

Keywords: Emergency response, Helicopter, Reconnaissance, Rescue, Communications

INTRODUCTION

A combination of rugged hilly and mountainous terrain of Bosnia and Herzegovina (hereinafter BH), bisected by gorges, ravines, as well as karst geomorphological phenomena (sinkholes, bays, reefs), coupled with insufficiently-developed road communication and heavy forest cover is a very complicated terrain to consider in the time of crisis; especially in conditions when the road infrastructure and other communications are threatened by floods, landslides, snow, etc. There are frequent occurrences when the populated places and entire regions are cut off from the rest of BH due to the failure of road and other communications.

A small number of airports / airfields in BH further complicates the situation when it comes to a quick response to a crisis situation. BH currently has 4 airports, 13 airfields, and about 7 landing strips registered with the BH Directorate of Civil Aviation (BHDCA, 2016). Apart from the main airports, other strips are used occasionally and do not have the infrastructure that could be used for mounting a quick response. The situation with heliports in BH is more troubling, and besides existing heliports of the Armed Forces of BH (Sarajevo, Banja Luka), there are only a handful of other locations suitable for helicopter landings (e.g. Sarajevo Clinical Center KCUS, Sarajevo; Bosmal tower; Zenica Police Training Facility, etc.); the location(s) suitable for

helicopter landing, according to the valid regulations (Official Gazette of BiH, 2009) are not registered and used in any of the crisis plans (CSS BiH, 2010).

PROBLEM

There is only a handful of operational and suitable helicopters that could be used in crisis situations in Bosnia and Herzegovina. The BH Armed Forces currently have ten operational helicopters, the Federal Police Administration (FUP) has one, while the RS Helicopter Service currently has two operational helicopters and plans to procure new ones. Somewhat smaller helicopters and the so-called gyrocopters (light aircraft that are a hybrid of helicopters and light aircraft) are privately owned and occasionally used in emergencies. Until 1992, the Republic of BH had ready access to helicopters through the Executive Council and the Municipal and Republic Ministry of Interior, but the equipment was requisitioned by Serbia during the war and replacement helicopters were never purchased. The only civilian helicopter that is somewhat suitable for operation during crisis conditions was originally part of the Helicopter Unit of the Ministry of Interior of the Republic of BH before 1992, and it was used by the police affairs and government ministries until May 1992, when it was effectively seized and was in possession of the authorities of the Republic of Serbia until December 10, 2010, when it was returned to BH (Ahatovic, 2018).

The emergency services radio-communication system in BH is in an even less enviable position. Most of the currently operation radio systems consist of analog radio devices, aged 5-20 years, which are already technologically obsolete. The reliability of such equipment is decreasing, while the maintenance costs are increasing because manufacturers are eliminating support for the old and phased-out models of analog radio devices as well as their corresponding relay systems (MUP ZDK, 2018). Although a framework agreement has been reached on the harmonization and use of the radio communication system between the BH police agencies, the RS Ministry of the Interior has opted against joining the agreement, and the agreement itself is still awaiting implementation. For the agencies that did not agree to participate in the unified communications system: the Ministry of Internal Affairs of the Republic of Srpska and the Brcko District Police, the provision was left in the Agreement for them to join and be part of this system at any time together with all other police agencies in BiH (DKPT, 2018).

Currently, police and security agencies in BH cannot easily communicate with each other due to different equipment and frequencies, and even less so with the BH Armed Forces, EUFOR or civil defense headquarters, which poses a considerable problem of coordination and field deployment during the emergencies. Most participants use their own mobile devices (phones) that are not intended for use in emergency situations, and can be compromised or left without a signal during an emergency.

LESSONS LEARNED FROM THE FLOODS OF 2014

The floods that affected BH in mid-May 2014 were the largest in the last 20 years; the natural disaster affected a quarter of the BH territory and about a million people. The total estimated damage was over 4 billion BAM or 15% of BH GDP. The emergency response was undertaken by the Armed Forces of Bosnia and Herzegovina (AFBH) with the aid of AF of the Republic of Slovenia, the AF of the Republic of Croatia, EUFOR, as well as the Ministry of Security of BH, who

were the main coordinators of the response activities in the field. All available AFBH helicopters were made available to the effort, but the number was not sufficient and helicopters from neighboring countries were called in and used to save more than 3,000 people and mitigate other potential dangers (BH Parliament, 2015).

In a later analysis of the situation, especially in Zenica-Doboj Canton (ZDK), where the situation was most critical, and certain locations could be reached only by a helicopter, it was concluded that the arrival of helicopters during the emergency period was "uncertain and dependent upon the complex chain of command in the AFBH as well as in the Units of the participating countries that sent helicopters, It was also important to point out the deteriorating technical, personnel and other state of resources in the AFBH, so that in a possible recurrence of similar events, the efficiency of helicopter units, over which we have no authority, would be questionable."(MUPZDK, 2018).

According to the after-action reports (AFBH, 2016), the conditions during the evacuations or directed support towards ground teams were further hampered by the inclement weather conditions, difficulties in flying at night (lack of night flying equipment) and the inability to communicate with the deployed ground teams and/or other aircraft. The process of airspace de-confliction was performed by the pilots themselves, while the communication with teams on the ground was performed either via mobile telephony (SMS messages), or occasionally via radio communication, in aircraft that were equipped with a secondary analog communication devices (Mahmutovic, 2016). The situation was especially difficult near Maglaj, where it was difficult to find a suitable terrain for landing and embarking people who needed to be evacuated; AFBiH / FUP helicopters were not equipped with winches and baskets to pull people out of the flooded area and do not have the ability to land on or in the water.

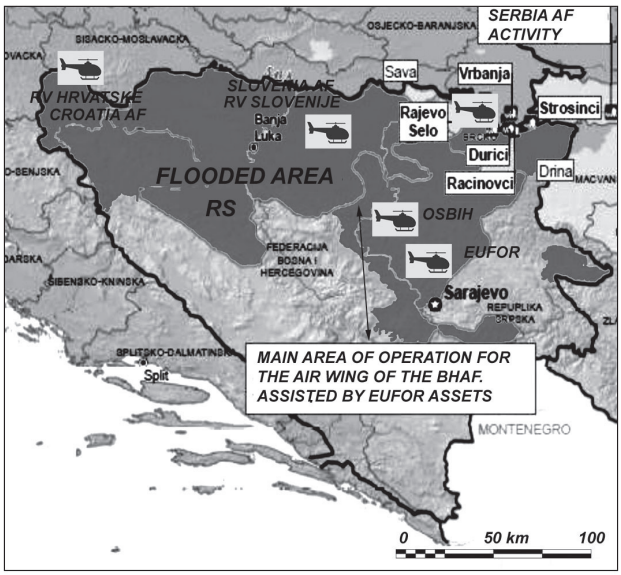


Figure 1. A depiction of the flooded area with the activities where helicopters played a special role. The most critical areas were in the northeast of the country, where the most evacuations had been carried

out by AFBH helicopters.

The main deficiencies observed during the floods were:

a) small number of available helicopters,
b) lack of equipment for performing operations in instrumental flight conditions; lack of sensor equipment and directional beams of light to perform night rescue
c) lack of equipment to pull people out by the winch and basket,
d) lack of ability to communicate with ground teams and other aircraft in the region,
e) lack of provisions for temporary landing in the flooded area.

Some of this specialty equipment was installed on a small number of EUFOR helicopters in BH and proved to be very useful in carrying out the necessary actions as well as a wide range of applications in the protection and rescue system (OSCE, 2017).

PROPOSED SOLUTION

Although the engagement of the AFBH is provisioned during an emergency, the complicated and time-consuming decision-making process on the authorization of helicopters and the support of ground teams needs to be re-considered and develop alternative options for rapid action and deployment. In addition to capacity-building and modernizing the AFBiH, it would be highly desirable to make a contingency plan to improve the capacity of Federation Police, Federal Directorate of Civil Defense and certain cantonal police forces that may face natural disasters of this kind. Planning for the procurement of multirole helicopters for the dedicated protection and rescue tasks, as well as the improvement of the communication system should be some of the key priorities of the BH administrative entities and cantons (Kesetovic, Z., Korajlic, N.& I. Toth, 2013).

Some of the key aspects a multirole helicopter should have:

1. Capacity 1 + 6 (or more) persons
2. Possibility of towing suspended loads (at least up to 1200 kg)
3. Equipped with instruments for flying at night and all weather conditions as well as a digital navigation system (eg Garmin 1000).
4. Possibility of installing a thermal imaging system (FLIR) and a spotlight beam
5. Installation of rescue winch (crane) and basket
6. Installation of equipment for the possibility of temporary landing on the water surface (pontoon)
7. Digital communication systems for communication with the other deployed teams in the field

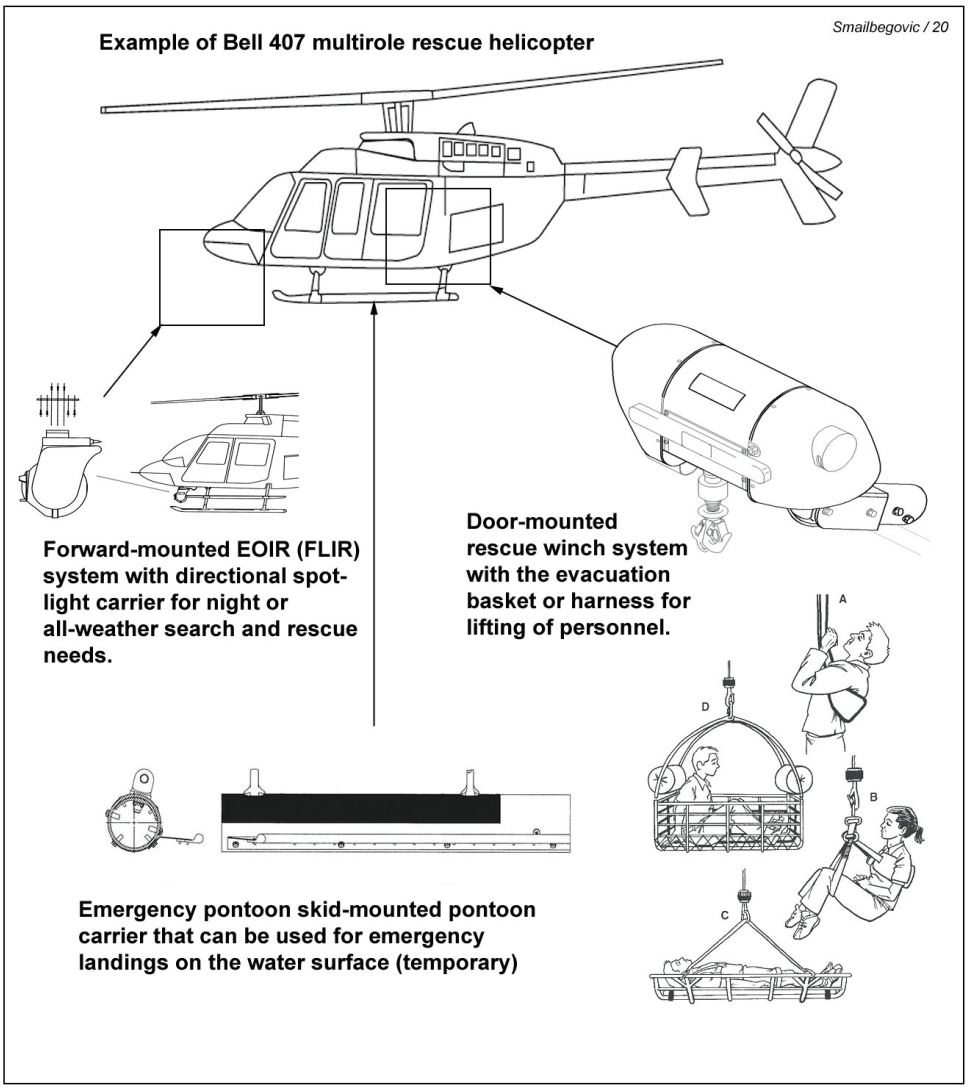


Figure 2. Overview of the basic elements necessary for conducting helicopter-borne civil protection and rescue missions in BH.

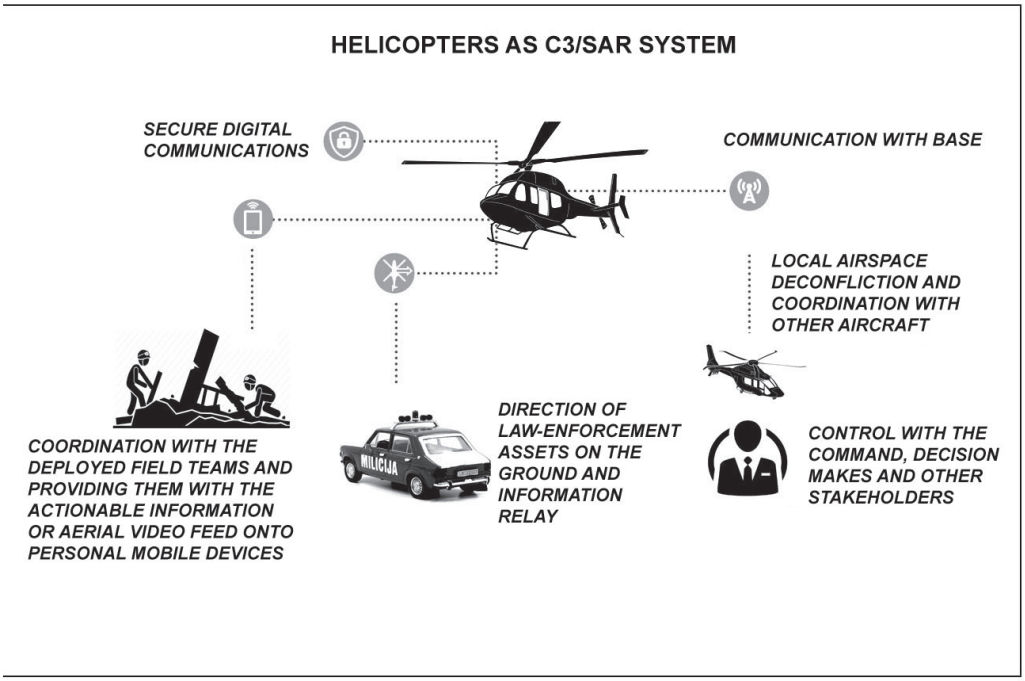


Figure 3. Example of a digital communication system network where a helicopter can serve as a mobile command-control-communications center. A single helicopter can manage a crisis and coordinate deployed teams on the ground.

Upgrading the existing analogue communication system to a digital communication system is desirable to ensure the expansion of field communication capabilities by sharing coordinates, notifications between the participants, and in some cases, using microwave communications (e.g. Teradek WiFi system) of short video content and aerial feed to the field teams. With the use of a digital communication system, a helicopter in the field can become a mobile command-control-communication hub.

CONCLUSION

Damages caused by the natural disasters which result in multimillion damages, significant loss of life and material goods are just one reflection of BH's unpreparedness to deal with the recurrent crisis management and form an adequate response. The Government of BH, governments of the administrative units of BH, cantons and municipalities still have not implemented concrete plans in order to improve, modernize and form an efficient rescue service, and that includes the use of helicopters as well as adequate communications.

According to the available information and analysis from BH (e.g. Zenica-Doboj Canton Police) but from around the world (Contra Costa Sheriff, 2016), a fully equipped helicopter (according to the specifications listed above) is in the price range of up to 5 million USD (8.7 million BAM) for a full a new unit, or about $ 3.6 million (BAM 6.3 million) for a previously used but

usable aircraft with equipment. The aircraft requires the training of at least three pilots, two technicians for evacuation (crew-chiefs), rescue and medical transport, and two mechanics to maintain the aircraft and equipment. For the requirements of modernization of the communication system within a single canton, the estimated cost is about 1 million BAM (depending on the manufacturer and type of equipment offered). Once established, the system can function smoothly for a long time, and the cost itself is cost-effective on a long-term bases if taken into account on how much BH pays in costs for each year of unpreparedness for the crisis.

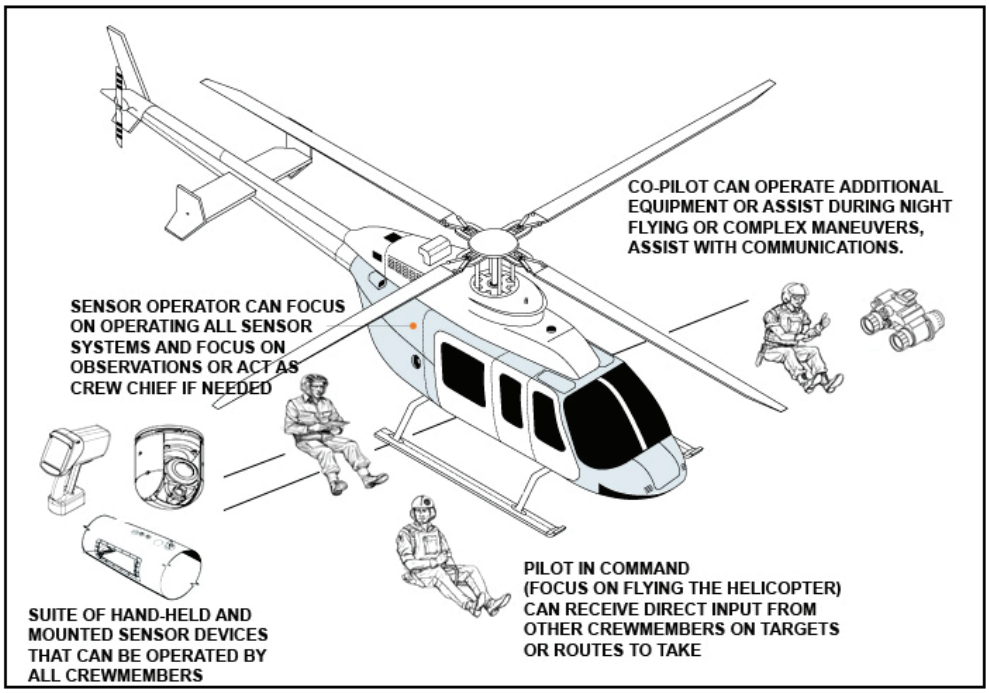


Figure 4. Example of an ideal crew configuration for a multi-role civil protection and rescue helicopter.

REFERENCE

- Ahatovic, N. (2018, 22 04). *Milorad Dodik mora vratiti helikopter državi BiH*. Retrieved from Index.ba: https://www.index.ba/foto-ukradeni-1992-milorad-dodik-mora-vratiti-helikopter-drzavi-bih/
- BHDCA. (2016, 01 03). *Aerodromi u BiH*. Retrieved from BH Direktorat za civilnu vazduhoplovstvo.: http://www.bhdca.gov.ba/index.php/bs/aerodromi
- Contra Costa Sheriff. (2016). *Sheriff's Helicopter Procurement.* Martinez, California: Field Operations Bureau.

- CSS BiH. (2010). *Zastita i spasavanje u Bosni i Hercegovini.* Sarajevo: Center for Security Studies.
- DKPT. (2018). *Srednjoročni plan rada Direkcije za koordinaciju policijskih tijela BiH 2020-2022.* Sarajevo: Direkcija za koordinaciju policijskih tijela BiH.
- Mahmutovic, V. (2016, 03 14). Letenje za vrijeme poplava. (A. Smailbegovic, Interviewer)
- MUP ZDK. (2018). *Elaborat uvodjenja digitalnog sistema veze.* Zenica: Ministarstvo Unutrasnjih Poslova ZDK.
- MUPZDK. (2018). *Elaborat opravdanosti nabavke helikoptera za potrebe MUP ZDK.* Zenica: Službene novine Zeničko-dobojskog kantona, broj: 7/10.
- Off.Gazette BiH. (2009, 02). Zakon o zrakoplovstvu Bosne i Hercegovine. *Sluzbeni glasnik BiH, Br. 39*.
- OSBiH. (2016, 20 11). *Specijalni prilog: poplave i odbrana* . Retrieved from Ministarstvo odbrane Bosne i Hercegovine: http://www.mod.gov.ba/afoto2016/201118-1.pdf
- OSCE. (2017, September). *NATO EADRC Field Excercise*. Retrieved from Ministry of Security of Bosnia and Herzegovina: http://www.msb.gov.ba/PDF/031220181.pdf
- Parlament BiH. (2015). *Upravljanje krizom: primjer poplava u BiH 2014. sa osvrtom na spremnost BiH za prijem veceg broja izbjeglica. .* Sarajevo. : Sekretarijat Zajednicka Sluzba Parlamentarne Skupstine BiH.
- Kesetovic, Z., Korajlic, N., & Toth, I. (2013). *Krizni menadzment; drugo izdanje,* FKKSS UNSA., Sarajevo, Bosna i Hercegovina & Veleuciliste Velika Gorica, Velika Gorica, Republika Hrvatska.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 337-361
ISSN 1512-5505

"NO MATTER WHAT REHABILITATION OR TREATMENT YOU GET... THERE IS ALWAYS POSSIBILITY.": AN EXAMINATION OF THE RISKS AND DANGEROUSNESS POSED BY CHILD SEX OFFENDERS FROM THE PUBLIC'S PERSPECTIVE

Lauren STEVENS

Abstract

Child sexual victimisation is considered as one of the most detrimental and seemingly 'unforgiveable' crimes against humans, which often results in these offenders becoming socially distant and commonly dehumanised, stigmatised, shamed and socially excluded in society. These horrendous crimes provoke negative attitudes from the community that reinforce the segregation between rehabilitating offenders and the community. Yet, it is the community that is a key component to any successful reintegration or rehabilitation in the community setting. To fully understand the complexities of public perception and the implications it has for criminological research and community-based reintegration efforts; it is necessary to understand the community's perception of risks posed by these offenders. Also, to identify the characteristics that are associated with heightened perception of risk, suggest ways of bridging the gap between offender and the community to encourage successful re-integration, while identifying different lines of inquiry to reduce child sexual victimisation in the first instance. Reflecting upon a mixed methods approach to identify the public's perception of risk using both an online questionnaire and semi-structured interviews, this paper draws upon the public's preference to prevention tactics rather than intervention strategies within the community-setting. This paper calls for an alternative focus to crimes against children, its offenders and criminal justice responses to these atrocities. Prevention is better than intervention. We should invest in prevention methods similar to those in Germany and the Netherlands such as, self-referrals for individuals who acknowledge a problematic behaviour before it becomes a criminal offence.

Keywords:

Rehabilitation, Community Reintegration, Child Sexual Offenders, Public Perspective, Explanatory Sequential Mixed Methods.

INTRODUCTION

Child sexual abuse (CSA), and by association paedophilia have been described as 'disturbing phenomena' (Olsen, Daggs, Ellevold & Rogers, 2007, p.232); although these concepts continue to remain largely misunderstood, particularly within the social context of modern society (Harrison, Manning & McCartan, 2010). The controversial phenomena of both paedophilia and CSA has evolved into a highly emotive socio-political issue since the 1970s; therefore, attracting an overwhelming amount of media attention, political debate and academic research originating from a variety of disciplines (Schofield, 2004).

Child sex offenders (CSOs) are subject to the effects of social distancing and commonly dehumanised, stigmatised, shamed and socially excluded (Rade, Desmarias & Mitchell, 2016); arguably a justifiable reaction considering the seriousness of these crimes on children and the significant impact they have on the families, the criminal justice system, the wider community, but also the offenders themselves (Cooper, Hetherington, Baistow, Pitts & Spriggs, 1995).

Community treatment and re-integration of CSOs provoke negative attitudes, public fear and complex challenges for the treatment process. CSOs are perceived as dangerous individuals, "…whose propensity to repeatedly commit crimes of a non-capital but otherwise serious nature puts the wellbeing of the rest of the community at risk" (Pratt, 2000, p.35). However, certain characteristics of a CSO could influence the public's opinion of risk and dangerousness. The rationale for this research is to understand this highly heterogeneous group, in order to improve child protection, reduce recidivism and encourage community integration to function together harmoniously.

THE CONSTRUCTION OF PUBLIC OPINION

Public opinion is argued to be a social construction with numerous institutions constituting the elements to its construction such as, the mass media, journalism, politicians and public relations – each with their own interests and agenda in shaping the concept of public opinion in their favour (Krippendorff, 2005). The following section is focused upon examining the social response to CSO cases, the media's influence and the theoretical explanation concerning the consequences of this negative social response. Also, it examines political influence has on perception and the specific characteristics or circumstances of a CSO that is said to influence its construction.

The Social Response and the Media

The 1990's through to the 21st Century saw the deaths of children such as, James Bulger (February 1993), Sarah Payne (July 2000), and Holly Wells & Jessica Chapman (August 2002). The negative and angry reactions from the public was ignited during the 'Named and Shamed' campaign launched by the News of the World newspaper, which exposed the identities of convicted CSOs (Silverman & Wilson, 2002, p.147), as the quote below demonstrates the essence of newspaper headlines at that time: "…these people, lowest of the low, are active and ongoing threat to your children. What are you going to do about it?"

The media reports caused repercussions across the UK over the following few months. For example, the Paul's Grove demonstration in Portsmouth inspired violence and caused an increased 'exaggeration' to the risks of 'stranger danger'. Despite the intentions of the public to

confront the perpetrators of these despicable crimes against children, it achieved the opposite because it encouraged CSOs to become 'invisible' and innocent people were attacked due to mistaken identity (Thompson & Williams, 2014). Burchfield & Mingus sums up effectively, "… for registered sex offenders looking for an opportunity to reintegrate into society, the message is clear: not in my backyard" (2014, p.110).

Sarah's law (UK) was aimed at 'outing' known CSOs by allowing the police to share information of where convicted CSOs lived (Thomas, 2005), which potentially damaged their re-integrative efforts (Prescott & Rockoff, 2008). Evidently, there could be psychological repercussions for the offender if the public continues to reject any effort made to reintegrate back into the community. CSOs are argued to feel a sense of stress, isolation, loss of relationships, and feelings of fear, shame, embarrassment, and hopelessness (Levenson & Cotter, 2005; Mercado, Alvarez & Levenson, 2008). The use of shame is resonated throughout the criminal justice system and society, although not all types of offenders respond to this 'institutionalised' shaming process as expected (Benson, Alarid, Burton, & Cullen, 2011; Braithwaite, 1989; Sherman, 1993). The Figure 1 below represents the differences between re-integrative and disintegrative shaming:

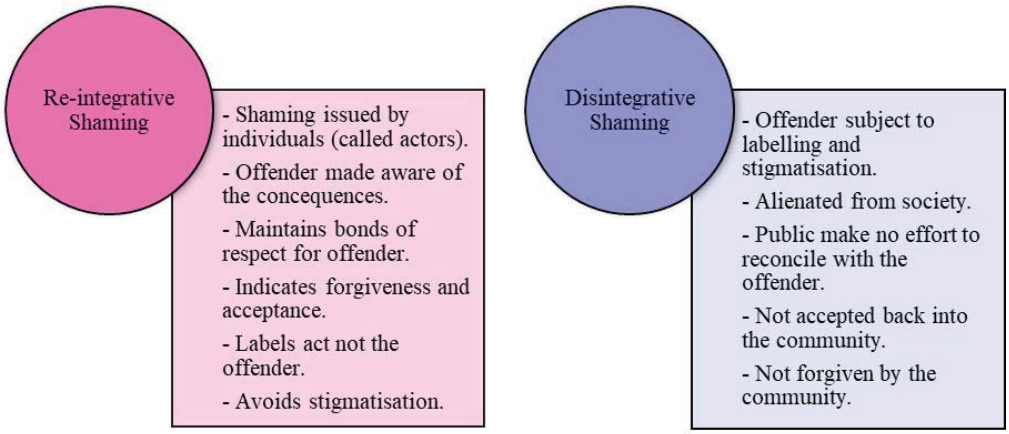


Figure 1:Adapted from Braithwaite, 1989

Stigmatic shaming is designed to express disapproval from others, onto the offender who is the target of criticism and made to feel guilty of their crimes (Dellaportas, 2014). However, it is functional for CSOs to utilise, and overcome the negative nature of stigmatisation. Strong family relationships are a functional equivalent in transforming external stigmatisation into a reintegrative and loving form of internal disapproval (Braithwaite and Drahos, 2002). However, Goffman (1963) and Struckoff (1971) argue stigmatisation of the offenders may become generalisable towards the family. The stigmatisation of the families may encourage an emotional divide between the family member and the offender, to reduce the feeling of degradation. Goffman (1963) refers to this phenomenon as 'courtesy stigma', whereby the stigmatisation of the family occurs with their association with an offender, this is particularly the case with CSOs.

Political Influence

It became apparent to the public and the Home Office during the 1990's of the system's failures, as the following quote demonstrates: "The system is haphazard and it is very easy for offenders to become invisible...there is no clear systems for tracking the individual and monitoring his movements." (Hughes, Parker & Gallagher, 1996, p.34).

The fear of a failing criminal justice system in its attempt to protect the public especially children from CSOs and their ability to monitor these 'dangerous' individuals provoked a 'moral panic' (Thomas, 2008). The theory of 'Moral Panic' is a social reaction to a phenomenon, which is usually unnecessarily exacerbated and shown to be disproportionate to the scale of the problem (Cohen, 2002; Young, 1971), causing an occasional dramatic political shift while satisfying the notion 'populist punitiveness'.

Populist punitiveness is "... the notion of politicians tapping into, and using for their own purposes, what they believe to be the publics' generally punitive stance" (Bottoms, 1995, p.40 as cited in Garland, 2001; Raynor & Vanstone, 2002). Populist punitiveness arises from an emotional response to crimes, which are considered rare but horrifying incidences and often attracts extensive media coverage (Roberts, Indermaur, Hough & Stalans, 2003). The primary purpose of populist punitiveness is for politicians and political parties to exploit public anxieties or fears, to appear 'tough on crime' to inevitably gain votes. However, populist punitiveness also has an honourable nature as it promotes a sense of moral agreement and social solidarity, regarding what is right and wrong through deterrence and incapacitation means of crime reduction (Matthews, 2005).

The sex offender register is arguably an example of populist punitiveness for monitoring them in the community once being released from prison. The Home Office Consultation Paper, 'Sentencing and supervision of sex offenders', was intended to improve the opportunity to provide treatment for sex offenders and to enhance public protection (Home Office, 1996, para. 1). The public, support groups, social services, the police and various other groups were supportive of a nationalised sex offender register, especially concerning child protection (Hughes, Parker & Gallagher, 1996; Thomas, 2004). However, the Home Office has previously disapproved the usage of a national register to record sex offenders (Thomas, 2008). Despite this, the Home Office supported the creation of a sex offender register under 'The Sex Offender Bill' 1996 because of the need to appear "tough on crime", as the 1997 general election was approaching (Thomas, 2011, p.62). As Parris (1997) published, "...there is no reason for this Bill. No reason at all. It is simply a piece of electioneering".

A significant feature of risk management concerning 'dangerous' offenders lies within the legislative position. There was an increased concern with risk management by probation, police and the wider criminal justice system (Kemshall, 2002). The 'Sexual Offences Act 2003' redefined sex offending to incorporate the notion of 'consensual sex' and the recognition of indirect sexual offending such as, online grooming (Ireland, Ireland & Birch, 2009). The 'Criminal Justice Act 2003' introduced the indeterminate sentence and the extended license, which were reserved for violent or sexual offenders to provide greater public protection and longer rehabilitation (Cobley, 2003; Ireland, Ireland & Birch, 2009; Hanvey, Philpot & Wilson, 2011).

Between 2010- 2015, the Coalition government had tightened the law on sex offenders by strengthening and extending security checks to the police, which created harsher restrictions

for removing an ex-offender from the register (Home Office & Brokenshire, 2012). However, remaining longer on the register can be damaging to offenders as it hinders the opportunities to re-integrate back into their communities, affect the treatment process, while increasing the risk of unemployment and alienation (Hanvey, Philpot & Wilson, 2011; Hudson, 2005). The Conservative Government from 2015- present has amended the Criminal Justice and Courts Act 2015 by including a new type of determinate sentence. The amendment is titled the 'Special Custodial Sentence for Certain Offenders of Particular concern', which applies to CSOs. This may have damaging consequences to the punishment, treatment and risk management services imposed upon CSOs (Hanvey, Philpot & Wilson, 2011).

The current punishment imposed on CSOs is a prison sentence and/or a community rehabilitation order. Rehabilitation is the primary strategy towards all types of offenders, whereby the 'punishment' element should evolve around the reformative needs of the offender such as, anger management, substance abuse, or sexual offending treatment (Banks, 2004), while the function is the incapacitation of individuals to protect the public from future offending (Morris, 1994). However, the common misconception is that prison life is a 'holiday camp' which influences the public to support a tougher system, particularly for those whom are deemed to commit what can be considered a very serious 'crime against humans' – notably children. An opinion poll argues that 70% want a harsher prison system, while 60% believed that rehabilitative efforts are in vain because it is a method of 'making excuses' for an offender's crime (Doyle, 2011). In contrast, Gendreau (1999) argue there is a misleading picture of crime and the public is a strong advocate for rehabilitation of offenders in prison.

The 'Criminal Justice and Court Services Act 2000' and the 'Criminal Justice Act 2003' had influenced a statutory duty for the prison services, probation service and the police, to assess and manage the risks posed by violent or sexual offenders in the community setting (Craissati, 2004; Hudson, Taylor & Henley, 2015). The criminal justice system is partly controlled by the 'public protection agenda', which focuses on multi-agency co-operation, to formulate co-ordinated risk management plans (Power, 2003).

Personal Factors

Alongside the media and political influences, there are also other personal factors that could aid the construction of public opinion. An individual's age could be an influential factor because it can determine the level of punitiveness one has. It is argued older people hold more punitive views than younger people towards crime and punishment (Cullen, Clark, Cullen & Mathers, 1986; Hale, 1996). Also, adaptability of opinion is usually only common among higher educated individuals. As Hough & Park (2002) argues the more educated an individual is, the more likely they are to be less punitive towards crime and offenders. They are also inclined to adapt their views when considering new information, in comparison to less educated individuals. In terms of holding less punitive views and even offering support to CSOs through their rehabilitation, gender can be a contributing factor as to the degree of support. It is argued that females are more likely to be sexually victimised in comparison to males (Richards, 2011). However, Ferguson & Ireland (2006) argues that it is women who hold more supportive attitudes towards sex offenders than men, despite the victimisation statistics.

It is clear in previous literature that the public's perception of crime and criminality is complex and has implications on criminological research and community-based reintegration efforts. It

is necessary to understand the community's perception of risks posed by these offenders, identify the characteristics that are associated with heightened perception of risk, suggest ways of encouraging successful reintegration techniques between the offender and the community. Therefore, the aims of this research were to:

i. Identify the public's perception of risk and dangerousness posed by a child sex offender;
ii. To identify what aspects of the public's perception regarding risk and dangerousness posed by child sex offenders is dependent upon the offender's personal characteristics and circumstances;
iii. To identify potential approaches on how to 'bridge the gap' between the offender and the community during the re-integrative stages.

METHODOLOGY AND METHODS

The research design was centred around ensuring the research questions took precedence over the selected paradigm and associated research methods – thus allowing knowledge to emerge by adapting the research foundations around the environment that is subject to enquiry (Venkatesh, Brown & Bala, 2013). Research methods should always provide the best opportunity to answer the research questions of any given project, for both empirical and practical efficacy (Johnson & Onwuegbuzie, 2004; Trahan & Stewart, 2013). The author's philosophical and epistemological standpoint derives from pragmatism whereby the aim to achieve 'meaning and truth' is sought, through the combination of abductive reasoning that moves between inductive and deductive methods (Venkatesh, Brown & Bala, 2013, p.37). Therefore, it seemed most appropriate to implement a mixed methods methodology, specifically an explanatory sequential mixed methods research design. The rationale for choosing this specific approach was to effectively provide a general understanding of the research problem (quantitative phase); whilst explaining those statistical findings through the exploration of participants' views in greater depth (Rossman & Wilson, 1985). The research consisted of two distinct phases: a quantitative followed by a qualitative phase (Creswell et al., 2003). The practical application of both phases of this research including, method, sampling, participants, platform and the authors rationales for the choices made are depicted in Table 1 below:

	Phase One (Quantitative)	Phase Two (Qualitative)
Method	Phase one was designed to address research aims 1 and 3. The purpose for having an online questionnaire was to generalise the public's perception, attitudes and beliefs about the levels of risk and dangerousness child sex offenders pose. The online questionnaire contained vignettes as a method to measure the participant's idea of risk and dangerousness, dependent upon different hypothetical situations of an offender (Schoenberg & Ravdal, 2000) – followed by a series of likert scale and demographic questions. The three vignettes comprised of a specific type of CSO, within different contexts of risk management and community integration[1]. A description of the offender and victim's characteristics were included prior to the introduction of the scenarios, based upon literature-informed characteristics.	Phase two was designed to address research aims 2 and 3, by exploring the rationale for the participants' perceptions, beliefs and attitudes using semi-structured interviews. The interviews were aimed to achieve a determination of why certain characteristics of a child sex offender influences public perception on levels of risk and dangerousness. Each interview lasted approximately 30 minutes in length at a mutually agreed locations between the researcher and the interview participant. The interviews were recorded using a Dictaphone (voice recorder) throughout their durations, with all participants' consent.
Participants/ Sampling	The questionnaire was created on the Bristol Online Survey program and was made available for a period of 30 days and successfully gained 143 responses for analysis. The primary method of sampling was initially opportunity/ convenience sampling because it allowed easy access to participants online (David & Sutton, 2004). However, the use of social media had evolved the sampling to snowball sampling (Bhutta, 2012).	The semi-structured interview sample included twelve participants. The author attempted to minimise the biased sample of the questionnaire by selecting the volunteers which were anticipated to belong to different groups, in accordance to the demographic of the participants. Bernard (2012) argued that the number of interviews needed in qualitative research is as many as it takes to reach data saturation, which is difficult to quantify. The rationale for choosing this sample size is from suggestions that twelve interviews reaches approximately 92% saturation (Guest, Bunce & Johnson, 2006; Morgan, Fischhoff, Bostrom and Atman, 2002).
Platform	Facebook	'Face-to-face'

[1] Three vignettes were created for the online questionnaire and depicted 'Mark' (hypothetical CSO) in three different scenarios for the participants to consider, see Appendix A.

Rationale	Upon examination of the survey administrations methods, it was determined that online surveys were the best option for this research project. Online surveys are more cost effective and a very accessible method of data collection (Couper & Miller, 2008). Each vignette portrayed an offender as being male and approximately 30 years of age, which is considered to be two 'typical' characteristics of a first time CSO (Woodall, Dixey & South, 2013). The chosen offender was designed using Knight, Carter & Prentky's Massachusetts Treatment Centre Child Molester Typology 3 (MTC:CM3) classification system. This research implemented a low fixation and high socially competent offender (Knight, Carter & Prentky, 1989). The rationale for choosing a low fixation but high socially competent CSO is because it is not the stereotypical offender. According to (Bux, Duncan & Collings, 2016), CSOs are portrayed as evil, monstrous and not deemed to be 'normal', which exemplifies the public's fear. This research will portray a CSO in a 'normal' life, to test participant's perception of risk and dangerousness. The online questionnaire was distributed on a social media platform to reduce the probability of a biased sample. As the population of social media users are increasing, the population also increases in diversity (De Vaus, 2014). Facebook was the chosen social media platform because it is the most popular social networking site, with a varied population of users (Helve, 2014).	Semi-structured interviews were chosen because it allows the participant to contextualise their views and opinions, simultaneously enabling the researcher to retain some control over the line of questioning (Creswell, 2003). 'Face-to-face interviews were implemented so the interviewer could assess the reactions to topics discussed in this highly-emotive subject area.

Table 1: Research Methods Application

QUALITY OF THE RESEARCH

The research had gained ethical approval prior to collecting the data and the author ensured all research practices were in accordance with the British Society of Criminology's Code of Ethics.[2] This study ensured only complete participant responses were analysed and all missing values were removed in order to increase internal validity. To ensure external validity of this research, the author compared the results of this study with other research that implemented similar methods.

DATA ANALYSIS

The questionnaire results (phase one) were analysed using IBM SPSS version 23. This intrinsic statistical software allows the cross-tabulation between the quantitative and qualitative data to successfully compare, contrast – thus enabling the successful triangulation in this research. All interviews (phase two) were transcribed verbatim and analysed using thematic analysis. Thematic analysis provides a purely qualitative and detailed account of data (Braun & Clarke, 2006) and is conducted by extracting core themes within a text (Bryman, 2012). In addition, thematic analysis permits the researcher to combine analysis of codes and themes within their contexts (Loffe and Yardley, 2004). This method of analysis is both sufficient and credible for use in this research as it focuses on identifying and describing both implicit and explicit ideas within the data, recognisable by the themes identified as part of the coding process (Guest, 2012).

FINDINGS

Quantitative Results

Once the questionnaire data set had been imported and cleaned of all missing data and errors, a hypothesis for each question from the questionnaire has been formulated, and then rationalised the assumption based on previous literature. The statistical test(s) chosen to discuss the five hypotheses are summarised in a table, found in Appendix B. The table highlights the type of research question needed to test the hypotheses, the dependent variables tested, independent variables tested, the variable's level of measurement, whether parametric or non-parametric tested were utilised and finally the appropriate statistical test chosen.

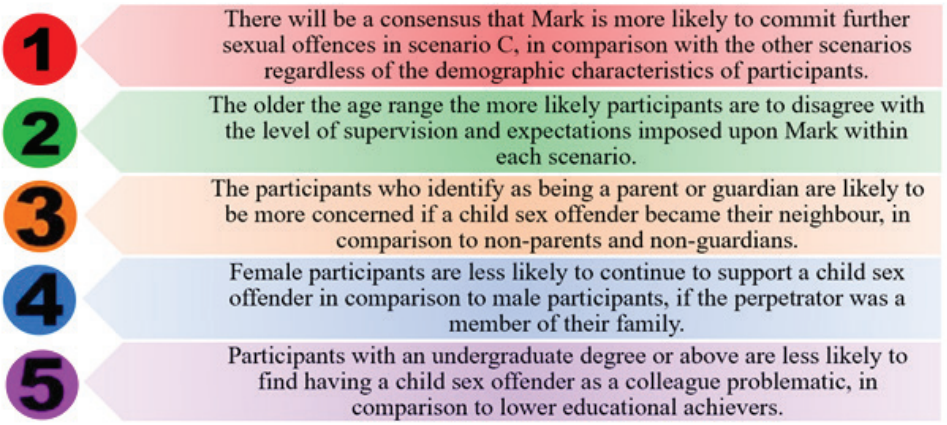


Figure 2: Hypothesis formulated

This paper will only present three main findings found in the questionnaire data concerning hypotheses 1, 3, and 4, due to the space constraints of this article. Beginning with hypothesis 1, the general attitude of the participants is that 'Mark'[3] is most likely to commit further sexual offences in scenario C (containing the least amount of supervision), in comparison to scenarios A and B[4] (both containing higher levels of supervision). The independent-samples t-tests and one-way between-groups ANOVA tests show that the mean scores decline in reverse-alphabetical order of scenarios. It was concluded that all five demographic characteristics collected from participants unanimously agreed that scenario C carried the most risk of Mark reoffending, in comparison to scenarios A and B.

Secondly, independent-samples t-tests were conducted to compare the means of questions A3, B3 and C3 of both male and female participants. There is a significant difference in the scores for male (M=2.05, SD=1.05) and female (M=1.67, SD=0.877) conditions; t(141)=2.219, p=0.028 within scenario C. This result shows the significant difference between males (unlikely) and females (Not at all likely) responses to whether they would continue to support Mark as a family member. According to the results from scenario A and B, there is no significant difference between groups but all participants are 'unlikely' to support Mark, regardless of the amount of supervision he has. As relevant to the previous hypotheses, the mean scores of male and female responses gradually decline through each scenario in reverse alphabetical order. This would mean that the less supervision Mark has, the less likely both male and female participants would continue to support Mark as a member of their family.

Thirdly, independent-samples t-tests were conducted to compare the means of questions A1, B1 and C1 of both parents and non-parents. There was a significant difference in the scores for parent (M=3.22, SD=0.81) and non-parent (M=2.69, SD=0.728)

conditions; t(141)=4.089, p = 0.020 for scenario A. Whilst scenario B, there was another significant difference in the scores for parent (M=3.39, SD=0.72) and non-parent (M=3.02, SD=0.791) conditions; t(141)=2.83, p = 0.005. In scenario A, non-parents would be minimally concerned if Mark became their neighbour, in comparison to 'moderately concerned' parents despite scenario A having the highest level of supervision. In scenario B, parents still have a higher concern, while non-parents only just reach a 'moderately concerned' score. The t-test concerned with scenario C confirms no significant difference between the groups. However, this result supports the idea that both parents and no-parents perceive a similar level of 'dangerousness' if Mark became their neighbour with no supervision from the authorities.

Qualitative Results

The qualitative data was transcribed verbatim and thematically analysed. This section will present the two major themes, four subsidiary themes and their associated codes, as extracted from the twelve transcripts. The purpose of collecting interview data was to highlight factors that would eventually be identified as significant influences on their perception of risk and dangerousness, while providing a rationale for the participant's views in the questionnaire findings. The first major theme is displayed in Figure 3 below:

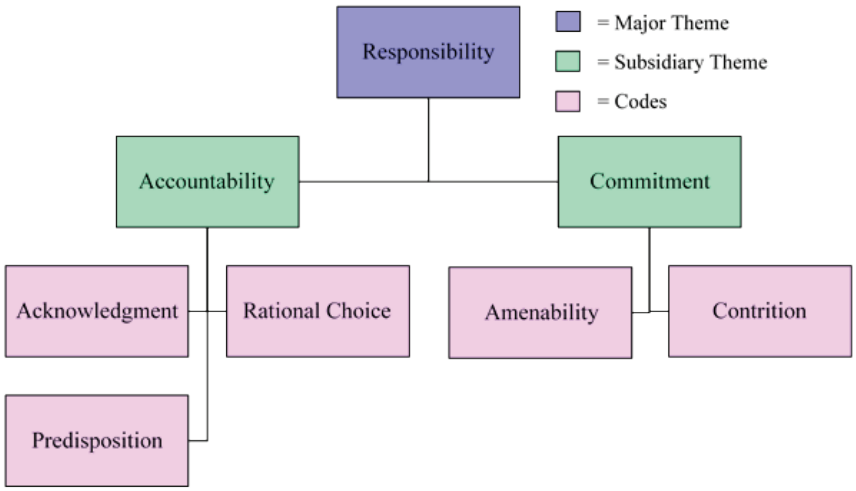


Figure 3: Major Theme - Responsibility

'Responsibility' was identified as the first major theme that refers to CSOs directly, in terms of the participant's expectations of an offender once an offence has taken place. Participants indicated a further two subordinate themes emerging, namely 'Accountability' and 'Commitment'. These themes represent the participants' expectations of a CSO. Once their expectations have been met, participants felt more comfortable providing support for the offender with their re-

habilitation and re-integrative efforts. 'Accountability' refers to the offender being accountable for their actions after an offence has taking place. The second subsidiary theme is 'Commitment', which refers to the CSO's level of dedication or willingness to change their offending behaviour. There were five recurrent notions (codes) of 'accountability' (Blue) and 'commitment' (Green) identified within the data, which is displayed in Figure 4 below:

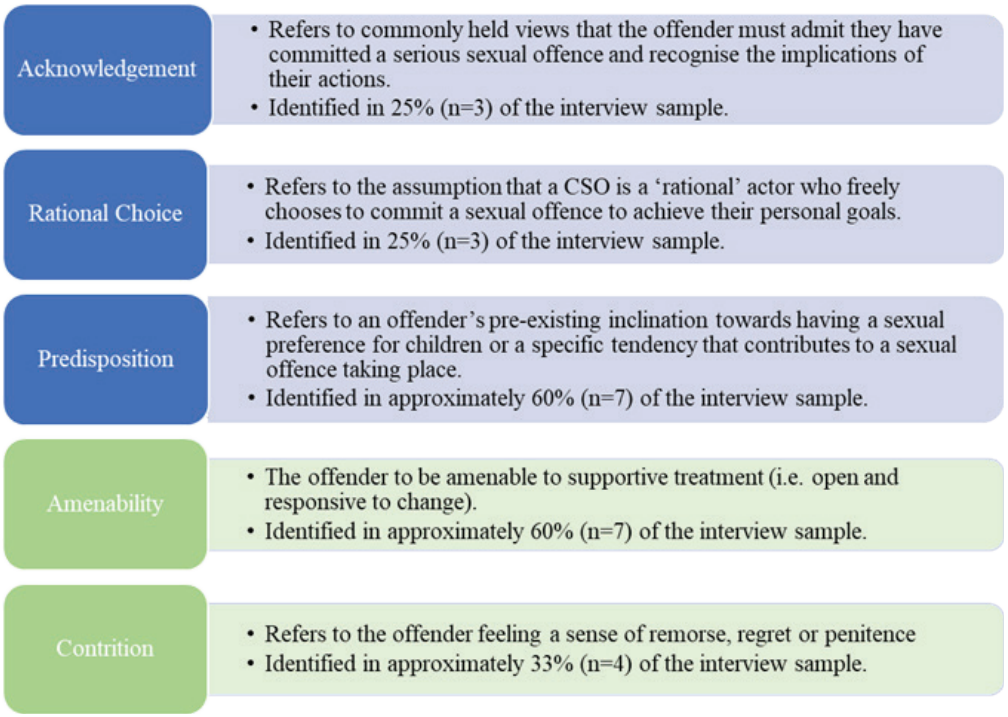


Figure 4: Codes associated with 'Responsibility'

All three codes of 'Accountability' displayed above are the three main determining factors which most influenced their perception concerning the culpability of an offender, in addition to how they perceive an offender should be held accountable after an offence has occurred. Some participants perceive the multitude of reasons for sexually abusing children actually derive from a predisposing condition, which entices a degree of sympathy and the subjects were therefore more inclined to offer support to the CSO. In comparison, the participants that were less inclined to offer positive support to the CSO also articulated that the offender's conscious ('rational') decision-making was the chief contributing factor to a sexual offence taking place. However, several participants found that 'acknowledgement' was a significant turning point in order for the CSO to admit accountability and ultimately take responsibility for their actions. Thus, as well as being functional to the recovery of victims, it was expected that this would enable a reduction the CSOs likelihood of recidivism.

Both codes under 'Commitment' are the two conditions that determine whether the participants would be willing to help the CSO through his rehabilitation and support long-term rein-

tegration. Many participants would provide support if they could see the offender display signs of remorse and made a conscious effort to amend their offending behaviour. Although, all participants stated that they would most likely withdraw support if the offender refused to change or continued committing sexual offences. 'Responsibility' was a compelling theme because it provided a level of positivity for a CSO to receive familial support with the aim of facilitating the rehabilitation process and the later possibility of reintegration. The characteristics of a CSO that influenced the interviewee's perception of the offender as a deserving recipient of support were based upon the visual display of remorse, a willingness to change, acknowledgement of their guilt and finally, to take responsibility for the causes of their offending behaviour, regardless of blameworthiness.

The second major theme is displayed in Figure 5 below:

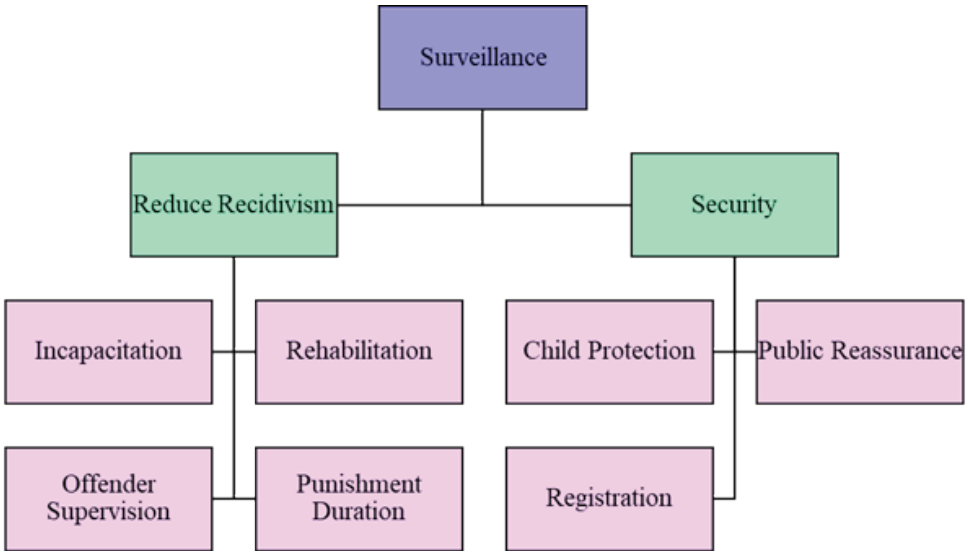


Figure 5: Codes associated with 'Surveillance'

Surveillance was identified as the second major theme that refers to the Offender Management Services (OMS), in terms of the participant's expectations of the OMS once an offence has occurred. Participants identified two subsidiary themes which emerged, namely 'Reduce Recidivism' and 'Security'. The junior themes are expectations upon authority to reduce the risk posed by CSOs by ensuring public safety from future offending. 'Reduce recidivism' is the first subordinate theme which refers to the efforts to lessen the likelihood of an offender relapsing into previous offending behaviour. These 'efforts' are distinguishable from four codes that are displayed in Figure 6. The second subordinate theme 'Security' refers to how secure the participants feel and what they think should be done to ensure their safety. The participant's expectations are split into three codes, also displayed in Figure 6. There were six recurrent notions (codes) of 'Surveillance' (Pink) and 'Security' (Yellow) identified within the data, which is displayed below:

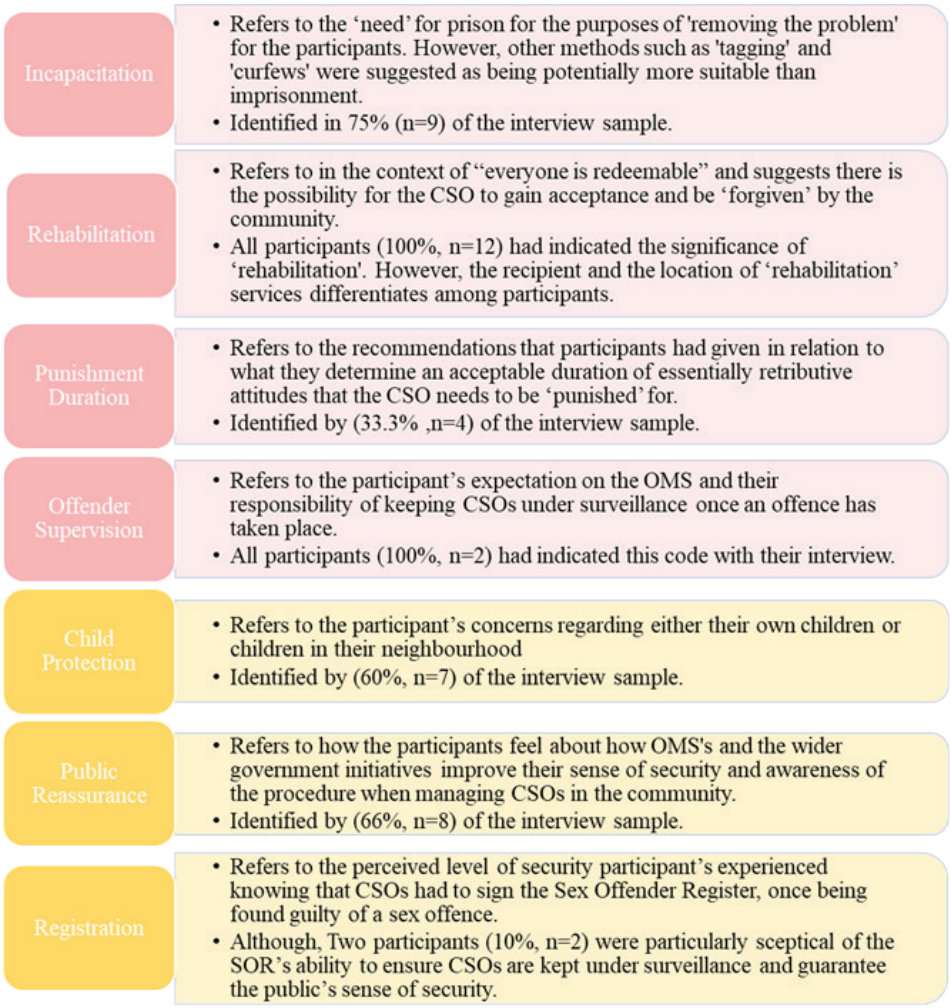


Figure 6: Codes associated with 'Surveillance'

The findings examined from the interviews were enlightening because they provided a rationale for the participant's answers in the questionnaire. The participants perspective was determined by their own expectations of CSOs and the OMS, once an offence has taken place. The rationale for their negative attitudes towards CSOs was based on the actions of the OMS. 'Offender Supervision' was highlighted as the most significant effort which contributes to the OMS' assurance of a reduction in recidivism.

Although, the public's sense of security was present if they felt their children were safe in their neighbourhood. Safety for some participants meant the offender should be incapacitated by imprisonment, 'tagging', or enrolment onto an intensive treatment programme. Secondly, the requirements to be met by a CSO would ultimately establish the level of support that the participants would consider most sufficiently aid the 'rehabilitation' process. The characteristics

that the CSOs would be required to display are conducive to the interviewee's perception as to the offender's risk of reoffending. These characteristics are the acknowledgement of guilt for the offence, while showing contrition for their actions and proactively attempting to rehabilitate themselves. The combination of a CSO taking 'responsibility' for their actions, in addition to the OMS ensuring the necessary surveillance techniques are available, have been further indicated as the most significant influences upon the participant's perspective of risk and dangerousness posed by CSOs.

DISCUSSIONS AND CONCLUSIONS

Quantitative

The questionnaire found that the most commonly reported attitude of the participants stated that CSOs are to more likely to commit further sexual offences when not given adequate supervision guidelines or management and are also likely to make participants feel 'uncomfortable' in their own community. As discussed in literature, CSOs are considered to be a highly heterogenous group and the management of their thoughts and behaviours as individuals are crucial to the success in reducing the risk of recidivism (Bonta & Andrews, 2010; Fortune, Ward & Willis, 2012; Steen, 2005).

However, it is argued that the public perceive CSOs as a highly homogeneous group regarding their propensity to re-offend, despite the level of management or supervision (Levenson, Brannon, Fortney & Baker, 2007). Their survey of 193 residents in Florida overwhelmingly supported public disclosure of information on local sex offenders, to improve their comfortability knowing where the 'dangerous' individuals were residing, representing a favourably higher level of supervision. The findings of the current research suggest similar. This research shows a change of public opinion to be directly influenced by the different levels of supervision provided in each scenario. In other words, the less supervision provided in a scenario the higher the likelihood of recidivism was anticipated.

As this research suggests that females tend to be less supportive of a CSO and more sceptical of their abilities to rehabilitate and re-integrate back into the community. However, a quantitative study by Ferguson & Ireland (2006) had concluded the opposite that women hold more supportive attitudes towards sex offenders than men, as their original hypothesis suggested. Gender differences in attitudes towards sex offenders could be explained by women's natural tendency to be more empathetic than men (Radley, 2001). However, it is this lack of empathy and emotional literacy that is a common characteristic of masculinity in both sexually abusive men and non-sexually abusive men (MacLeod & Saraga, 1988). Ferguson & Ireland's (2006) study was also conducted using vignettes and scale-like questions to assess the attitudes towards sex offenders. However, each vignette contained a different type of sexual offence while assessing gender differences between participants. Therefore, it fails to account for the participant's rationale for their attitudes due to the nature of the chosen methodology. More importantly, Ferguson & Ireland's study cannot provide an answer as to what attributes determine the public's perception regarding the risks posed by CSOs within the community context.

The questionnaire found that parents are more concerned than non-parents if they were aware of a CSO as a neighbour, understandably so. As discussed in the literature, parents are the predominant group that ensure the safety and wellbeing of their children, but are also the

main recipient for the negative media reports concerning the dangers CSOs pose to children in their communities (Silverman & Wilson, 2002). The notorious 'Named and Shamed' campaign launched by the News of the World was primarily aimed at alerting parents to these risks against their children (Silverman & Wilson, 2002). However, the demonstrations resulting from the campaign such as, the Pauls' Grove demonstration in Portsmouth, were participated by both parents and non-parents within the estate (Thompson & Williams, 2014).

This would further suggest that parents are more cautious to the risks CSOs pose within their community, in comparison to non-parents which may not be an overexaggerated stance. For parents, there is another layer of concern and anxiety towards the prospect of having a CSO as a neighbour because the offender could attempt to groom the family, in terms of gaining their trust and the potential access to their child. According to Finkelhor's precondition model (1984), the four prior conditions to child sexual abuse involves the grooming of parents, as well as the child - also known as one of the external inhibitors to overcome in order to enable the opportunity to abuse. Therefore, the proximity of CSOs is identified as a risk factor because it conditions the circumstances for sexual abuse to occur.

Qualitative

The participants expect a CSO to show a high level of 'commitment' to change their offending behaviour. As well as acknowledging the wrong-doing, it is vital that the CSO has reformative intentions. For some participants to continue to support a CSO, they must first display their 'commitment' by attending treatment programmes and have the intention not to reoffend. The participants would expect a CSO to be displaying attitudes such as regret, remorse and possibly feeling shameful of their actions. As discussed in literature, the shaming of offenders is resonated throughout the criminal justice System and society, although not all types of offenders respond to this 'institutionalised' shaming process as expected (Benson, Alarid, Burton, & Cullen, 2011; Braithwaite, 1989; Sherman, 2003). Dellaportas (2014) argued that stigmatic shaming is designed to express disapproval from others, onto the offender who is the target of criticism and made to feel guilty for their crimes, through the process of labelling. Negative labelling can exclude offenders from normal everyday routine and increases the risk of further offences (Ray and Downs, 1986; Paternoster and Iovanni, 1989).

Some participants expressed a desire to support a CSO through rehabilitation as a member of their family, providing the offender meets their conditions of acknowledging their wrong-doing, understanding the implications of their actions and actively attended treatment to change their behaviour. It is argued that strong family relationships are a functional equivalent in transforming external stigmatisation into a reintegrative and loving form of internal disapproval (Braithwaite and Drahos, 2002); essentially becoming a fragment of the overall reintegrative process (Braithwaite and Mugford, 1994). Therefore, reintegration of a CSO would be possible if they have a strong family network that is willing to utilise internal disapproval, maintain a respectful bond with the offender, and be supportive of a CSOs treatment progress. However, some participants were strongly against the idea of ever supporting a CSO through their rehabilitation as the offender should not be the focus of rehabilitative initiatives.

One participant suggested that there needs to be an emphasis on the "victim's recovery", rather than emphasising on the offender's needs and the nature of their sexual offending behaviour. However, this participant argued that the CSO should contribute to the victim's recov-

ery by acknowledging their wrong-doing as the first step towards rehabilitation. According to Gromet & Okimoto (2014), the three key components necessary for successful reintegration of an offender are:

I. Offender amends-making
II. Victim forgiveness
III. Peer acceptance

In relation to this research, a CSO will have to try to 'make amends' for the wrong-doing they had caused to their victim(s). This restorative approach would entail acknowledging their wrong-doing, apologising for the offence(s) and taking steps to improve relations (Strang & Sherman, 2003; Walker, 2006). However, the prospect of a CSO 'making amends' with their child victim has both practical and legal implications, in terms of the inevitable and understandable restriction of access in aid of child protection (Gromet & Darley, 2009). However, Focquaert & Raine (2012) argued that attending treatment for the purposes of restoring an offender's autonomy to prevent further sexual offences occurring could be an act of amends-making.

All participants also have expectations of OMS' to provide adequate management of such offenders. All participants strongly agreed that longer sentencing and intensive surveillance are necessary for reducing the likelihood of recidivism and provide better security and safety for children. However, the initiative with the greatest success of reducing recidivism is disputed among the participants. Participants recognised the complexities of CSOs and their offender behaviour are "very entrenched" and require a lifetime treatment programme. Similarly, Marshall & Barbaree (1990) argued the origins of sexual deviancy are partially entrenched within biological and early developmental vulnerabilities of an offender. According to Perkins, Hammond, Coles & Bishopp (1998), a successful sex offender programme should address the developmental dispositions contributing to offending behaviour, develop the offender's insight and install positive motivations to sustain a life without criminality; which is a process that takes a lifetime to achieve and maintain. Therefore, suggesting the complex criminogenic needs are vast and difficult to manage in a short sentence.

Some participants were very sceptical of the current arrangements for monitoring CSOs because he was concerned about the opportunity to "go disappearing" due to the lack of constant surveillance. One alternative suggestion concerning surveillance strategies was 'tagging' because it would reduce the opportunity for recidivism and provide more security in vulnerable areas such as, schools and playgrounds. According to previous literature, Farabee (2005) argues surveillance technology induces the incentive to change their behaviour over time and not breach their licensing conditions, through fear of being incarcerated once more consequently. However, electronic tagging is argued to further disadvantage an offender's employment opportunities due to time and location restrictions (Black & Smith, 2003). The inability to gain employment will also make the CSOs risk management plan difficult to create and potentially make the reintegration process harder for the offender (Ward & Maruna, 2007).

There was an emerging debate among the participants regarding whether CSOs are 'rational' actors whom freely chooses to commit child sex offences, or whether they have pre-existing inclinations towards their sexual preference for children and contributing to a sexual offence occurring. Most of the participants expressed support for a predisposition being a contributing factor or the cause of sexual offending – by suggesting contributing factors such as, poor men-

tal health, loneliness, isolation or feeling inadequate in life. Contradictory to the majority, one participant argued that CSOs may have a sexual preference towards children (a predisposition) but they still "choose to be that way" and choose to act upon their urges. This participant suggests paedophilia is a choice therefore, it is that individual who is accountable for their actions and should take full responsibility for their urges before a sexual offence occurs. However, Hossack, Palyle, Spencer & Carey (2004) argue that CSOs are not accountable for the existence of their sexual preferences and only responsible for acting upon their urges. Interestingly, the participant argued that an individual who is willing to come forward for treatment prior to "ruining a child's life", they would probably get more community and family support. Supportive family ties have been linked to reducing re-offending and enable the offender time to focus on the importance of their family relationships (Scott & Codd, 2010).

Mixed Method Synthesis

The purpose of a mixed methods synthesis is to integrate the discussions from both quantitative and qualitative sections to identify the key implications to convey the importance of the relationship between the quantitative and qualitative findings. Finally, the implications identified will then be used to provide suggestions of how to combat the issues arising from the findings of this research.

The public's perception of risk and dangerousness posed by a CSO is dependent upon various aspects including: the CSO characteristics, circumstances, their conceptions of OMS' efficiency and the external factors that influences their views. It was determined that the characteristics deemed 'risky' are the CSOs refusal to plead guilty for the crimes committed, lack motivation or drive to change their offending behaviour and lack contrition for their actions. The rationale for these risk factors is rooted in the increased possibility of recidivism and posing a further security risk to children if the offender does not meet their expectations. Therefore, to reduce the public's perception of risk, the CSO must take full responsibility for the offence committed and display a level of commitment by making a conscious effort to change their offending behaviour, to achieve successful community reintegration. However, it is more desirable if the individual was to come forward for treatment prior to offending, therefore the likelihood of community and particularly familial support is higher.

Regardless of a CSO's reformative intentions there remains a doubt as to whether the CSO can ever truly sustain life without criminality, especially if they are not attending a treatment programme. To reduce the scepticism, the public require constant reassurance that the OMS meets the public's expectations by ensuring the appropriate level of supervision is applied to reduce the likelihood of recidivism. In terms of external factors, the proximity of CSOs in the community is identified as a risk factor for parents because it conditions the circumstances for sexual abuse to occur. However, the public's knowledge and understanding with regards to the nature of sexual deviancy, the prevalence of child sexual abuse and the effectiveness of the rehabilitative initiatives is overall limited. Although, their awareness of the risks posed by a CSO is extensive and occasionally exaggerated; however, the level of education appears to be a contributing external factor that appears to alter their perception of risks. As argued above, lower educated individuals are more likely to fear being victimised, over-estimate the prevalence of crime and are likely to view sentencing as too lenient for serious offences (Hough & Moxon, 1985).

In light of this research, there are several recommendations that have been drawn to combat the issues identified in the findings, as seen below:

I. More education is needed regarding the nature of offending behaviour and the potential successes of community-based rehabilitation, then this may allow for a more effective response and reduce the risk perception from the public regardless of their level of educational achievement;

II. The maintenance and recovery of damaged familial relationships could be part of the rehabilitative process. Therefore, more intensive counselling designed to rebuild familial relationships within the community is recommended as part of the rehabilitative process;

III. It is recommended that more should be done to investigate the possibility that an individual can take responsibility of their unconventional sexual desires, prior to committing sexual offences.

Research Limitations

The questionnaire sample showed the majority were female and between the ages of 16-24. If this research were to be undertaken again, it is recommended that a different online platform should be utilised to distribute the questionnaire. This may provide a more evenly distributed sample that is more representative of the general population. The second limitation to this research project is concerning the construction of the scenarios. Therefore, if this research was to be undertaken again, it is recommended that more consideration and attention could have been given to the construction of the scenarios to potentially include other factors.

Final Thoughts

This research has been able to answer the core research questions through appropriate use of research methods, while illuminating further questions. A new line of inquiry concerning prevention strategies rather than intervention has emerged. An interview participant identifies,

> *"It is a choice at the end of the day. If one of them go somewhere and held their hands up to say, "I have a problem", then services will help you, surely, they would. Any help at the pre-stages is better than intervention. Prevention is better than intervention. Rather than leave it to the last minute when it is too late."*

This proposed research will have an impact on what society should consider when promoting a new strategy to reduce child sexual abuse, through focusing on self-referral of individuals prior to sexually abusing children. A new preventative approach has arose promoting the usage of a child sex offender's autonomy to recognise problematic sexual behaviour and self-refer for treatment (Cantor & McPhail, 2016). Therefore, it is appropriate at this time to examine preventative approaches and their capabilities to ensure the success of the clients' continued non-offending behaviour, to ultimately protect children from abuse at its root cause.

REFERENCES

- Banks, C. (2004). *Criminal Jusitce Ethics: Theory and Practice* (1st ed.). London: SAGE.
- Bernard, R. H. (2012). *Social research methods: Qualitative and quantitative approaches* (2nd ed.). Thousand Oaks, CA: Sage.
- Benson, M. L., Alarid, L. F., Burton, V. S., & Cullen, F. T. (2011). Reintegration or Stigmatisation? Offenders' Expectations of community re-entry. *Journal of Criminal Justice, 39*, 385- 393. Doi: 10.1016/j.jcrimjus.2011.05.004.
- Bhutta, C. B. (2012). Not by the Book: Facebook as a Sampling Frame. *Sociological Methods & Research, 41*(1), 57-88. Doi: 10.1177/0049124112440795.
- Black, M., & Smith, R. G. (2003). Electronic monitoring in the criminal justice system. *Trends and Issues in Crime and Criminal Justice, 254,* 241-226. Retrieved from: http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi254.pdf
- Bonta, J., & Andrews, D. (2010). Viewing offender assessment and rehabilitation through the lens of the risk-needs-responsivity model. In McNeill, F., Raynor, P., & Trotter, C. (Eds*.) Offender Supervision: New directions in theory, research and practice*. (pp.19 40). Cullompton, UK: Willan.
- Braithwaite, J. (1989). *Crime, Shame and Reintegration.* New York: Cambridge University Press.
- Braithwaite, J., & Drahos, P. (2002). Zero Tolerence, Naming and shaming: Is there a case for it with crimes of the powerful? *Australian & New Zealand Journal of Criminology, 35*(3), 269-288. Doi:10.1375/acri.35.3.269.
- Braithwaite, J., & Mugford, S. (1994). Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders. *British Journal of Criminology, 34*(2), 139-171. Doi: 10.1093/oxfordjournals.bjc.a048400.
- Braun, V., & Clarke, V. (2006). Using Thematic analysis in Psychology. Q*ualitative Research in Psychology, 3*(2), 77-101. Retrieved from: http://eprints.uwe.ac.uk/11735/2/thematic_analysis_revised...
- Bryman, A. (2012). *Social Research Methods* (4th Ed.). Oxford: Oxford University Press.
- Bux, W., Duncan, J., & Collings, S. J. (2016). The experience of non-offending caregiversfollowing the disclosure of child sexual abuse: Understanding the aftermath. *South African Journal of Psychology, 46*(1), 88-100. Doi: 10.1177/0081246315595038.
- Cobley, C. (2003). The Legislative Framework. In A. Matravers (Ed.), *Sex Offenders in the Community* (pp.51-71). Cullompton: Willan Publishing.
- Cohen, S. (2002). *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (3rd ed.). Oxon: Routledge.
- Cooper, A., Hetherington, R., Baistow, K., Pitts, J. & Spriggs, A. (1995). *Positive Child Protection: A View from Abroad.* Lyme Regis: Russell House Publishing.
- Craissati, J. (2004). *Managing High Risk Sex Offenders in the Community: A Psychological Approach*. Cornwall: Routledge.
- Creswell, J. W. (2003). *Research design: Qualitative and mixed methods approaches* (2nd ed.). London: SAGE.

- Cantor, J. M., & McPhail, I. V. (2016). Non-Offending Paedophiles. *Current Sexual Health Reports, 8*(20), 121-128. Doi:10.1007/s11930-016-0076-z.
- Couper, M. P., & Miller, P. C. (2008). Web Survey Methods: Introduction. *Public Opinion Quarterly, 72*(5), 831-835. Retrieved from: https://academic.oup.com/poq/article/72/5/831/1834115/Web-Survey MethodsIntroduction
- Cullen, F.T., Clark, G.A., Cullen, J.B., & Mathers, R.A. (1985). Attribution, salience and attitudes toward criminal sanctioning. *Criminal Justice and Behaviour, 12*, 305-331. Doi: 10.1177/0093854885012003003.
- David, M., & Sutton, C. (2004). *Social research: the basics*. London: Sage.
- Dellaportas, S. (2014). The Effect of a Custodial Sentence and Professional Disqualification on Reintegration. *Critical Perspectives on Accounting, 25*(8), 671-682. Retrieved from: http://www.sciencedirect.com/science/article/pii/S1045235414000392.
- De Vaus, D. (2014). *Surveys in Social Research* (6th ed.). Abingdon, Oxon: Routledge.
- Doyle, J. (2011, April 6th). *Public backs tougher jail terms for criminals: Blow to Clarke as 80% say sentencing is too soft*. Retrieved from Daily Mail: http://www.dailymail.co.uk/news/article-1373830/Blow-Kenneth-Clarke-80-sayprison-sentences-soft.html.
- Farabee, D. (2005). *Rethinking Rehabilitation*. Washington, DC: The AEI Press.
- Ferguson, K., & Ireland, C. A. (2006). Attitudes towards sex offenders and the influence of offence type: A comparison of staff working in a forensic setting and students. *British Journal of Forensic Practice, 8*, 10-18. Retrieved from: http://www.emeraldinsight.com/doi/pdfplus/10.1108/14636646200600009.
- Finkelhor, D. (1984). *Child Sexual Abuse: New Theory and Research*. New York: Free Press.
- Focquaert, F., & Raine, A. (2012). Ethics of Community-Based sanctions. In S. Barton Bellessa (Ed.). *Encyclopedia of Community Corrections* (pp.114-148). Retrieved from: https://www.researchgate.net/publication/265302220_Ethics_of_community based_sanctions
- Fortune, C. A., Ward, T., & Willis, G. M. (2012). The Rehabilitation of Offenders: Reducing Risk and Promoting Better Lives. *Psychiatry, Psychology and Law, 19*(5), 646- 661. Doi: 10.1080/13552600008413301.
- Garland, D. (2001). *The Culture of Control: Crime and Social Order in Contemporary Society.* Oxford: Oxford University Press
- Gendreau, P. (1999). Rational Policies for reforming offenders*. The ICCA Journal of Community Corrections 9,* 16-20. Doi: 10.1111/j.1752-0118.1987.tb00788.
- Goffman, E. (1963). *Stigma: Notes in the Management of Spoiled Identity*. Englewood Cliffs, NJ: Prentice Hall.
- Gromet, D. M., & Darley, J. M. (2009). Punishment and beyond: Achieving justice through the satisfaction of multiple goals. *Law and Society Review, 43*, 1–38. Doi:10.1111/j.1540-5893.2009.00365.x
- Gromet, D. M., & Okimoto, T. G. (2014). Back into the Fold: The Influence of Offender Amends and Victim Forgiveness on Peer Reintegration. *Business Ethics Quarterly, 24*(3), 411-441. Doi: 10.5840/beq20147814.
- Guest, G. (2012). *Applied Thematic Analysis.* Los Angeles: SAGE Publications.

- Guest, G., Bunce, A., & Johnson, L. (2006). How many interviews are enough? An experiment with data saturation and variability. *Field Methods 18*, 59–82. Doi: 10.1177/1525822X05279903.
- Hale, C. (1996). Fear of crime: A review of the literature. *International Review of Victimology, 4,* 79-150. Doi: 10.1177/026975809600400201
- Hanvey, S., Philpot, T., & Wilson, C. (2011). *A Community-based Approach to the Reduction of Sexual reoffending: Circles of Support and Accountability*. London: Jessica Kingsley Publishers.
- Harrison, K., Manning, R., & McCartan, K. (2010). Multi-disciplinary definitions and understandings of 'paedophilia'. *Social & Legal Studies*, *19*(4), 481-496. Doi: 10.1177/0964663910369054.
- Helve, O. (2014). A medical consultation service on Facebook: Descriptive analysis of questions answered. *Journal of Medical Internet Research, 16*(9), e202. Retrieved from: http://www.jmir.org/2014/9/e202/
- Home Office. (1996). *Sentencing and Supervision of Sex Offenders: A Consultation Paper 3304*. London: Home Office.
- Home Office., & Brokenshire, J. (2012). *Tightening the law on Sex Offenders*. Retrieved from: https://www.gov.uk/government/news/tightening-the-law-on-sex-offenders.
- Hossack, A., Playle, S., Spencer, A., & Carey, A. (2004). Helpline: Accessible help inviting active or potential paedophiles. *Journal of Sexual Aggression, 10*(1), 123 132. Doi: 10.1080/13552600410001667742.
- Hough, M., & Moxon, D. (1985). Dealing with offenders: Popular opinion and the views of victims. Findings from the British Crime Survey. *The Howard Journal, 24*, 160-175. Doi: 10.1177/000486588702000304.
- Hough, M., & Park, A. (2002). How malleable are attitudes to crime and punishment? Findings from a British deliberative poll. In J. Roberts & M. Hough (Eds.). *Changing Attitudes to Punishment: Public opinion crime and justice*. (pp.163-183). Cullompton: Willan.
- Hudson, K. (2005). *Offending Identities: Sex Offenders' perspectives on their treatment and management*. Cullompton, Devon: Willan Publishing.
- Hughes, B., Parker, H., & Gallagher, B. (1996). *Policing Child Sexual Abuse: The View from Police Practitioners,* (Police Research Group). London: Home Office.
- Hudson, K., Taylor, C., & Henley, A. (2015). Trends in the management of registered sexual offenders across England and Wales: a geographical approach to the study of sexual offending. *Journal of Sexual Aggression, 21*(1), 56–70. Doi:10.1080/13552600.2014.949314
- Ireland, J. L., Ireland, C. A., & Birch, P. (2009). *Violent and Sexual Offenders: Assessment, Treatment and Management*. Cullompton, Devon: Willan Publishing.
- Johnson, R.B., & Onwuegbuzie, A.J. (2004). Mixed methods research: A research paradigm whose time has come. *Educational Researcher, 33*(7), 14-26. Retrieved from: http://www.socsci.uci.edu/~castellj/fieldstudies/webdocs/F/Readings/MixedMethodsResearch.pdf.
- Kemshall, H. (2002). Risk, public protection and Justice. In D. Ward, J. Scott & M. Lacey (Eds.). *Probation Working for Justice* (2nd ed.). Oxford: Oxford University Press.

- Knight, R. A., Carter, D. L., & Prentky, R. A. (1989). A system for the classification of child molesters: Reliability and application. *Journal of Interpersonal Violence, 4*, 3-23. Doi: 10.1177/088626089004001001.
- Krippendorff, K. (2005). The Social Construction of Public Opinion. *Kommunikation über Kommunikation. Theorie, Methoden und Praxis. Festschrift für Klaus Merten*, 129 149. Retrieved from http://repository.upenn.edu/asc_papers/75.
- Leverson, J. S., Brannon, Y. N., Fortney, T., & Baker, J. (2007). Public Perception about sex offenders and public protection policies. *Analyses of Social Issues and Public Policy, 7,* 1-25. Doi: 10.1111/j.1530-2415.2007.00119.x.
- Levenson, J., & Cotter, L. (2005). The effect of Megan's Law on sex offender reintegration. *Journal of Contemporary Criminal Justice, 21*(1), 49-66. Doi: 10.1177/1043986204271676.
- Loffe, H., & Yardley, L. (2004). Content and thematic analysis. In L. Yardley, & F. D. Marks (Eds.), *Research methods for clinical and health psychology* (pp. 56-69). London: SAGE Publications.
- MacLeod, M., & Saraga, E. (1988). Challenging Orthodoxy: towards a feminist theory and practice, *Feminist Review, 28*, 16-55. Doi: 10.2307/1394893.
- Marshall, W. L., & Barbaree, H. E. (1990). An Integrated theory of the etiology of sexual offending. In W. L. Marshall, D. R. Laws., & H. E. Barbaree (Eds.), *Handbook of Sexual Assault: Issues, theories and treatment of the offender*. (pp. 257-275). New York: Plenum Press.
- Matthews, R. (2005). The Myth of Punitiveness. *Theoretical Criminology 9* (2), 175- 201. Doi: 10.1177/1362480605051639.
- Mercado, C. C., Alvarez, S., & Levenson, J. (2008). The Impact of Specialized Sex Offender Legislation on Community Reentry. *Sexual Abuse: A Journal of Research and Treatment, 20*(2), 188-205. Doi: 10.1177/1079063208317540.
- Morgan, M. G., Fischhoff, B., Bostrom, A., & Atman, C. J. (2002). *Risk Communication: A Mental Models Approach*. London: Cambridge University Press.
- Morris, H. (1994). A Paternalistic Theory of Punishment. In A. Duff, & D. Garland, *A Reader on Punishment* (pp. 92-111). Oxford: Oxford University Press.
- Olson, L. N., Daggs, J. L., Ellevold, B. L., & Rogers, T. K. (2007). Entrapping the innocent: Toward a theory of child sexual predators' luring communication. *Communication Theory*, *17*(3), 231-251. Retrieved from: https://www.tib.eu/en/search/id/BLSE%3ARN212609223/Parris, M. (1997). 'All- party witch hunt, *The Times* 24th January.
- Paternoster, R., & Iovanni, L. (1989). The labelling perspective and delinquency: an elaboration of the theory and an assessment of the evidence. *Journal of Justice Quarterly, 6*(3), 359-394. Doi: 10.1080/07418828900090261
- Perkins, D., Hammond, S., Coles, D., & Bishopp, D. (1998). *Review of Sex Offender Treatment Programmes, Department of Psychology.* Broadmoor Hospital: High Security Psychiatric Services Commissioning Board.
- Pratt, J. (2000). Dangerousness and Modern Society. In M. Brown & J. Pratt (Eds.). *Dangerous Offenders: Punishment and Social Order* (pp. 35- 50). London: Routledge.

- Prescott, J., & Rockoff, J. (2008). Do sex offender registration and notification laws affect criminal behaviour?. *National Bureau of Economic Research Working Paper series*. Retrieved from: www.nber.orh/papers/w13803
- Power, H. (2003). Disclosing information on sex offenders: The human rights implications. In Matravers, A. (Ed). *Sex Offenders in the Community: Managing and reducing the risks.* (pp.72- 101). Devon: Willan Publishing.
- Radley, L. (2001). Attitudes towards sex offenders. *Forensic Update, 66*, 5-9. Doi:10.1080/13552600.2010.540678.
- Ray, M. C., & Downs, W. R. (1986). An empirical test of labelling theory using longitudinal data. *Journal of Research in Crime Delinquency, 23*(2), 169-194. Doi: 10.1177/0022427886023002004.
- Raynor, P., & Vanstone, M. (2002). *Understanding Community Penalties*. Buckingham: Open University Press.
- Richards, K. (2011). Misconceptions about child sex offenders. *Trends and issues in crime and criminal justice, 429*, 421-440. Retrieved from: http://www.aic.gov.au/publications/current%20series/tandi/421-440/tandi429.html.
- Roberts, J., Indermaur, D., Hough, M., & Stalans, L. (2003*). Penal Populism and Public Opinion: Lessons from Five Countries*. Oxford: Oxford University Press.
- Rossman, G. B., & Wilson, B. L. (1985). Numbers and words: Combining quantitative and qualitative methods in a single large-scale evaluation study. *Evaluation review*, *9*(5), 627-643. Doi: 10.1177/0193841X8500900505.
- Schoenberg, N. E., & Ravdal, H. (2000). Using Vignettes in awareness and attitudinal research. *International Journal of Social Research Methodology, 3*(1), 63-74. Doi: 10.1080/136455700294932.
- Schofield, K. (2004). Collisions of culture and crime: Media commodification of child sexual abuse. In J. Ferrell, K. Hayward, W. Morrison & M. Presdee (Ed.s), *Cultural criminology unleashed* (pp. 135-146). Routledge: Cavendish.
- Scott, D., & Codd, H. (2010). *Controversial Issues in prison*. New York: Open University Press.
- Sherman, L. W. (1993). Defiance, deterrence, and irrelevance: A theory of the criminal sanction. *Journal of research in Crime and Delinquency*, *30*(4), 445-473. Doi: 10.1177/0022427893030004006.
- Silverman, J., & Wilson, D. (2002). *Innocence Betrayed: Paedophilia, the Media and Society*. Cambridge: Polity Press.
- Steen, C. (2005). Cognitive-behavioural treatment under the Relapse Prevention umbrella. In M. C. Calder (Ed.), *Children and Young people who sexually abuse: New theory, research and practice development* (pp.223- 236). Lyme Regis: Russell House Publishing Ltd.
- Strang, H., & Sherman, L. W. (2003). Repairing the harm: Victims and restorative justice. *Utah Law Review, 1,* 15–42. Retrieved from: http://restorativejustice.org/rjlibrary/repairing-the-harm-victims-and-restorative justice/3775/#sthash.8dqvNy2f.dpbs

- Struckoff, D. (1971). *Stigmatisation as a Neglected Variable in Predicting Family Adjustment to Imprisonment* (Unpublished Doctorate Thesis). University of Southern Illinois: Carbondale.
- Thomas, T. (2005). Sex Crime: Sex offending and Society (2nd ed.). Cullompton, Devon: Willan Publishing.
- Thomas, T. (2008). The Sex Offender Register: A measure of public protection or a punishment in its own right?. *British Criminology conference, 8*, 85-96. Retrieved from: http://britsoccrim.org/new/volume8/6Thomas08.pdf.
- Thomas, T. (2004). Sex Offender Registers and Monitoring. In H. Kemshall & G. McIvor (Eds.). *Managing Sex Offender Risk*. London: Jessica Kingsley Publishers.
- Thompson, B., & Williams, A. (2014). *The myth of moral panics: sex, snuff, and Satan*. London: Routledge.
- Trahan, A., & Stewart, D. M. (2013). Toward A pragmatic framework for mixed- methods research in Criminal Justice and Criminology. *Applied Psychology in Criminal Justice, 9*(1), 59-74. Retrieved from: http://dev.cjcenter.org/_files/apcj/apcjspring2013trahan.pdf_1368481261.pdf.
- Venkatesh, V., Brown, S. A., & Bala, H. (2013). Bridging the Qualitative- Quantitative Divide: Guidelines for Conducting Mixed Methods. Research in Information Systems. *MIS Quarterly, 37*(1), 21-54. Retrieved from: https://arizona.pure.elsevier.com/en/publications/bridging-the-qualitative quantitative-divide-guidelines-for-condu
- Walker, M. U. (2006). *Moral repair*. New York: Cambridge University Press.
- Ward, T., & Maruna, S. (2007). *Rehabilitation.* Abingdon: Routledge.
- Wheatley, P. (2006). *HM Prison Service: Annual Report and Accounts April 2005-May 2006.* London: TSO. Retrieved from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/2282/1291.pdf
- Woodall, J., Dixey, R., & South, J. (2013). Prisoners' perspectives on the transition from the prison to the community: implications for settings-based health promotion. *Critical Public Health, 23*(2), 188-200. Doi: 10.1080/09581596.2012.732219.
- Young, J. (1971). *The Drugtakers: The social meaning of drug use*. London: Paladin.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 363-384
ISSN 1512-5505

PREVENTIVE EFFECTS OF PENAL SANCTIONS*

* This paper is based on the previously published German-language article: Tetal, C. (2018). Die Wirkung strafrechtlicher Sanktionen auf die Legalbewährung. Evidenzorientierte Kriminalprävention in Deutschland. In M. Walsh, B. Pniewski, M. Kober & A. Armborst (eds.), Evidenzorientierte Kriminalprävention in Deutschland (p. 533-556). Wiesbaden: Springer VS

Carina TETAL

The author would like to express her sincere gratitude to Dr. Chris Murphy, Max Planck Institute for Foreign and International Criminal Law, Freiburg i.Br., Germany, for this English-language translation.

Abstract

Based on sanction and recidivism data alone, it looks like that the probability of recidivism is much higher after a prison sanction then after a fine. This article examines whether this is a result of the criminal sanctions themselves, or whether other factors are involved. To achieve this, data from three offense groups (theft, fraud, burglary) that can be punished with different criminal sanctions (prison, suspended prison sentence, or a fine) are examined. Based on a bivariate combination of criminal sanctions and recidivism, offenders who spend time in prison are more likely to reoffend than offenders who receive a suspended prison sentence or a fine. However, further analysis shows that when a range of other variables are taken considered, the apparent sanctioning effect does not arise from the nature of the criminal sanction, but rather from the offenders' criminal past. Other factors have a far greater effect on reconviction. In particular, a person's previous criminal history strongly influences the likelihood of recidivism.

1. INTRODUCTION

One of the most important goals of criminal sanctions is to reduce crime by providing a deterrent to both the commission and recommission of offenses. Accordingly, a criminal sanction should fulfil its preventive purpose. Based on a bivariate combination of criminal sanctions and recidivism, offenders who spend time in prison are more likely to reoffend than offenders who receive a suspended prison sentence or a fine. This article examines whether this is a result of the criminal sanctions themselves, or whether other factors are involved. To achieve this, data from a range of offenses that can be punished with different criminal sanctions (prison, suspended prison sentence, or a fine) are examined.

The analysis uses data from the German recidivism study.[1] With the data from this study it is – for the first time in Germany – possible to analyze the impact of criminal sanctions on recidivism using a very large pool of convictions.

The analysis takes a quasi-experimental design. Courts in Germany do not provide uniform sanctions for the same types of crime with factually similar conditions: across the country, different sanctions for similar crimes are possible. On this basis, several types of offenses that can theoretically be sanctioned in a number of ways, such as a monetary fine or a prison sentence, are analyzed to see if, based on the same legal preconditions, different sanctions produce different recidivism rates. The aim is to test whether the type of criminal sanction has an effect on recidivism.

2. THE IMPACT OF CRIMINAL SANCTIONS

Beginning in the 1970s, the use of fines to settle criminal proceedings (almost 80% of adult offenders in Germany are nowadays fined) significantly increased interest in the assessment of the impact of different criminal sanctions. Albrecht (1982) conducted a study on the preventive efficiency of fines compared to suspended prison sentences and imprisonment. His study took into account a range of factors, such as prior criminal record, marital status, age, occupation etc. (Albrecht 1982, p. 236), and concluded that the relationship between sanction (excluding control variables) and recidivism (measured by re-conviction rates) is considerably overestimated (Albrecht 1982, p.227).

Over a decade later, Böhm (1996) found that all sentences have the same rate of success, so long as key recidivism features – such as gender, age, criminal bias, level of education, recreational habits, and work behavior – are considered. According to his findings, persons who are not likely to reoffend will seldom reoffend, regardless of the sanction (imprisonment, fine, etc.) they receive (Böhm 1996, p. 274).

Heinz (2007) noted that, according to the current state of research, the deterrent effects of threats and punishment are, in general, low (Heinz 2007, p. 5). Indeed, in the case of mild and moderate crimes, the severity of punishment has no measurable preventive effect.

In discussing the effectiveness of sanctions in the German criminal justice system, Streng (2007) noted that sanctions are largely interchangeable: more severe sanctions have no greater preventive effect than less severe sanctions (Streng 2007, p. 72). He nevertheless argued that good reasons exist for the use of severe sanctions to deal with certain offender groups (Streng 2007, p. 72). According to Streng, sanctions must make it clear that certain behavior is not tolerated. However, when different sanctions can be chosen to do this, the least severe option should, in general, be selected. This approach is better for the offender and better for society (Streng 2007, p. 81).

The influence of sanctions on renewed criminal behavior has been studied in other countries, too. Wermink et al. (2015) describe three Dutch studies, which conclude that imprisonment does not result in lower rates of recidivism compared to suspended prison sentences or monetary fines (Wermink et al. 2015, p. 137). In Switzerland, Killias (2006) conducted a study comparing the preventive effects of community service and short-term prison sentences. The recidivism rates between both groups hardly differed, though over the longer term, the former

[1] Legalbewährung nach strafrechtlichen Sanktionen (Jehle et al. 2013 und 2016)

prisoners were slightly more integrated in society. These findings are, however, not generalizable due to the study's small sample size (Fink 2016, p. 179).

Killias and Villetaz (2007) produced a systematic literature review on whether (short-term) imprisonment or so-called "alternative penalties" have a more favorable effect on recidivism rates. The majority of the studies they reviewed showed no significant correlation between the type of sanction and the likelihood of criminal relapse. In the studies that found a significant correlation, the result were largely in favor of alternative penalties. Furthermore, the authors carried out a meta-analysis of five experimental investigations: the results were unable to attribute a significantly more favorable effect to alternative punishments (Killias and Villetaz 2007, p. 207).

In 2007, a new sentencing system entered into force in Switzerland. As Fink (2015) notes, this new system provides courts with greater sentencing flexibility for crimes that would have previously resulted in automatic short-term imprisonment. Due to differences in the sentencing practices between Switzerland's 26 cantons, it was possible for the author to compare whether different sanctions result in different recidivism rates. The author found that for minor crimes, both fines and prison sentences are equally effective (Fink 2015, p. 314). This corresponds with previous that suggests the almost interchangeable nature of fines and prison sentences for minor crimes in terms of their impact on future recidivism (Fink 2009, p. 26). Despite differing sentencing practices in the 26 cantons, no effect on cantonal recidivism rates was observable (Fink 2016, p. 182).

3. DATA

As mentioned, the data for the present analysis stem from the German reconviction study, which was realized by researchers at the University of Göttingen and the Max Planck Institute for Foreign and International Criminal Law (Jehle et al. 2013 und 2016). The data are from the German Central Register (*Bundeszentralregisters* (BZR)) and include all judicial registrations in Germany, which were recorded in the register at three different dates: April 2008 (first wave), April 2010/2011 (second wave) and April 2013/2014 (third wave). Using a personal cryptic key, an individual's data can be combined from across the waves.

Included in the data are all convicted German citizens, aged 18 and over[2], who were sentenced by a criminal court and either fined or given a suspended prison sentence in 2007, or were released from prison in 2007 (the reference year). Only German citizens are included: the data for non-citizens could not be correctly recorded as they may not remain in Germany following a conviction (voluntary departure or deportation), meaning reconviction rates cannot be monitored. In addition, the data do not include cases where juvenile law was applied by the courts, as sanctions for juveniles do not allow for a comparison between fines, suspended sentences, and imprisonment.

Of the 528,273 persons who committed a crime or were released from prison in 2007, 3.9% were imprisoned, 13.7% received a suspended prison sentence, and 82.4% were fined (Table 1). Of the sample, 80% were male and 20% female. Nearly 60% were previously convicted, and

[2] Only a handful of adolescents (age 18 to 20 years old) are included in the data, because most of them were convicted and sentenced according to juvenile law.

one-third, in fact, were previously convicted three or more times.

Table 1: Frequencies, percentages and rate per 100,000 population of basic decision sanctions (reference year 2007)

Basic Decision Sanction	n	%	Rate per 100,000 population
Imprisonment*	20,536	3.9	35
Suspended Prison	72,281	13.7	122
Fine	435,456	82.4	732
Total	**528,273**	**100**	**888**

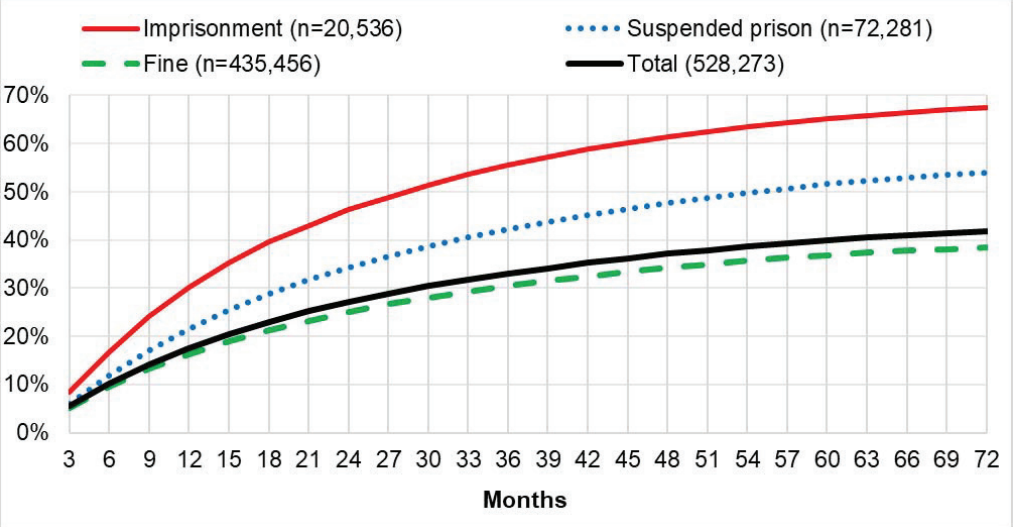
* Release from prison occurred in 2007. When no release or parole date was provided, the date was calculated using the length of the original sentence.

The offenses involved vary greatly and include hundreds of different criminal activities. As a judicial decision recorded in the German Central Register often consists of multiple offenses, the most serious offense (based on the range of the sentence) is considered the reference decision for the present analysis.

Recidivism is defined as any reconviction (recorded in the German Central Register) after the reference decision or after release from prison in 2007. The reconviction offense and the reference decision offense do not have to be the same or related: all offenses, minor or major, are considered to amount to a criminal relapse. The recurrence period is the time between the reference decision – date of court sentence or release from prison – and the date of the first subsequently (recorded) offense.

Figure 1 shows the cumulative recidivism rate by penalty type over a six-year period from the reference year 2007. The black line shows the relapse rate for all adult German offenders. 33% relapsed within three years, 42% within six years. The top line shows the recidivism rate for those who were already imprisoned and released from prison in 2007. Here, 56% relapsed within three years, 67% within six years. The dotted blue line shows the recidivism rate of those who received a suspended prison sentence. Forty-two percent relapsed within three years, 54% within six years. The reconviction rate was significantly lower for those who received a fine, as indicated by the green dashed line. Thirty-one percent relapsed within three years, 39% within six years. Thus, when only the type of sanction is considered, the recidivism rate is significantly higher when more severe sanctions are involved.

Figure 1: Cumulative Reconviction Rates per Base Sanction (2007 – 2013)



4. THE IMPACT OF CRIMINAL SANCTIONS: ANALYSIS OF SEVERAL OFFENSE GROUPS

The effect of different sanctions on recidivism is investigated by using a quasi-experimental approach. For this purpose, variations in sentencing that exist in individual cases, but also systematically between different regions of Germany, are used (Grundies 2016). This enables an examination of whether different sanctions result in different recidivism rates under the same conditions. For each of the offenses examined – theft, fraud, and aggravated theft – the law allows judges to apply numerous types of sanctions.

4.1. Theft and Unlawful Appropriation (StGB §§ 242, 246, 248 b, 248 c)

The first offense group examined are those who were sentenced for a reference offense of theft or unlawful appropriation. Under German law, those found guilty of theft or appropriation be sentenced to imprisonment (suspended or non-suspended) or fined.

Table 2: Composition of the offense group „Theft" (reference year 2007)

Offense of Basic Decision	n	%	Range of Sentences
Theft (§ 242)	59,780	90.1	up to 5 Years or Fine
Unlawful Appropriation (§ 246 (1))	3,964	6.0	up to 3 Years or Fine
Unlawful Appropriation (§ 246 (2))	1,673	2.5	up to 5 Years or Fine
Unauthorized use of a vehicle (§ 248 b)	279	0.4	up to 3 Years or Fine
Abstraction of electrical Energy (§ 248 c)	642	1.0	up to 5 Years or Fine
Total	**66,338**	**100**	

Figure 2: Cumulative Reconviction Rates per Base Sanction - Theft (2007 – 2013)

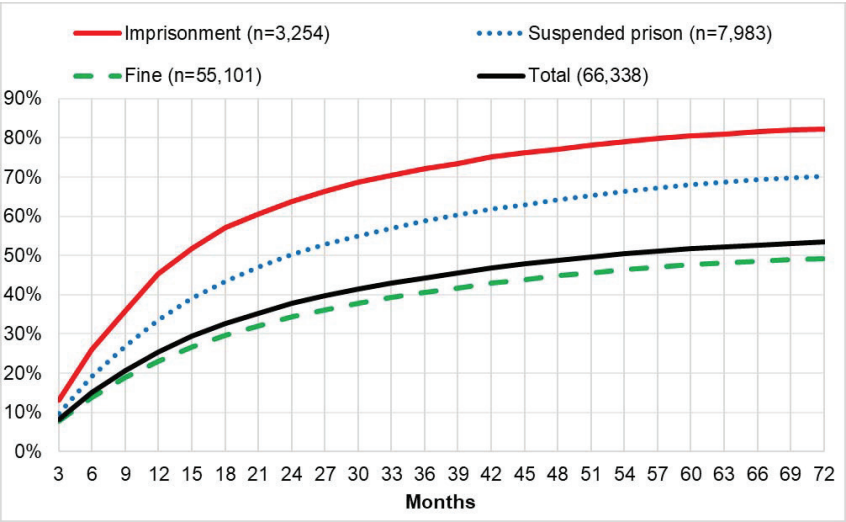


Table 2 outlines the composition of the theft offense group. In total, the group is comprised of 66,338 offenders. Of these, roughly 60,000 (90%) committed theft and were sentenced by a judge or released from prison in 2007 (§ 242 StGB). A sentence for theft can range from the imposition of a fine to imprisonment (up to five years). Of the offender group, 69% are male, 31% female. The proportion of female offenders in this group is higher than average. The proportion of offenders with a prior criminal record is also above average: over 70% of the offenders from the theft offense group have a prior criminal record, 45% are repeat offenders (three or more prior convictions).

The vast majority of the offenders in the group (83%) received a fine for their reference offense. Of the remainder, 12% received a suspended prison sentence and 5% a non-suspended prison term. Figure 2 shows the cumulative recidivism rate for those convicted of theft during the six-year period from 2007-2013. The black line shows the recidivism rate of all offenders from the theft group. As can be seen, 45% of the offenders who were convicted or released in 2007 for theft relapsed within three years, 53% within six years. The recidivism rate for the theft group was higher than the recidivism rate for all offenders (Figure 1). The highest line (red line) shows the recidivism rate of those imprisoned, 72% relapsed within three years, 82% within six years. The dotted blue line shows the recidivism rate of those who received suspended prison sentences: 59% relapsed within three years, 70% within six years. The dashed green line shows the cumulative recidivism rate for theft offenders who received a fine. The recidivism rate is considerably lower: 41% relapsed within three years, 49% within six years. Thus, for the theft offense group, if only the type of sanction is considered then it would appear that more severe sanctions lead to higher recidivism rates: imprisonment (served or suspended) resulted in a recidivism rate of 73.8% within six years, whereas the recidivism rate was 49.3% within six years after the issuance of a fine.

By calculating the likelihood of recidivism within six years as follows:

$$\text{Chance}_{rf} = \frac{Probability_{rf}}{Probability_{no\ rf}}$$

$$\text{Chance}_{rf} \text{ after prison sentence (served or suspended)} = \frac{73,8}{26,2} = 2.82$$

$$\text{Chance}_{rf} \text{ after a monetary fine} = \frac{49,3}{50,7} = 0,97$$

One arrives at an Odds Ratio of $(\frac{2,82}{0,97}) = 2.9$. That is, when considering only the bivariate relationship between sanction and relapse, after imprisonment the likelihood of recidivism is 2.9 times greater than after a fine.

This difference raises the question of whether this is caused by the type of sanction itself or by other factors: that is, are specific sanctions more likely to be applied to specific offenders (a so-called "selection effect") and, thus, the increase in recidivism could be traced back to the selection effect. In order to test for this, a logistic regression[3] analysis is needed to test for other factors that may influence recidivism.

The factors included in the logistic regression analysis are:

- Sanction: imprisonment / fine
- Sex: male / female
- Age of the person in 2007
- Range of sentences of the reference decision
- Concurrence of offenses (StGB § 52)
- Multiplicity of offenses (StGB § 53)
- Further offenses
- Mitigating circumstances (StGB § 49)
- Aiding (StGB § 27)
- Abetting (StGB § 26)
- Co-offenders (StGB § 25 Abs. 2)
- Diminished responsibility (StGB § 21)
- Intoxication (StGB § 323 a)
- Attempt (StGB § 22)
- Theft and unlawful appropriation of objects of minor value (StGB § 248 a)
- Criminal record:
- Number of total previous convictions
- Number of corresponding previous convictions
- Number of sanctions according to Juvenile Law (JGG)
- Number of previous fines
- Number of previous suspended sentences
- Number of previous imprisonments
- Accumulated number of previous daily fine rates
- Cumulative duration of time spent in prison before the reference decision.

The length of a sentence or the size of a fine cannot be included as this information is directly

linked to the sanction. Other variables that could contribute to an explanation of differences in reconviction rates – such as education, marital status, occupation, and financial status – are not available for the analysis.

Table 3: Logistic Regression of Reconviction within 6 Years. Base Offense Theft in 2007. (Extract of the result, the logistic regression was made with all presented variables.)

Variables		Odds Ratio	Std. Error	p>|z|	n
Sanction	Fine (ref.)				55,101
	Prison Sanction	1.14	0.03	0.000	11,237
Sex	Female (ref.)				20,561
	Male	1.09	0.02	0.000	45,777
Age	18-20 (ref.)				1,588
	21-24	0.80	0.05	0.000	9,359
	25-29	0.73	0.04	0.000	9,641
	30-34	0.68	0.04	0.000	6,864
	35-39	0.58	0.04	0.000	7,375
	40-44	0.48	0.03	0.000	7,701
	45-49	0.44	0.03	0.000	7,186
	50-59	0.39	0.02	0.000	9,342
	60+	0.30	0.02	0.000	7,282
Range of Sentences	< 5 Years (ref.)				62,124
	< 3 Years	0.82	0.03	0.000	4,214
Concurrence of Offenses		0.85	0.05	0.007	1,932
Multiplicity of Offenses		1.07	0.03	0.014	11,020
Further Offense		1.22	0.06	0.000	4,905

Co-Offender		0.83	0.03	0.000	6,015
Theft of objects of minor value		1.08	0.02	0.000	35,994
Number of previous convictions	0 (ref.)				19,391
	1	1.47	0.06	0.000	10,091
	2	1.95	0.10	0.000	6,748
	3, 4	2.40	0.13	0.000	8,621
	5+	2.91	0.20	0.000	21,487
Variables		Odds Ratio	Std. Error	p>|z|	n
Number of corresponding previous convictions	0 (ref.)				32,531
	1	1.14	0.03	0.000	11,910
	2	1.25	0.04	0.000	6,572
	3, 4	1.30	0.05	0.000	6,986
	5+	1.58	0.08	0.000	8,339
Number of previous imprisonments	0 (ref.)				55,668
	1	1.16	0.06	0.002	3,699
	2	1.21	0.08	0.003	2,009
	3, 4	1.47	0.10	0.000	2,359
	5+	1.45	0.10	0.000	2,603
Number of previous suspended sentences	0 (ref.)				46,370
	1	0.85	0.05	0.012	8,472
	2	0.88	0.06	0.085	4,792
	3, 4	0.82	0.06	0.012	4,590

	5+	0.79	0.07	0.011	2,114
Number of previous fines	0 (ref.)				26,646
	1	1.08	0.09	0.348	12,294
	2	1.06	0.11	0.560	8,080
	3, 4	1.05	0.12	0.652	9,567
	5+	1.17	0.15	0.220	9,751
Number of previous youth sanctions	0 (ref.)				50,083
	1	1.01	0.04	0.864	4,819
	2	1.12	0.05	0.018	3,948
	3, 4	1.26	0.06	0.000	4,892
	5+	1.47	0.10	0.000	2,596
Total	Pseudo $R^2 = 0.12$				66,338

The logistic regression (Table 3) shows that after imprisonment (served or suspended), recidivism is 14% more likely than after a fine. This result is highly significant. The following results are also highly significant: (1) within six years, males relapse 9% more often than females, (2) the probability of relapse decreases with age, and (3) concerning appropriation, if the sanction is imprisonment for up to three years, then recidivism is less likely than for a sanction of up to five years imprisonment.

The factual circumstances of the reference decision also influence recidivism. If another offense was sanctioned in the same decision, such as trespass or obtaining by fraud, relapse is 22% more likely in comparison to reference decisions without additional offenses. If the offense was committed with accomplices, recidivism is more seldom than with individual offenders. The recidivism rate is strongly influenced by prior criminal history, especially the number of prior convictions. If there were two convictions before the reference decision, relapse is twice as likely. With five or more previous convictions, it is three times more likely. The number of prior convictions for closely related crimes (to the reference decision) also increases the probability of recidivism, though the effect is not as strong as it is with prior convictions in general.

The number of previous fines has no significant impact on recidivism. Nor does the total number of daily fines or the cumulative duration of time spent in prison before the reference decision (not shown in the table). Other circumstances of the reference decision – mitigation, intoxication, attempt – do not affect relapse behavior.

Because of the reduced effect of the type of sanction under control of other variables, it is obvious that there will be a selection effect in addition to the effect of the sanction itself. To neutralize this selection effect, a counterfactual approach is used. (Sampson et al. 2006) The aim of this approach is to "turn off" the selection effect of the sanction.

In a first step, the propensity score (PS) is estimated by a logistic regression with the dependent variable type of sanction and all existing independent variables (pseudo $R^2 = 0.39$).[4] The propensity score is the probability of being imprisoned and is determined by the existing factors. In a second step, the propensity score is used to calculate the *inverse probability of treatment weighting* (IPTW).

Table 4: Logistic Regression with Counterfactual Approach of Reconviction within 6 Years. Base Offense Theft in 2007 (extract)*

Variables		**Odds Ratio**	**Std. Error**	**p>|z|**
Sanction	Fine (ref.)			
	Prison Sanction	0.95	0.05	0.311
Sex	Female (ref.)			
	Male	1.10	0.05	0.044
Age	18-20 (ref.)			
	21-24	1.04	0.23	0.843
	25-29	0.91	0.20	0.648
	30-34	0.79	0.18	0.301
	35-39	0.65	0.15	0.058
	40-44	0.53	0.12	0.005
	45-49	0.46	0.10	0.001
	50-59	0.34	0.08	0.000
	60+	0.35	0.09	0.000
Number of previous convictions	0 (ref.)			
	1	1.91	0.22	0.000
	2	2.71	0.31	0.000

	3, 4	3.31	0.39	0.000
	5+	4.07	0.55	0.000
Number of corresponding previous convictions	0 (ref.)			
	1	1.20	0.08	0.008
	2	1.24	0.09	0.002
	3, 4	1.32	0.09	0.000
	5+	1.66	0.13	0.000
Total			n = 66,338	Pseudo R^2 = 0.15

* The logistic regression was made with all presented variables.

In calculating the IPTW, each person is assigned the sanction probability associated with his/her actual sanction as a statistical weight: A person sanctioned to imprisonment receives the statistical weight 1/PS. A Person sanctioned with a fine receives the weight 1/(1-PS). Thus, a person sanctioned to imprisonment with a low propensity score (high probability of fine) will have a high weighting. Likewise, a person sanctioned to a fine and a high propensity score (high probability of imprisonment) will also have a high weighting. Individuals whose actual sanction and probable sanction match receive a low weighting. The sanction effect is then evaluated with a logistic regression that uses, in addition to the independent variables, the individual's statistical weight.

Table 4 shows an extract from the results of the logistic regression with counterfactual approach (pseudo R^2 = 0.15). The results show that the probability of relapse after a prison sanction is not significantly different than after a fine. For the offense of theft, the type of sanction has no influence on recidivism. Males relapse 10% more frequently than females (p = 0.044). The influence of the number of prior convictions is again highly significant and increases even more when using a counterfactual approach.

If only the Odds Ratio of sanction and recidivism is considered, the likelihood of recidivism after a prison sanction is 2.9 times higher than after a fine (Table 9). If other factors are included via logistic regression, recidivism after a prison sanction is more likely by a factor of 1.14 when compared to a fine. If the influence of covariates is adjusted by a counterfactual approach, it follows that the type of sanction has no influence on the probability of recidivism.

4.2. Fraud (StGB §§ 263, 263 a, 264, 265, 265 b, 266, 266 a, 266 b)

The second offense group to be examined in order to ascertain the impact of the type of sanction on recidivism is fraud and embezzlement (hereafter, the "fraud" group). The details of the fraud group are shown in Table 5. Slightly more than 92,000 offenders from this group were sentenced in 2007 or left prison in 2007 for fraud. Fraud and embezzlement can be sanctioned

with imprisonment (up to five years) or a fine. Obtaining services by deception (fare dodging) (§ 265 a StGB) is not included in this group as it is a less severe offense and is therefore considered a separate offense group. Of the fraud group, 88% of the offenders (81,000 persons) were convicted for fraud (§ 263 StGB), including computer fraud (§ 263 a StGB) and subsidy fraud (§ 264 StGB) and were sentenced with imprisonment up to five years, a suspended sentence, or a fine. Males comprise 67% of the fraud group, females 33%. Thus, the proportion of females in this group is, compared to all offenses, above average (and higher still than for the theft group). Fifty-four percent of the offenders from the fraud group have prior convictions, 28% three or more convictions. Compared to all offenses, the proportion of prior convictions is below average (and significantly lower than for the theft group).

Table 5: Composition of the offense group „Fraud" (reference year 2007)

Offense of Basic Decision	**n**	**%**	**Range of Sentences**
Fraud (§§ 263, 263 a, 264)	81,162	88.2	up to 5 Years or Fine
Aggravated Fraud (§§ 263 (3), 264 (2))	2,734	3.0	from 6 Months up to 10 Years
Fraud, gang (§§ 263 (5), 264 (3))	111	0.1	from 1 Year up to 10 Years
Other Fraud (§§ 265, 265 b, 266 b)	96	0.1	up to 3 Years or Fine
Embezzlement (§ 266)	1,930	2.1	up to 5 Years or Fine
Withholding of salaries (§ 266 a)	6,027	6.5	up to 5 Years or Fine
Total	**92,060**	**100**	

Figure 3: Cumulative Reconviction Rates per Base Sanction - Fraud (2007 – 2013)

77,412 offenders from the fraud group (84%) received a fine, 12,394 (13.5%) a suspended prison sentence, and 2,254 (2.5%) were imprisoned. Figure 3 shows the cumulative recidivism rates for the group over the following six-year period (2007-2013). The black line shows the recidivism rate for all offenders in this group. Twenty-nine percent relapsed within three years, 37% within six years. Thus, the relapse rate is lower than the recidivism rate for all offenses. The red line (the highest rate of recidivism) is the recidivism rate of those released from prison in 2007 for a fraud offense. Nearly half of this group (49%) relapsed within three years, 61% within six years. The dotted line shows the recidivism rate of those who received a suspended prison term. Thirty-five percent relapsed within three years, 47% within six years. As with the theft group, the recidivism rate for those who received a fine is significantly lower, with 28% relapsing within three years and 35% within six years. Taking only sanction and relapse into account, the likelihood of recidivism within six years of imprisonment is 1.8 times greater than within six years of a fine.

As with the theft group, a logistic regression for the fraud group concludes that it is not the sanction – but rather other factors – that affect the recidivism rate (pseudo $R^2 = 0.12$). When an inverse probability of treatment weighting is also carried out (pseudo $R^2 = 0.14$), the results again show that the type of sanction has no impact on relapse for the fraud group.

An excerpt from the logistic regression with counterfactual approach is shown in Table 6. Gender affects recidivism, with males 26% more likely to relapse than females within six years. This result is highly significant. Recidivism also decreases with age. This too is highly significant. The relapse rate of those aged 40 to 44 is half of those aged 21 to 24. If additional offenses exist in addition to the reference decision (e.g., counterfeiting or theft), recidivism is 33% more likely than for fraud alone.

Once again, recidivism is strongly influenced by criminal history. Those with a prior criminal conviction are 56% more likely to relapse. While the number of fraud-specific prior convictions impacts recidivism, it is not as strong as the impact of overall prior convictions. No significant influence is able to be attributed to the factual circumstances of the offense, such as aiding, abetting, or inciting.

Table 6: Logistic Regression with Counterfactual Approach of Reconviction within 6 Years. Base Offense Fraud in 2007 (extract)*

Variables		**Odds Ratio**	**Std. Error**	**p>|z|**	**n**
Sanction	Fine (ref.)				77,412
	Prison Sanction	1.02	0.04	0.623	14,648
Sex	Female (ref.)				29,999
	Male	1.26	0.06	0.000	62,061
Age	18-20 (ref.)				10,441
	25-29	0.74	0.06	0.000	15,810
	30-34	0.59	0.05	0.000	12,052
	35-39	0.54	0.04	0.000	12,697
	40-44	0.50	0.04	0.000	12,645
	45-49	0.42	0.04	0.000	10,354
	50-59	0.31	0.03	0.000	12,398
	60+	0.21	0.03	0.000	4,476
	18-20	0.53	0.30	0.259	1,184
Further Offense		1.33	0.12	0.002	5,974
Number of previous convictions	0 (ref.)				42,399
	1	1.56	0.16	0.000	15,453
	2	2.31	0.25	0.000	8,284
	3, 4	2.74	0.30	0.000	9,494
	5+	3.38	0.45	0.000	16,430

Number of corresponding previous convictions	0 (ref.)				65,250
	1	1.26	0.07	0.000	14,378
	2	1.27	0.09	0.000	5,585
	3, 4	1.32	0.10	0.000	4,270
	5+	1.69	0.18	0.000	2,577
Total	Pseudo $R^2 = 0.14$				92,060

* The logistic regression was made with all presented variables

The results of the logistic regression (with and without counterfactual approach) show that the type of sanction has no influence on subsequent recidivism. Both the fraud and theft offense groups confirm this. Looking only at sanction and recidivism (Table 9), the likelihood of recidivism after imprisonment is 1.8 times higher than after a fine. However, if other factors are included in the analysis, the type of sanction has no influence on recidivism. What does have a major influence is the number of prior criminal convictions.

4.3. Aggravated Theft (StGB §§ 243, 244, 244 a)

The final offense group investigated is aggravated theft. As the name implies, this group is comprised of criminals who committed theft with aggravating circumstances in their reference decision: a breakdown of these aggravating circumstances is provided in Table 7. In 2007, 6,893 aggravated theft offenders received a suspended prison sentence or where released from prison. Seventy-nine percent (5,413) were convicted of aggravated theft (StGB § 243), 19% (1,340) for aggravated theft with a weapon, and 2% (140) for aggravated gang theft. Aggravated theft offenses can only be sanctioned with imprisonment (suspended or non-suspended). Thus, in the case of aggravated theft, the effect studied is whether a difference exists between suspended and non-suspended sentences.

Adolescents who commit aggravated theft are usually sentenced according to juvenile law and very rarely under general criminal law. Therefore, the aggravated theft analysis is carried out without their data.

Ninety-four percent of the offenders from this group are male, 6% female. The proportion of males compared to all offenses is above average. More than 90% have a criminal record and more than three-quarters have three or more prior convictions (this is significantly above the average for all offenses).

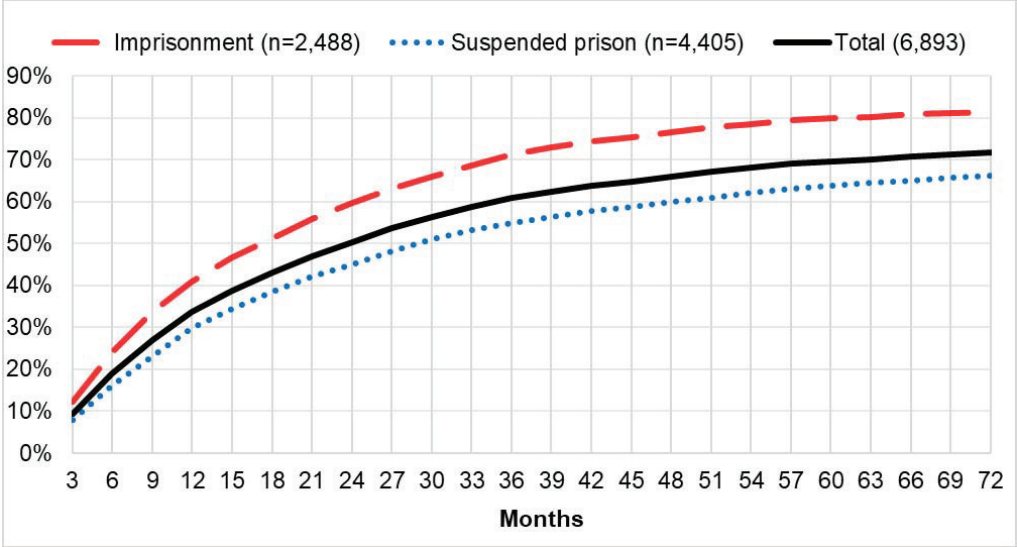
Of the offense group, 2,488 offenders (36%) were released from prison in 2007, and 4,405 offenders (64%) received a suspended prison sentence in the same year. Figure 4 shows the cumulative recidivism rates of the aggravate theft offense group (2007-2013). The solid black line shows the recidivism rate for all offenders in this group. Sixty-one percent relapsed within

three years, 72% within six years. The rate is significantly higher than the average recidivism rate for all offenses. The dashed red line is the recidivism rate of those released from prison for aggravated theft in 2007. Of this group, 71% relapsed within three years, 82% within six years. The dotted blue line is the cumulative relapse rate of those who received a suspended sentence: 55% relapsed within three years, 66% within six years.

Table 7: Composition of the offense group „Burglary" (reference year 2007)

Offense of Basic Decision	**n**	**%**	**Range of Sentences**
Aggravated Theft (§ 243)	5,413	78.5	from 3 Months up to 10 Years
Theft with weapons (§ 244)	1,340	19.4	from 6 Months up to 10 Years
Aggravated Theft, gang (§ 244 a)	140	2.0	from 1 Year up to 10 Years
Total	**6,893**	**100**	

Figure 4: Cumulative Reconviction Rates per Base Sanction - Burglary (2007 – 2013)



Recidivism is 2.2 more likely after a non-suspended prison sentence than after a suspended prison sentence. However, as with the other two offense groups (theft and fraud), it is not immediately apparent whether the recidivism results are due to the type of sanction or whether other factors are responsible. Thus, further analysis is warranted.

Using a logistic regression to take into account other factors that influence recidivism (e.g., gender, age, number of prior convictions in general, number of prior convictions for aggravated theft, penalties, further offenses in the reference decision, mitigation (§ 49 StGB), assistance,

complicity etc.), the likelihood of recidivism after a non-suspended prison sentence compared to a suspended prison sentence is revalued to 1.17 times more likely (p = 0.046). Accordingly, while recidivism after a non-suspended sentence is more likely, the difference is no longer as extreme. As with the other offense groups, a significant factor for future recidivism is the number of prior criminal convictions.

Table 8: Logistic Regression with Counterfactual Approach of Reconviction within 6 Years. Base Offense Burglary in 2007 (extract)*

Variables		**Odds Ratio**	**Std. Error**	**p>|z|**	**n**
Sanction	Suspended prison (ref.)				4,405
	Imprisonment	1.16	0.12	0.168	2,488
Sex	Female (ref.)				409
	Male	1.29	0.21	0.126	6,484
Age	18-20 (ref.)				1,313
	25-29	0.82	0.12	0.198	1,881
	30-34	0.55	0.10	0.001	1,204
	35-39	0.46	0.10	0.000	949
	40-44	0.33	0.07	0.000	729
	45-49	0.18	0.05	0.000	398
	50-59	0.21	0.05	0.000	317
	60+	0.63	0.68	0.670	102
Further Offense		0.93	0.17	0.690	398
Mitigation		0.57	0.14	0.025	247
Number of previous convictions	0 (ref.)				599
	1	2.13	0.76	0.033	501
	2	3.10	1.00	0.000	409
	3, 4	3.02	0.96	0.001	908
	5+	3.73	1.22	0.000	4,476
Total	Pseudo R^2 = 0.16				6,893

* The logistic regression was made with all presented variables

Table 8 depicts an extract from the logistic regression with counterfactual approach for aggravated theft. Here, when comparing non-suspended prison sentences with suspended prison sentences, the type of sanction does not significantly influence relapse. There are no significant differences concerning gender either: when relapse occurs within six years, the relapse behavior of females from the offense group corresponds with that of males. Age does, however, influence recidivism: the 25 to 29 year-old age group does not differ significantly from the 21 to 24 year-old age group, but from the age of 30 onwards, the likelihood of relapse begins to decrease.

Additional crimes included in the reference offense (e.g., assault) do not lead to higher recidivism rates. However, if mitigating circumstances (§ 49 StGB) were cited into the reference decision, recidivism is only half as likely in comparison to those reference decisions without mitigating circumstances.

Once again, the number of prior convictions has a significant influence on recidivism. More prior convictions result in more rapid relapse. Recidivism is twice as likely for those with prior convictions compared to those without. The number of prior convictions for aggravated theft has no influence on recidivism. Likewise, circumstances such as assistance, incitement, or complicity have no significant impact on recidivism. Therefore, the analysis shows that the type of sanction has no influence on recidivism and that it is the number of prior convictions that is the most crucial recidivism variable.

4.4. Summary

Based on sanction and recidivism data alone, it is clear that for all three offense groups – theft, fraud, and aggravated theft – that offenders who receive more severe sanctions are more likely to reoffend when compared to offenders who receive less severe sanctions. However, further analysis shows that when a range of other variables are taken considered (e.g., gender, age, prior convictions and sanctions, mitigating circumstances, complicity, incitement) the apparent sanctioning effect does not arise from the nature of the criminal sanction, but rather from the offenders' criminal past.

Table 9 shows different Odds Ratios for the impact of the type of sanction on recidivism for theft, fraud, and aggravated theft. The second column provides information on the Odds Ratio when only sanction and recidivism are included; the third and fourth columns contain other factors (in addition, the fourth column is with inverse probability of treatment weighting). If only the sanction type and likelihood of recidivism is taken into account, the recidivism Odds Ratio increases with sanction severity: for theft, recidivism is 2.9 times more likely after a prison sanction than after a fine; for fraud, the ratio is 1.8. For aggravated theft, recidivism is 2.2 more likely after a non-suspended vs. suspended prison sentence.

Table 9: The Impact of the type of the Sanction on Recidivism

Offense	Odds-Ratio of the Type of Sanction (no inclusion of other factors)	Odds-Ratio of the Type of Sanction under control of other Factors	Impact of the type of sanction with IPTW* under control of other factors
Theft (Fine – Prison Sanction)	2.9	1.14 (p=0.000) (Pseudo R^2 = 0.12)	No significant Impact (p=0.311) (Pseudo R^2 = 0.15)
Fraud (Fine – Prison Sanction)	1.8	No impact (Pseudo R^2 = 0.12)	No Impact (Pseudo R^2 = 0.14)
Burglary (Suspended Prison - Imprisonment)	2.2	1.17 (p=0.046) (Pseudo R^2 = 0.13)	No significant Impact (p=0.168) (Pseudo R^2 = 0.16)

* IPTW: Inverse Probability of Treatment Weighting

If other factors are taken into account, the Odd-Ratios for the type of sanction are different. If theft is sanctioned with imprisonment (suspended or non-suspended), recidivism is 1.14 times more likely than after a fine. When, through a counterfactual approach, sanction-related selection effects are eliminated, no significant sanction effect exists.

In the case of fraud, no significant sanction effect exists when additional factors (with or without IPTW) are included. The different recidivism rates are not a result of the sanction itself, but rather the different composition of the groups (imprisonment vs. fine).

For the aggravated theft group, the effect of different prison sanctions are compared (suspended vs. non-suspended). When other factors are included, relapse after time spent in prison is 1.17 times more likely (p = 0.046) than after a suspended prison sentence. If the selective impact of the sanction is adjusted via a counterfactual approach, no significant sanction effect is found.

5. CONCLUSION

As the above analyzes show, for the offense groups theft, fraud, and aggravated theft, it is not the type of sanction that results in different recidivism rates. There is no causal link between the type of sanction and reconviction rates. Other factors have a far greater effect on reconviction. In particular, a person's previous criminal history (measured by the number of prior convictions) strongly influences the likelihood of recidivism: the longer the criminal record, the greater the probability of recidivism. Thus, it is concluded that sanctions are largely interchangeable within the legal limits for the examined offense groups and, in accordance with the thesis posited by Kaiser, when two different sanctions are likely to lead to the same result, the less severe sanction should be favored (1996, p. 978). Tougher sanctions will not lead to lower recidivism rates.

LITERATURE

- Albrecht, H.-J. (1982). *Legalbewährung bei zu Geldstrafe und Freiheitsstrafe Verurteilten*. Freiburg: Max-Planck-Institut für ausländisches und internationales Strafrecht.
- Böhm, A. (1996). Die spezialpräventiven Wirkungen der strafrechtlichen Sanktionen. In J.-M. Jehle (ed.), *Kriminalprävention und Strafjustiz* (p. 263-290). Wiesbaden: Kriminologische Zentralstelle.
- Heinz, W. (2007). Mehr und härtere Strafen = mehr Innere Sicherheit! Stimmt diese Gleichung? *Strafrechtspolitik und Sanktionierungspraxis in Deutschland im Lichte kriminologischer Forschung. Konstanzer Inventar Sanktionsforschung KIS*. http://www.uni-konstanz.de/rtf/kis/Heinz_Mehr_und_haertere_Strafen_he306.pdf. Accessed on: January 14, 2019.
- Fink, D. (2009). *Überwachen statt Einsperren. Die Freiheitsstrafe in der Schweiz und ihre Zukunft*. Neuchâtel: Bundesamt für Statistik.
- Fink, D. (2015). Die Konstanz des Rückfalls. In D. Fink & P.M. Schulthess (eds.), *Strafrecht, Freiheitsentzug, Gefängnis* (p. 306-319). Bern: Stämpfli Verlag.
- Fink, D. (2016). Die statistische Beobachtung von Rückfall, 1900-2012. In D. Fink (ed.), *Kriminalstatistik. Studien zur Geschichte der Kriminal- und Strafrechtsstatistiken der Schweiz* (p. 171-183). Bern: Stämpfli Verlag.
- Grundies, V. (2016). Gleiches Recht für alle? – Eine empirische Analyse lokaler Unterschiede in der Sanktionspraxis in der Bundesrepublik Deutschland. In F. Neubacher, & N. Bögelein (eds.), *Krise – Kriminalität – Kriminologie* (p. 511-525). Mönchengladbach: Forum Verlag Godesberg GmbH.
- Jehle, J.-M., Albrecht, H.-J., Hohmann-Fricke, S., & Tetal, C. (2013). *Legalbewährung nach strafrechtlichen Sanktionen. Eine bundesweite Rückfalluntersuchung 2007 bis 2010 und 2004 bis 2010*. Mönchengladbach: Forum Verlag Godesberg GmbH.
- Jehle, J.-M., Albrecht, H.-J., Hohmann-Fricke, S., & Tetal, C. (2016). *Legalbewährung nach strafrechtlichen Sanktionen. Eine bundesweite Rückfalluntersuchung 2010 bis 2013 und 2004 bis 2013*. Mönchengladbach: Forum Verlag Godesberg GmbH.
- Kaiser, G. (1996). *Kriminologie. Ein Lehrbuch*. Heidelberg: C. F. Müller Verlag
- Killias, M., Gilliéron, G., Poglia, C., Villard, F., Vuille, J., & Perisset, C. (2006). Bessere Resozialisierung nach gemeinnütziger Arbeit? Ein Vergleich mit kurzen Freiheitsstrafen – 11 Jahre später. *Crimescope*, 34.
- Killias, M., & Villettaz, P. (2007). Rückfall nach Freiheits- und Alternativstrafen: Lehren aus einer systematischen Literaturübersicht. In F. Lösel, D. Bender, & J.-M. Jehle (eds.), *Kriminologie und wissensbasierte Kriminalpolitik. Entwicklungs- und Evaluationsforschung* (p. 208-225). Mönchengladbach: Forum Verlag Godesberg GmbH.
- Sampson, R. J., Laub, J. H., & Wimer, C. (2006). Does Marriage Reduce Crime? A Counterfactual Approach to Within-Individual Causal Effects. *Criminology Volume 44 Number 3* (p. 465-508).

- Streng, F. (2007). Die Wirksamkeit strafrechtlicher Sanktionen – Zur Tragfähigkeit der Austauschbarkeitsthese. In F. Lösel, D. Bender, & J.-M. Jehle (eds.), *Kriminologie und wissensbasierte Kriminalpolitik. Entwicklungs- und Evaluationsforschung* (p. 65-92). Mönchengladbach: Forum Verlag Godesberg GmbH.
- Tetal, C. (2018). Die Wirkung strafrechtlicher Sanktionen auf die Legalbewährung. In M. Walsh, B. Pniewski, M. Kober & A. Armborst (eds.), *Evidenzorientierte Kriminalprävention in Deutschland* (p. 533-556). Wiesbaden: Springer VS.
- Wermink, H., Nieuwbeerta, P., De Keijser, J., Blokland, A., Apel, R., Ramakers, A., & Dirkzwager, A. (2015). The effects of punishment on criminal behavior. In C. Dâmboeanu (ed.), *Sociological studies on imprisonment. A European perspective* (p. 115-148). Bukarest: Trito

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 385-393
ISSN 1512-5505

SOME PERSPECTIVES ON THE MEXICAN CRIMINAL JUSTICE SYSTEM

Axel Francisco Orozco TORRES

Abstract

The Mexican Criminal Justice System was reformed in 2008, entering into forcé troughout the country in 2016. This work is a brief tour of the Mexican Criminal Justice System, going throug the principles that govern it, the reformed Mexican Constitution articles and the different stages of the criminal process.

INTRODUCTION

The Mexican Criminal Justice System was reformed on 2008, it was a total transformation, it migrated from an inquisitorial system to an adversarial system, however it became validity since June 2016 in all around Mexico. The main reasons to reform the Criminal Justice System, were the high levels of impunity and corruption, so the Mexican Government decided the legal reforms to stablish the new Criminal Justice System.

Also was thought that the criminal justice system reformed, would attend integrality the victims, including the damage payment, the legal advisory, the psychology atention and the medical atention when required.

The main characteristic of this new Criminal Justice System is the orality in the procedures.

This Criminal Justice System includes everyone, not only those involved, this System must became a mass media interest, a social interest, only in that way; its effectiveness will be warranted.

These last two years with the validity of the System, many voices have born against, but these speeches come from people that ignore the new ways to reach a truly justice, became from those who feels comfortable in a corruptious world, because they've been rewarded in that world, in that way of life.

In this paper will be exposed the reformed constitutional articles, the fundamental principles and the new considered ways to work up the criminal procedures, all that is a contribution to let know some perspectives on the Mexican Criminal Justice System to different audiences.

1. THE CONSTITUTIONAL REFORM

To transform the Mexican Criminal Justice System was necesary to make a great Mexican Constitution reform, thereof the Mexican Congress assumed, to make it happened, the Mexican Congress modified seven articles involved with criminal law and the public security; those articles will be exposed in their main content as an approach knowledgement to their content.

Article 16th. Establishes the principle of legality; this principle determines that every legal act must be ordered by a jurisdictional authority. This article also recognizes as a legal arrest when the criminal is caught in the act.

Article 17th. Determines the existence of the alternative dispute resolution mechanisms as the negotiation; the mediation; and the conciliation as a ways to solve some criminal trials.

Article 18th. Establishes the basis to regulate the penitentiary system; in the same way, establishes the minors justice system, determining as a valid age for a criminal trial, from 12 to 18 years old.

Article 19th. Establishes the maximum term of detention of a person at the court without there being an order of attachment to the criminal process. In addition, it indicates which crimes merit informal preventive detention.

Article 20th. This article is divided in three; the first part establishes the characteristics of the criminal process, which is oral, in addition, determines the principles that regulate the criminal process: publicity, contradiction, concentration, continuity and immediacy. The second part is about the rights for those imputed and the third part, determines the victim's rights.

Another innovation in this system are the victim's rights; before this system, the victim wasn´t considered, the victim was invisibilized; now, with this Criminal Justice System the victim have the next rights:

I. To receive legal advisory; to be informed about the victim's rights and to be informed about the stages of the criminal procedure.
II. Help the prosecutor; the right to present all the legal proves during the investigation phase and in the criminal process.
III. To receive, from the first moment of the committed crime, medical and psychological attention
IV. To get the damage repair. The prosecutor is obliged to ask for the damage repair
V. The victims have the right to safeguard their identity and personal data when they are minors; when they are victims of rape and kidnapping
VI. The prosecutor must warranty the protection of the victims, witnesses and all the people that are involved in the procedure.
VII. The victims have the right to ask for protection and the restitution of their rights
VIII. The victims have the right to oppose the prosecutor's omissions at the investigation phase.

Article 21st. Determines the prosecutor's and the police functions, considering that the prosecutor is the responsible of the criminal investigation and the police must act under his or her order.

Article 22nd. Establishes the extinction of ownership over assets of the ofender.

All the cited articles have much more text, however, as it has said, we are considering only the nuclear part of each one of they.

On the other hand, some of those articles have legal innovations among the Mexican criminal justice system; some others, only were modified on the rules of the new ways to solve the criminal procedures.

2. PRINCIPLES THAT RULES THE MEXICAN CRIMINAL JUSTICE SYSTEM

The Mexican criminal justice system have fundamental principles which are divided in two groups, one of those are known as Constitutional principles, and the other group is known as a procedimental principles.

2.1 Constitutional principles

These five Cosntitutional principles are considered in the first part of the 20th Mexican Constitutional article and they arte: Principle of publicity; principle of contradiction; principle of concentration; principle of continuosly and principle of immediation.

a) Principie of publicity

Before the Mexican adversarial justice system, the publicity wasn't considered as a posibility during the criminal procedures, with the incorporation of this posibility, it becomes an innovation in the Mexican Criminal Justice System.

The principle of publicity is established in the 20th Mexican Constitution article and in the 5th article of the criminal law process, that say:

All the audiences must be publics with the purpose that every interest people assist to their development.

The journalists and the mass media may Access to the place in wich will be developed the audience, complying with the rules. (National Criminal Procedure Law)

This principle of publicity permits transparent procedures, also permits that society observe the developmente of the audiences and witness the work of every one, the Judge, the Prosecutor, the Defendansor and all others. The presence of the people provoques all the involved must do their work as it is commended

The publicity is the general rule in the criminal procedure, however there are exceptions provided by the Article 64 of the National Code of Criminal Procedures and are the following:

I. When some of the parts have a personal risk
II. When the national security is on risk.
III. When an official, commercial or industrial secret is on risk
IV. When the Judge consider not to be public
V. When the rights of boys or girls are on risk

b) Principle of contradiction

The principle of contradiction supposes the possibility to confront the proves from the other, which means that no body may be punished without being listened on trial (ANDRADE, 2007).

The objectives of the principle of contradiction are:

1. Assure the quality of the information that must be tested
2. To give the other the opportunity to be in charge of the prove.
3. Give the Judge the trust when he or she solve the trial. (GONZÁLEZ, 2011).

The 6th article of the National Code of Criminal Procedures provides the principle of contradiction and refers: The parties may hear, challenge or confront the means of evidence, as well as oppose the petitions and allegations of the other party, except as provided in this Code.

c) Principio de Concentración

El principio de concentración tiene como propósito la celeridad procesal al ser su principal objetivo que las pruebas, el debate y la resolución se emitan en un solo acto.

Este principio está previsto en el artículo 20 constitucional señalando que el juicio se realice en presencia de los que intervienen en él de manera sucesiva y sin perder la continuidad.

El artículo 8º del Código Nacional de Procedimientos Penales menciona que las audiencias se desarrollarán preferentemente en un mismo día o en días consecutivos hasta su conclusión.

d) Principio de Continuidad

La finalidad del principio de continuidad es que el debate no tenga interrupciones, es decir, las audiencias deben ser de manera constante pudiéndose prolongar en sesiones sucesivas hasta su conclusión.

El establecer la continuidad como un principio del sistema de justicia penal fue con la intención de atender el reclamo social respecto a tener una justicia pronta y expedita.

El principio de continuidad está previsto en el artículo 7º del Código Nacional de Procedimientos Penales, que refiere: Las audiencias se llevarán a cabo de forma continua, sucesiva y secuencial.

e) Principio de Inmediación

Bajo las reglas de la inmediación nadie mas interviene entre quien ofrece la información y quien la recibe, por lo tanto hay un contacto directo entre las partes. Requiere que durante las audiencias, todos los que participan estén presentes.

El principio de inmediación está contemplado en el artículo 9º del Código Nacional de Procedimientos Penales y menciona que: toda audiencia se desarrollará íntegramente en presencia del Órgano Jurisdiccional, así como de las partes que deban intervenir en la misma.

2.2 Principios procesales

Los llamados, por algunos, principios procesales son: principio de igualdad ante la ley, principio de igualdad entre las partes, principio de juicio previo y debido proceso, principio de presunción de inocencia y principio de prohibición de doble enjuiciamiento.

Estos principios, en conjunto con los principios constitucionales, otorgan las bases que deben regir en todos los procesos dentro del sistema de justicia penal mexicano.

a) Principio de igualdad ante la ley

Está previsto en el artículo 10 del Código Nacional de Procedimientos Penales y refiere que todas las personas que intervengan en el procedimiento penal recibirán el mismo trato y tendrán las mismas oportunidades para sostener la acusación o la defensa. No se admitirá discriminación motivada por origen étnico o nacional, género, edad, discapacidad, condición social, condición de salud, religión, opinión, preferencia sexual, estado civil o cualquier otra que atente contra la dignidad humana y tenga por objeto anular o menoscabar los derechos y las libertades de las personas.

Las autoridades velarán porque las personas en las condiciones o circunstancias señaladas, sean atendidas a fin de garantizar la igualdad sobre la base de la equidad en el ejercicio de sus derechos. En el caso de las personas con discapacidad, deberán preverse ajustes razonables al procedimiento cuando se requiera.

b) Principio de igualdad entre las partes

La igualdad entre las partes está contemplada en el artículo 11 del Código Nacional de Procedimientos Penales que menciona que a las partes se les garantiza, en condiciones de igualdad, el pleno e irrestricto ejercicio de los derechos previstos en la Constitución y los Tratados internacionales.

c) Principio de juicio previo y debido proceso

Este principio está correlacionado con la garantía de los Derechos Humanos para llevar un proceso que transcurra por todas y cada una de sus etapas y permita al imputado defenderse, pero también garantiza a la víctima que ninguna etapa procesal se omita y menos aun, que le provoque tal omisión un daño con mayores efectos.

El principio de juicio previo y debido proceso está contemplado por el artículo 12 del Código Nacional de Procedimientos Penales y refiere que ninguna persona podrá ser condenada a una pena ni sometida a una medida de seguridad, si no es en virtud de resolución dictada por un Órgano Jurisdiccional previamente establecido, conforme a leyes expedidas con anterioridad al hecho, en un proceso sustanciado de manera imparcial y con apego estricto a los Derechos Humanos.

d) Principio de presunción de inocencia

Constituye otro de los principios que nunca deben dejar de aplicarse, pues de lo contrario se estaría ante una rotunda violación a los derechos humanos. Este principio nos deja claro que nadie puede ser juzgado si no existieron datos suficientes que demostraran lo contrario.

Al agente del Ministerio Público le corresponde aportar todos los elementos posibles, mediante los cuales se desvanezca la inocencia del imputado, sin que ello implique una violación a sus Derechos Humanos.

El artículo 13 del Código Nacional de Procedimientos Penales es el que da vida a la presunción de inocencia refiriendo que toda persona debe presumirse inocente y así debe ser tratada en todas las etapas del procedimiento, mientras no se declare su responsabilidad penal, a través de una sentencia dictada por el Órgano Jurisdiccional.

e) Principio de prohibición de doble enjuiciamiento

Este principio está previsto en el artículo 14 del Código Nacional de Procedimientos Penales estableciendo que toda persona condenada, absuelta o cuyo proceso haya sido sobreseído, no podrá ser sometida a otro proceso penal por los mismos hechos.

Los citados principios, tanto constitucionales como procesales, tienen aplicación en cada uno de los actos y etapas que contiene el proceso penal.

3. Algunos elementos del proceso penal

En este trabajo no es posible abordar todas las reglas del proceso penal, por lo que nos centraremos en los elementos de mayor relevancia y que permitan un acercamiento a la forma en como se lleva cabo.

El proceso penal está dividido en tres grandes etapas: 1) etapa de investigación o inicial, dividida en dos: investigación inicial e investigación complementaria; 2) etapa intermedia, la cual comprende desde la formulación de acusación hasta el auto de apertura del juicio; y, 3) etapa de juicio, que comprende desde que se recibe el auto de apertura a juicio hasta la sentencia emitida por el Tribunal de enjuiciamiento.

Cabe referir que una novedad mas en este sistema de justicia penal es la actuación de dos tipos de jueces, el primer tipo denominado Juez de Control que atiende las dos primeras etapas y el otro tipo, denominado Tribunal de Enjuiciamiento compuesto por tres jueces distintos al Juez de Control y cuya función es resolver la tercera etapa.

3.1 Etapa de investigación

Esta etapa inicia a partir de que el Ministerio Público tiene conocimiento de la existencia de un hecho delictuoso y concluye con la formulación de imputación. El Ministerio Público debe iniciar la investigación de manera inmediata, eficiente, exhaustiva, profesional e imparcial, libre de estereotipos y discriminación, orientada a explorar todas las líneas de investigación posibles que permitan allegarse de datos para el esclarecimiento del hecho delictivo, así como la identificación de quien lo cometió o participó en su comisión.

De acuerdo al Código Nacional de Procedimientos Penales, la investigación de un delito podrá iniciarse por denuncia o por la comunicación que haga cualquier persona cuando se trata de delitos graves.

La etapa de investigación se divide en dos partes, investigación inicial e investigación complementaria; la primera inicia con la presentación de la denuncia y concluye cuando el imputado queda a disposición del juez de control para que se le formule imputación; la segunda parte, la investigación complementaria comprende desde la formulación de imputación y termina una vez que se haya cerrado la investigación.

3.1.1 Audiencia inicial

En la audiencia inicial se informarán al imputado sus derechos constitucionales y legales, se realizará el control de legalidad de la detención, se formulará la imputación, se resolverá sobre la solicitud de vinculación a proceso y se definirá el plazo para el cierre de la investigación.

Si el imputado está detenido se procederá a llevar a cabo la audiencia inicial y en ésta se determinará la legalidad o ilegalidad de la detención; si se considera que la detención es legal, el Ministerio Público procederá a formular la imputación, lo que significa que hará del conocimiento del imputado el hecho que se le atribuye, la calificación jurídica del mismo, la fecha, el lugar, el modo en que se cometió, la forma en la que intervino en el hecho y el nombre de su acusador; acto seguido se le da el derecho al imputado para declarar o abstenerse de ello.

Después de que el imputado haya declarado o haya manifestado su deseo de no hacerlo, el Ministerio Público solicitará al juez, la vinculación del imputado a proceso. El Juez podrá dictar auto de vinculación o de no vinculación a proceso, en este caso se ordenará la libertad inmediata del imputado.

3.2 Etapa intermedia

El objeto de la etapa intermedia es el ofrecimiento y admisión de los medios de prueba, así como la depuración de los hechos controvertidos que serán materia del juicio. Esta etapa se compone de dos fases, la primera es escrita e inicia con el escrito de acusación que formule el Ministerio Público y comprenderá todos los actos previos a la celebración de la audiencia intermedia. La segunda fase es oral y da inicio con la audiencia intermedia y termina con el auto de apertura a juicio.

La acusación solo puede ser por los hechos y las personas señaladas en el auto de vinculación a proceso, aunque se haga una clasificación distinta del delito. Una vez presentada la acusación, será notificada a las partes al día siguiente, así como la fecha en la que se desahogará la audiencia intermedia.

Las partes están obligadas a darse a conocer entre ellas en el proceso, los medios de prueba que pretendan ofrecer en la audiencia de juicio.

La audiencia intermedia será presidida por el juez de control; en su inicio, el Ministerio Público realizará una exposición resumida de su acusación, seguida de las exposiciones de la víctima y el acusado por sí o por conducto de su defensor; el juez se cerciorará de que las partes se han hecho de su conocimiento sus pruebas. Antes de finalizar la audiencia, el juez dictará el auto de apertura de juicio y lo hará llegar al Tribunal de enjuiciamiento.

3.3 Etapa de juicio

El juicio es la etapa de decisión de las cuestiones esenciales del proceso. Se realizará sobre la base de la acusación en el que se deberá asegurar la efectiva vigencia de los principios. Está a cargo del Tribunal de enjuiciamiento.

El día y la hora que se fijen para la celebración de la audiencia de juicio, quien la presida, verificará que los demás jueces, las partes, los testigos, los peritos o intérpretes que deban participar en el debate, se encuentren presentes, así como la existencia de las cosas que se deban exhibir, una vez verificado, declarará abierta la audiencia.

Una vez abierto el debate, el juzgador que presida la audiencia de juicio concederá la palabra al Ministerio Público para que exponga de manera concreta y oral la acusación y una descripción sumaria de las pruebas que utilizará. Acto seguido se concede el uso de la voz al asesor jurídico

de la víctima para los mismos efectos. Posteriormente se ofrecerá la palabra al defensor, quien podrá expresar lo que al interés del imputado convenga en forma concreta y oral.

Cada parte determinará el orden en que desahogará sus medios de prueba. Primero se recibirán los medios de prueba admitidos al Ministerio Público, posteriormente los de la víctima y finalmente los de la defensa.

Concluido el desahogo de las pruebas, el juzgador que preside la audiencia de juicio otorgará sucesivamente la palabra al Ministerio Público, al asesor jurídico de la víctima y al defensor, para que expongan sus alegatos de clausura. Acto seguido, se otorgará al Ministerio Público y al Defensor la posibilidad de replicar y duplicar. La réplica solo podrá referirse a lo expresado por el Defensor en su alegato de clausura y la dúplica a lo expresado por el Ministerio Público o a la víctima en la réplica. Se otorga la palabra por último al acusado y al final se declarará cerrado el debate.

Inmediatamente después de concluido el debate, el Tribunal de enjuiciamiento ordenará un receso para deliberar en forma privada, continua y aislada, hasta emitir el fallo correspondiente. La deliberación no podrá exceder de veinticuatro horas ni suspenderse, salvo en caso de enfermedad grave del juez o miembro del Tribunal.

Una vez concluida la deliberación, el Tribunal de enjuiciamiento se hará presente en la sala de audiencias, después de ser convocadas las partes, con el propósito de que el juez relator comunique el fallo respectivo. El Tribunal de enjuiciamiento dará lectura y explicará la sentencia en audiencia pública.

Una vez emitida y expuesta, la sentencia será redactada por uno de los integrantes del Tribunal de enjuiciamiento; la sentencia puede ser absolutoria o condenatoria.

En la sentencia absolutoria, el Tribunal de enjuiciamiento determinará la causa de exclusión del delito, pudiendo tomar como referencia las causas de atipicidad, de justificación o inculpabilidad.

Por su parte la sentencia condenatoria fijará las penas, cuando alguna de éstas sea la prisión, debe expresar con toda precisión el día desde el cual empezará a contarse y fijará el tiempo de detención. El Tribunal de enjuiciamiento condenará a la reparación del daño.

4. CONCLUSIONES

Existe un sector amplio de personas que se oponen al sistema de justicia penal acusatorio señalando que con éste, los delincuentes han encontrado vías fáciles para no ser juzgados; que la violencia e inseguridad se han incrementado; que la corrupción y la impunidad siguen presentes; que el sistema de justicia penal acusatorio no funciona; éstas y algunas otras, son las manifestaciones de rechazo a este sistema de justicia penal.

Sin embargo, se debe reflexionar respecto las realidades que se viven derivado de la entrada en vigor de este sistema, la primera de ellas es el tiempo de vigencia, puesto que solo tiene poco mas de dos años de haber iniciado en todo el país.

En cuanto a que los delincuentes han encontrado vías fáciles para no ser juzgados es un error de apreciación, ya que con este sistema, por un lado, se pretende la aportación de pruebas verídicas que permitan llegar a la imposición de sanciones si ese fuera el único camino que se persigue; por otro lado, socialmente, debemos aceptar que ahora existen mecanismos mediante los cuales no es necesario que se impongan sanciones de privación de la libertad, sino

que se repare íntegramente el daño causado a la víctima del delito y que el responsable reciba alguna sanción distinta a la prisión.

El incremento de la violencia y la inseguridad depende de elementos multifactoriales que deben ser atendidos, pero no a partir de las reglas procesales, sino de políticas públicas que busquen la solución a las conductas violentas y de inseguridad que se padecen.

Por lo que ve a la corrupción e impunidad, son dos males que han aquejado a nuestro país desde tiempo atrás, no surgen en este sistema de justicia penal, sino al contrario, los principios y las reglas procesales; como se puede observar, contemplan los mecanismos necesarios para la búsqueda de la disminución de la corrupción e impunidad.

El sistema de justicia penal está dotado de figuras jurídicas novedosas para México, con las cuales se pretende que la sociedad tenga un mayor acceso a la justicia y que se erradiquen la corrupción e impunidad, una de ellas es precisamente la posibilidad de cualquier ciudadano acuda a las audiencias y sea testigo de lo que ahí sucede, que sea quien exija una práctica legal por parte de los responsables de la impartición de justicia.

También, la posibilidad de que los medios de comunicación estén presentes en el desahogo de las audiencias, exige actuaciones ajustadas plenamente al derecho, a la ética, al profesionalismo, lo que en su conjunto tiene la tendencia de erradicar la corrupción e impunidad.

De esta manera, se considera que la ruta del sistema de justicia penal de corte acusatorio es la mas conveniente para lograr que la sociedad tenga un verdadero acceso a la justicia con un total respeto a los derechos humanos.

BIBLIOGRAFÍA

- ANDRADE CASTRO, Jason A. y CÓRDOBA ANGULO, Miguel F. “Estructura básica del sistema procesal colombiano”. Estudios sobre el sistema penal acusatorio, núm 3, Universidad del Externado de Colombia, 2007.
- GONZÁLEZ OBREGÓN, Diana Cristal. Manual práctico del juicio oral, 3ª ed., México: Tirant lo Blanch
- Código Nacional de Procedimientos Penales.
- Constitución Política de los Estados Unidos Mexicanos.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 395-416
ISSN 1512-5505

RE-CONSIDERING CONTEMPORARY STATE CRIMINALITY: A THEORETICAL FRAMEWORK OF STATE CRIMES AGAINST DEMOCRACY (SCADs)

Alexandra M. UIBARIU

Abstract

With an acknowledgement that state criminality extends beyond the actions of authoritarian regimes in feeble political systems, this paper calls for a re-consideration of political deviance under an inter-disciplinary framework which allows for a theorisation of State Crimes Against Democracy (SCADs). Formulated on the basis of the academic thought stemming from public administration, political science and criminology, the definition and (budding) theory of SCADs lays the case for a review of the critical criminological agenda to consider the harmful (and often criminal) actions and inactions of democratic governments in their efforts to undermine popular sovereignty. SCADs are constructed as crimes of omission or commission which encompass electoral manipulation and incapacitation, political unaccountability, and breaches of human, civil and political rights, and which often result in the destabilisation of the rule of law and economic development, the undermining of broader social norms, moral values and public trust in democratic institutions, and the promotion of various other types of criminality.

Keywords:

state crime, state crimes against democracy, critical criminology, theoretical criminology

INTRODUCTION

It has long been recognised that a decisive feature of the state is its monopoly on the means of (il)legitimate violence within any given territory (Monaghan and Prideaux, 2016). All states, be they liberal or autocratic, are not only able to secure legitimacy through a process of hegemony (Gramsci, 1971), whereby beliefs that support the *status quo* are instilled in the citizenry, so that they transcend as matters of consensus and common sense (Thorne and Kouzmin, 2013), but are also equipped for the use of force, and claim the "legitimate right to perform acts that if anyone else did them would constitute violence and extortion" (Green and Ward, 2004, p. 3). *In extremis*, one could also argue that, should depriving people unjustly of their property, land,

way of life, or life itself be regarded as criminal, then political crimes lay at the formation of virtually any state, and thus the very existence of such socio-political structures can be regarded as a crime (against humanity) (Krimerman and Perry, 1986). Essential functions of the state, such as the military and taxation, may also be considered felonious under most definitions of political delinquency (Martin, 2000).

Over the centuries, the most horrific crimes – in terms of physical harm to human beings, abuses of human rights, political and civil liberties, and economic loss – have been committed by (albeit rarely attributed to) states (Friedrichs, 2000). Nevertheless, it is the state that is a leading force in the social construction of crime (Monaghan and Prideaux, 2016), owns the monopoly over the interpretation and enforcement of society's legal requirements and prohibitions (deHaven-Smith, 2013), and engages in the production of apocryphal knowledges whose core theories and research 'findings' validate the vision of social reality favoured by political-economic elites (Michalowski, Chambliss and Kramer, 2010). *De facto*, the mythos at the basis of any given political system inculcates a generous degree of civic trust in government representatives, with the general public being socialised to think that popular control of government and the rule of law are effectively secured by periodic competitive elections and institutional checks and balances *alone* (deHaven-Smith, 2011; Turk, 1982; Warren, 1999). Beyond the totalitarian state, democratic citizens are taught that elected representation restrains the corrupting influence of governmental power by pitting the powerful against one another and by periodically subjecting them to electoral evaluation; and that through selection and socialisation, the decision-making procedures and electoral mechanisms of representative government generally produce a class of officials who are largely honest, law-abiding and devoted to public service (deHaven-Smith, 2011).

When instances of political criminality in contemporary democracies are exposed, they are often officially labelled as unreasonable anti-government allegations, thus weakening popular vigilance against abuses of power, cover-ups and other genuine threats to democratic governance (deHaven-Smith and Witt, 2012). The subsequent tendency to think of democratic governments in conventional terms also infiltrates academia, where the vast majority of those who pursue the study of criminology and criminal justice professionally share a similar sense of indifference, discomfort, or outright hostility when presented with the notion of 'state crime' (Barak, 1990; 1991; Friedrichs, 1998a; Manwell, 2010; Tombs and Whyte, 2003; Turk, 1982).

Based on an acknowledgement that threats to the functioning and well-being of a state and its inhabitants often come from within the internal apparatus of the state *per se* – as represented by its governing institutions and elected political agents – rather than from external, pre-nominated, criminal groups and individuals, this paper draws upon an inter-disciplinary (re)consideration of issues of governance and security and lays a theoretical framework of State Crimes Against Democracy (SCADs). The author reasons that state actions which threaten the quality of democracy amount to state crimes, and contends that regardless of the contemporary academic trends and the pertinence of their claims to relevance, state criminality does not resume to a constrained category of particularly vicious actions committed in times of conflict, by those who happen to fit the standard imposed by the Cold War, where appropriate actors are certain pre-demonised states, and offences are not regarded as such unless they constitute abuses of human rights. Rather, state criminality (against democracy) is often disguised in longstanding processes and practices associated with governance, which are often – and perhaps, wrongly – understood and accepted as 'politics as usual'. In making a case for the consideration of SCADs,

this paper will progress by first highlighting the traditional academic reluctance in addressing state criminality, along with an overview of the products of the scholastic inquiry to date, and then move towards a conceptualisation of the concerns inherent to contemporary democracies and a presentation of the theoretical model of crimes against democracy.

DIS-CONSIDERING STATE CRIMINALITY

Grounded in the critical discourse of power and knowledge, the author argues that the latter is only approved in any one society for as long as it is produced by those elite groups that have been sanctioned as proprietors of shared meanings and understandings, and who maintain their legitimacy by undermining alternative knowledges (Foucault, 1977; Foucault and Gordon, 1980; Freire, 1970; Kincheloe, 2005; Kincheloe and McLaren, 1994; 2005; Kincheloe, McLaren and Steinberg, 2011). Similarly, the language of policy and law-making, and the knowledge of crime do not simply reflect 'real' legal or policy issues and problems, but rather produce the issues with which policy and law-makers ought to deal with – and, implicitly, refute those that should not be dealt with (Weldes, 1998). The aforementioned translate in academia, where the study of state crime is not only largely rendered as negligible, but also fraught with both pragmatic and empirical hindrances (Friedrichs, 1998a; 1998b; Ross et al., 1999).

State crime is deemed to be neither an important, nor an appropriate focus for (under-)graduate education in criminology, and few of those who have pursued such topics appear to have received significant exposure or encouragement, much to the point where one could quite easily observe that "a focus on state crime cannot be recommended as a particularly efficient approach to academic and professional success" (Friedrichs, 1998a, pp. xiv-xv). Many scholars have publicly acknowledged being faced with diverse barriers when researching crimes of the powerful (see, for example, Barak, 1990; 1991; Friedrichs, 1998b; Ross, 1995a; 1998; Rothe and Kauzlarich, 2016), ranging from obstacles in securing funding from mainstream sources and obtaining ethical approval, to difficulties in getting material published, often because of the very resistance stemming from state agencies, and from various senior academics cooperating with the aforementioned institutions (Ross et al., 1999).

As with all other state institutions, contemporary educational systems reproduce the kakistocratic social order, and reinforce what Ross (2000, p. 17) refers to as the "pedagogy of the oppressed". Politics, international relations and criminology scholars are unlikely to be encouraged to address harmful actions that fall outside the narrow range of wrongdoings condemned by the state itself, and even less so when the wrongdoings are committed by the states themselves (Kramer, Michalowski and Chambliss, 2010; Michalowski, Chambliss and Kramer, 2010).

Predictably, the key texts with which new scholars are presented in their first year of their higher education studies in criminology are inevitably bound to reflect a curriculum aimed at designing successful graduates who will prove their societal worth by becoming police, prison and probation officers determined to reinforce the existing order of state control. The trend extends to the vast arena of criminological outputs, where the author observed that out of 158 peer-reviewed academic journals, only one is centred around disseminating research on state criminality alone, and some two others publish articles on the matter regularly (see Table 1 below). In Witt's (2010, p. 935) words, then young, promising scholars learn quickly what can and cannot be authored and submitted for publication… Sterilized intellectual inquiry and emascu-

lated moral ingenuity thus sprawl across countless pages of academic screed, whose deals and hollow incantations parrot… torrents of fatuous and/or circular claims of truth and relevance.

Humanities and Social Sciences Journals	Total Number	Number of Journals Relevant to the Study of State Crime
Criminology	53	1
Human Rights	10	0
Political Science	204	0
Sociology	214	0
Multi-disciplinary	145	0
	626	1 (0.15%)

Table 1: Humanities and Social Sciences Journals

Unsurprisingly perhaps, the rate of theoretical progress is remarkably slow, as well as limited, within academia (Kauzlarich, Matthews and Miller, 2001). Whilst state crimes have come – with some delay – to the attention of criminology, political science, international relations and public administration scholars, the concept does not make up for a significant discipline topic in any academic field (Barak, 1990; 1991; Doig, 2011; Friedrichs, 1998a; 1998b; 2000; Hinson, 2013; Witt, 2010). Much of the literature carries the name of USA academics, disregards democratic states, is centered on either the re-analysis of a few popular examples of state crimes (Ross and Rothe, 2008), or on territories which could hardly be described as functioning states, where such crimes are the norm, rather than the exception, and blatantly ignores abuses of political rights (Hinson, 2013).

In the meantime, civil society members participating in Uibariu's (2017) study had observed that contemporary scholarly work is limited to engagement that is of an "esoteric and elitist" (Ruggiero, 2012, p. 157) kind, characterised by a use of language that reifies and reproduces dominant constructions of crime and justice; a constant failure to produce work which is pragmatically relevant to individuals and groups who are most harmed by state violence; and the use of approaches that limit the participation of extra-academic publics (see also Piché, 2015). Public criminology habitually fails its *raison d'être* by privileging interactions with the powerful in the foolish hope that the dissemination of knowledge to these audiences will somehow enhance the lives of those affected by state repression.

As of today, we appear to be presented with the constant reminder that, since its inception, the discipline of criminology has served as an extension of state power itself (Michalowski, Chambliss and Kramer, 2010), and that, undoubtedly, most criminological knowledge is, just like all state-approved knowledge, merely an artefact of power (Foucault, 1977). The *status quo* presents us with a powerful *quid pro quo*, strategically summarised by Witt (2010, p. 929) as a context whereby policy makers pretend not to act, academics pretend not to see or hear, except at some safe temporal distance with always clean hands. Moral transgressions in high public process are meanwhile neatly circumscribed as 'anomalies'… that prove the rule.

Much in accordance with Kramer (2016), the author contends that criminologists have a moral responsibility to act as public intellectuals by speaking in the 'prophetic voice' concerning state

crimes and their victims, and act in the political arena in a systematic attempt to control and prevent such harms. State crime scholars should engage in sustained efforts to participate in "social and/or legal justice at individual, organizational, and/or policy levels, which goes beyond typical research, teaching, and service" (Belknap, 2015, p. 5; see also Carlen, 2011; Currie, 2007; Piché, 2015; Rock, 2014; Ruggiero, 2012), work with progressive movements in their efforts to challenge the endemic hegemonic cultures and change policies related to these harms, and deploy sustained efforts for the strengthening of formal international controls over state crimes (Kramer, 2016). It is crucial that public criminologists re-direct their efforts towards evaluating and reframing cultural images of the criminal, reconsidering rulemaking, and evaluating social interventions (Clear, 2010; Rock, 2014; Uggen and Inderbitzin, 2006) for the purposes of enabling authentic popular control of government, and impede and punish administrative abuses of power.

In the meantime, however, it is reasonable to argue that Barak's (1990, p.33) depiction of traditional criminological scholarship does not only endure some three decades later, but perhaps extends beyond the discipline of criminology, where the journey towards the development of a discipline of state criminality will not be accomplished without resistance from both inside and outside the boundaries of academic criminology… [and] there [still] are a number of disciplinary biases and… political obstacles to overcome.

In turn, the skewed power relationships between the higher education system and the administrative apparatus in any one state mean that academia often concedes its authority in creating knowledge to the government, in exchange for some sort of capital, be it (the promise of) research funding or recognition.

CONCEPTUALISING STATE CRIMINALITY

Nevertheless, a number of scholars have approached the study of state crime, whose conceptual work reference a vast array of 'appropriate' actors, victims, motives and forms of illegal conducts. It appears that the ambiguities and debates surrounding the concept of state crime merely manage to emphasise the social, political and cultural constructions of power archetypal to any one society on the one hand, and the degree of relative academic subjugation to authority on the other. All attempts to conceptualise state crime tend to oscillate between legalistic, humanistic and moralistic, and political and popular approaches (Friedrichs, 2000; Michalowski, 1985; 2010), much to the point where the resulting academic thought is unable to transcend its own disciplinary boundaries (Uibariu, 2017).

Not only is the term 'state crime' employed differently within the same discipline, as well as across various fields of study, but many scholars are correspondingly eager to interchangeably refer to the phenomenon as 'governmental crime' (see, for example, Friedrichs, 1998a; 1998b; 2000), 'political crime' (see, for example, Barak, 1990; 1991), 'state-political crime' (see, for example, Ross, 1995; 2000; 2003), and 'state-organisational deviance' (see, for example, Green and Ward, 2004). Whilst the vast majority of authors consider state crime to be committed variously by public officials, states or governments, there is no agreement as to where criminality takes place (from deviant state agencies and organisations to individual office-holders), why it takes places (from state interest to individual self-interest), what it involves (from breaches of human rights to corruption), the process through which it happens (from initiated to facilitated, from commission to omission), what its consequences ought to be (from a formal breach

of criminal law to causing harm), or who are the 'appropriate' victims (Uibariu, 2017). 'State crime' is, thus, a concept fraught with difficulties on a number of bases.

It is crucial that one commences the conceptualisation of state crime by delineating the particularities of the 'appropriate' actors. The discipline must recognise that the use of the vaguely defined term 'state' implies a common motive across all state agencies and institutions, an implicit failure to recognise that the state rarely acts as a unitary force, and a considerable degree of ignorance towards the existence of multiple layers of responsibilities, roles and perspectives embedded within modern polities (Uibariu, 2017). States are geographically-delineated juridical abstractions, which, while possessing some sort of an international legal personality, are incapable of acting, and thus incapable of committing crimes (Dixon, Spehr and Burke, 2013; Friedrichs, 2000). An effective demarcation of state crimes requires, thus, an assessment of the range of actors that may, on the basis of their political status, act on their behalf, and who may act in ways which are consistent with abuses of power, and are in violation of either codified international law, customary international law, domestic law (Doig, 2011), or broader social and moral values (Friedrichs, 2000; Hillyard and Tombs, 2007; Matthews and Kauzlarich, 2007).

The implications of a generalised lack of consensus in defining state crime transcend academia, and deleteriously impact on the (possibility for) action of civil society groups against political criminality (Uibariu, 2017). In their attempts to use academic work as the basis for encouraging good democratic governance, practitioners have highlighted that the differential employment and theorising of the term 'state crime' across, as well as within, disciplines leads to a situation whereby relevant research outputs are difficult to identify, and – when successfully located – problematic to analyse (Uibariu, 2017). The added lack of cross-disciplinary research and strict adherence to the associated theoretical inclinations often result in an inevitable failure to acknowledge the complexity of the term, articulate the concept comprehensively, and respond to the full range of challenges posed by state crime (Uibariu, 2017). For the time being, regardless of the evidence of malpractice both at home and abroad, it is apparent that, with very few exceptions, academia turns a blind eye to the crimes committed by powerful states, for as long as (unsubstantiated) claims to sovereignty and (democratic) legitimacy are presented as categorical justifications.

CONCEPTUALISING DEMOCRACY: THE CASE FOR A CONSIDERATION OF SCADS

Whilst the foundations of what we commonly refer to as 'democracy' had been laid some twenty centuries ago, and subjected to public, political and philosophical debate for just as long, the vast body of knowledge accumulated throughout the past two thousand years merely suggests that all previous attempts to delineate, proscribe and endorse a democratic model of governance are bound to diverge from whatever utopic archetype may be regarded as preferable at any one point in time. Contemporary democracy can be conceptualised on three discrete linguistic spectrums as a *value,* a *form of governance*, and an *ensemble of institutions* operating within a geographically-delineated politically sovereign territory, as follows:

i. As a value, democracy ought to be based upon human dignity, and foster social, political and economic equality, respect for human rights and the rule of law, and – some degree of – liberty (see Bell, 1997).

ii. As a form of governance, democracy entails a competitive multi-party system, whereby state representatives are elected in periodic, free and fair elections, with real consequences, and whereby those in power are responsible for the well-being of, and held accountable, by the citizenry (Bossaert and Demmke 2005; Bowman, Berman and West, 2001; Cooper 1991).

iii. Ultimately, as an ensemble of institutions, democracy requires the existence of three separate entities: *the state*, defined as geographically delineated juridical abstraction, represented by the range of actors who, on the basis of their political status, have the legal authority to act on their behalf; *the civil society,* defined as the public space between the state, the market and the ordinary household, in which people can deliberate and tackle action; and *the market,* or the economic realm whereby commercial dealings take place. Ideally, the aforementioned cooperate for, and operate within a socio-political order that is delineated by legal and moral norms which remain open to debate[1] (Cowell, Downe, and Morgan, 2011; Knight, 2007; Lewis 1991; Lewis and Gilman, 2005; Van Doeveren, 2011).

Democracies ought, in principle, to differentiate themselves from all other political regimes by allowing for individuals – acting alone or collectively – to re-configure their relationships with the state, express, militate for, and negotiate their interests, and control those in authority outside organised electoral processes. In turn, governments are expected to respond to pressures for change in a way that is congruent with the aforementioned democratic principles, and most likely to achieve the greatest good, for the greater number of people, by adjusting all realms of social life, including the market and the public sphere (see also Gutmann and Thompson, 1998; Schmitter and Karl, 1991). Whilst the epitome of the democracy legitimised by 'shared beliefs' which aims to achieve the 'public good' through politicians elected by majority rule may transcend as a matter of common sense, one must acknowledge that neither what is 'shared' and 'public', nor what is 'good' can be conceptualised in an objective manner. Shared beliefs are not set in stone, and their understanding as collective norms will fluctuate between social groups and classes, as well as over time (Altemeyer, 1996; Arblaster, 2002; Axtmann, 2007; Dahl, 1971; Giraudy, 2015; Kaplan, 2015; Lasswell, 1977; Roth, 2009; Schaar, 1981; Young, 2007; Zakaria, 1997). In turn, the degree to which both citizens and their representatives adhere to social norms and regulations will vary, as will their individual prioritisation of such principles (Gutmann and Thompson, 1998). Whilst citizens will (dis)agree on the substantive goals of political action, rulers will respond with varied degrees of commitment to people's preferences and will weight these differently in accordance with the origins of the group who has expressed them (Schmitter and Karl, 1991).

Conceptually, then, democracies are not necessarily more efficient administratively than other forms of government; they are unlikely to appear more orderly, consensual, stable, or governable than the autocracies they replace; and they may not immediately bring social or political peace and the end of ideology (Uibariu, 2017). Nevertheless, unlike authoritarian regimes, "democracies have the capacity to modify their rules and institutions consensually in response to changing circumstances" (Schmitter and Karl, 1991, p. 87), and thus may – conceptually still – stand a better chance of producing the aforementioned goods than autocracies do.

---

[1] And are amended when they no longer effectively serve the achievement of fundamental democratic principles.

Whilst established democracies are portrayed as having the most potential to impede political abuses of power, and provide a pathway towards achieving the 'common good' the *status quo* presents us with the twelfth consecutive year of qualitative decline in governmental transparency, responsiveness and accountability (Freedom House, 2018; see Figure 1), whereby the end of 2018 has witnessed some 71 countries suffering net regressions in political and civil rights as a result of political leaders' pursuits of individualistic concerns (Freedom House, 2019).

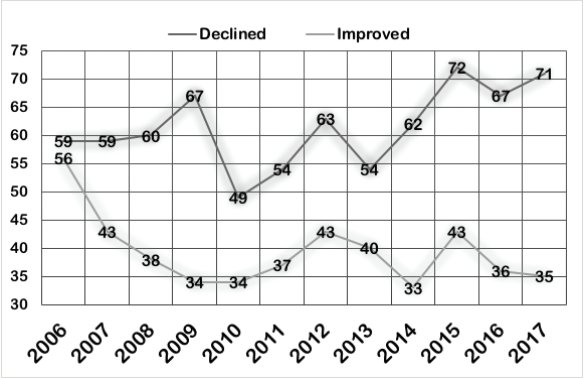


Figure 1: Democratic Liberties (adapted from Freedom House, 2018)

Hardly surprisingly, public trust and confidence in government are at an all-time low (Menzel, 2015), and so is citizen satisfaction with the fruits of democracy (see Figure 2 below). In the West, democratic governments' limitations in responding to their publics' economic and political concerns have brought about a situation whereby "large numbers of people now reject ritualistic elections that bring to power scarcely distinguishable political parties" (Ayers and Saad-Filho, 2015, p. 599) which continue to fail the citizenry and sacrifice the common good to powerful private interests. Fishkin's commentary appears to apply today, with voters continuing to exhibit a "clear sense of disconnection from the political process, suffering alienation, disengagement or complacency", whereby public officials are largely selected in the absence of informed political debate, "more or less the way we choose detergents" (Fishkin, 1991, p. 3).

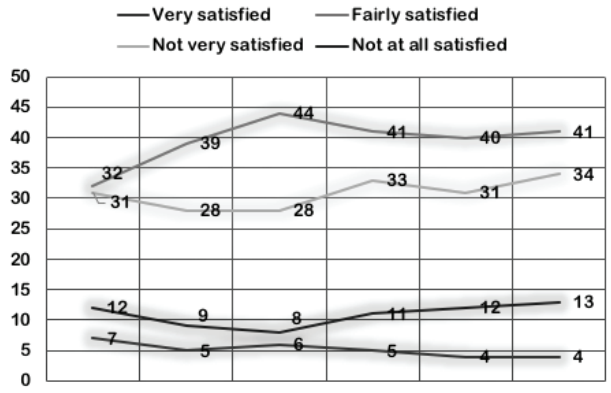


Figure 2: Public Satisfaction with Democracy in the EU and Turkey (adapted from GESIS, 2017)

The *status quo* presents us with a curious contradiction, where Europeans subsequently – claim to – believe that engagement in participatory democracy is crucial, yet some 42% declare to have never attempted to influence political decision-making, and 34% have only gone as far as signing a petition (European Economic and Social Council, 2013). Whereas citizen disillusionment with the fruits of democracy is, undoubtedly, the result of political decision-making and action that is not only irrelevant for the common good, but habitually counterproductive and harmful, "the actions of the apathetic do not escape politics; they merely leave things as they are" (Held, 2006, p. 269). Democracy requires that enough members of society are committed to the project of popular sovereignty to hold those who would undermine it to account (Gowder, 2015), yet lacking the collective vow to the democratic ideal, individuals are bound to settle for whatever constellation of miseries they find themselves in (Turk, 1982).

In the context of a " culture of passivity, leading to an obedient and docile citizenry, is not consistent with the healthy" (Economist Intelligence Unit, 2016, p. 12), contemporary democratic governments do not only habitually ignore their duties of protecting and promoting democratic principles, but also undermine popular preferences in their struggle to integrate within a competitive global economy, whereby the interests of increasingly powerful state contractors are favoured over those of the wider community. The neoliberal economic model, which has been often imposed on the world with little democratic consent, has led to a further weakening of contemporary democracies. The consequence is a vision of an economically driven polity that privileges a (apolitical) political culture where the economic field of power becomes the placeholder of power and seeks to organize social, cultural, and political formations according to its imperatives (Vasquez-Arroyo, 2008, p. 129).

Neoliberalism casts both the political and social spheres as appropriately organised by a market rationality, and fittingly dominated by market concerns (Brown, 2006), whereby the state does not only facilitate the economy, but constructs itself in market terms, develops policies and promulgates a political culture whereby citizens are fashioned primarily – and at times, solely – as consumers whose moral autonomy is measured by their capacity for self-care (Chomsky, 2010; Crouch, 2004; Ghosh, 2012; Kulish, 2011). The new market democracy presents us with state agencies which are increasingly concerned with the integration within a global economy and the acquisition of global capital, in favour of the protection of citizens; with non-state actors which enact greater powers of discipline and governance on the other hand; and with citizens whose commitment and efforts are directed at the acquisitive self, rather than some ethical conception of the communal good (Guarneros-Meza and Geddes, 2010; McNevin, 2006).

Through devaluating political autonomy; transforming political problems into individual troubles with market solutions; producing the consumer-citizen; and desacralising the law to the point where it translates in a permanent state of exception, routine suspension and abrogation, the nation-state legitimises the neoliberal 'equal right to inequality' and strips itself of previous commitments to egalitarianism and universalism (Lemke, 2002; Wood, 1995) – both fundaments of political democracy. As a political rationality, neoliberalism is not only unreservedly incompatible with full political democracy (since the latter is based upon universal inclusion and equal rights, whilst capitalist market processes are predicated upon minority control of the means of production and class-based disparities of influence over the conditions of social reproduction (Dahl and Soss, 2014)), but has also inadvertently prepared the ground for anti-democratic practices (Ayers and Saad-Filho, 2015).

Neoliberalism maintains class and elite power without necessarily exerting direct political power in the traditional ways that characterised prior modes of production (Vasquez-Arroyo, 2008) by extending a "cannibalism of liberal democracy already underway from other sources in the past half century" (Brown, 2006, p. 691), whereby democratic subjects are open to political tyranny precisely because they are absorbed in a province of choice and need-satisfaction that they mistake for freedom (Adorno, Frenkel-Brunswik and Levinson, 1950; Horkheimer and Adorno, 1972; Marcuse, 1964). The quotidian citizen is busy accepting private schools in response to the collapse of quality public education; anti-theft devices, private security firms, and gated states in response to the conception of the permanent underclass; and "finely differentiated and titrated pharmaceutical antidepressants as a response to lives of meaninglessness or despair amidst wealth and freedom" (Brown, 2006, p. 704). In turn, the elected are free to trample the essence of democratic culture by attacks on public debate, the obscuring of the rights of the 'peoples' in favour of those of 'individuals' and the refashioning of public spheres into institutions of policing and incarceration (see also Casanova, 1996; Giroux, 2008). In a context whereby the neoliberal market rationality is promoted and taught above all else, and new cultural standards and individualistic moralities are enforced upon a democratically paralysed population, the citizenry moves away from the shared commitment democracy requires.

Not only is much of the citizenry divested of any orientation toward what Arendt (1971, p. 440) defines as "a shared responsibility for the public world", but as the domain of the state is increasingly seized by private actors, people's ability to change the course of their lives through voting alone diminishes accordingly. And whilst neoliberal theory may assert that individuals can exercise choice through spending, one must acknowledge that some have more to spend than others, and very few have enough to make a difference (Monbiot, 2016). Even if done effectively, in the presence of receptive political actors, engagement in political processes does not grant a path towards political action, for the governments' capacity to respond appropriately to requests depends largely on their ability to negotiate the conditions for change with market actors who are rarely interested in conceding own interests for the sake of utilitarianism (Vasquez-Arroyo, 2008).

In a context whereby the governance system is neither representative, nor responsive to the requests of a disappointed citizenry, many have renounced political action, thus permitting governments to act largely unsupervised in their pursuit of capital and power, which often culminate in the abrogation of fundamental and political rights (Uibariu, 2017). Today's apathetic voter is neither concerned with the greater good, nor the regulation of authority. Instead, the political substance of the customary elector is unearthed in the citizen who loves and wants neither freedom nor equality, even of a liberal sort; the citizen who expects neither truth nor accountability in governance and state actions; the citizen who is not distressed by exorbitant concentrations of political and economic power, routine abrogations of the rule of law, or distinctly undemocratic formulations of national purpose at home and abroad (Brown, 2006, p. 692).

The newly re-discovered state monopoly over what is to be regarded as lawful action and over the means of 'legitimate' – or otherwise acceptable – violence (Monaghan and Prideaux, 2016) unlocks new realms towards the achievement of deviant state, governmental, and state-institutional goals which often amount to state crime.

Where all of democracy's fundamental principles have been eroded but for its institutions, private property rights, and the ritual of voting (Habermas, 1975), one is faced with the realisa-

tion that the essence of such political systems may, in fact, rest in social processes, inter-relationships and the management of cultural associations (Institute for Democracy and Electoral Assistance, 2008). Nevertheless, as long as the interests of the privileged and powerful are the guiding commitment of … political factions, people who do not share these interests tend to stay home (Chomsky, 1996, p. 164).

A contemporary democracy – much like the Weberian-Schumpeterian procedural model of democracy (Schumpeter, 1976; Weber, 1972; 1978) – is neither "a kind of society nor a set of moral ends", but rather a "mechanism for choosing and authorising governments", whereby two or more self-chosen sets of politicians (élites), arrayed in political parties [compete] for the votes which will entitle them to rule until the next election (Macpherson, 1977, pp. 77-78).

De facto, it appears that few democratic systems have managed to preserve even the most basic characteristics of a democracy, and fewer seem to have sustained themselves effectively throughout the past decades (Arblaster, 2002; Kaplan, 2015). In the meantime, the general citizen apathy and lack of demand for accountability permits elected politicians, appointed public officials and state contractors to overstep the boundaries in which they are permitted – both by law and shared norms – to act, and allows them to use the thin line parting political negligence and administrative criminality as a jumping rope (Dixon, Spehr and Burke, 2013). It is precisely in this context of political decay that both scholars and practitioners ought to envisage the veiled perils of state-proclaimed democratic governance, and take active steps in both theorising and responding to elite abuses which threaten to – and do – undermine the human, civil and political rights of democratic citizens.

CONCEPTUALISING SCADs

The notion of SCADs has been coined by public administration scholars in an attempt to draw attention to all systematic efforts by political actors to "mislead or distract the electorate, discourage citizen participation, or in other ways undermine enlightened citizen choice" (deHaven-Smith, 2006, p. 333). SCADs encompass all "concerted actions or inactions by public officials that are intended to weaken or subvert popular control of their government" (deHaven-Smith, 2006, p. 333), as well as other attacks on the fundaments of democracy. Nevertheless, since democracy cannot be proscribed, SCADs ought to be assessed in accordance to the constitution or body of legislature of the polity which is the crime scene, international covenants – namely, the United Nations' International Covenant on Civil and Political Rights 1966 and International Covenant on Economic, Social and Cultural Rights 1966 – and by reference to the principles which form the basis of a democratic state as examined above.

An action is, thus, a crime against democracy by the state if it involves an act of commission or omission that breaches an obligation voluntarily adopted by the state to protect democratic principles, *only* when the act can be attributed to the conduct of individuals, organs of the state, or groups of persons having capacity to act on behalf of the state, granted the crime was not:

i. a pre-emptive-protective act, undertaken in the reasonable belief that an act harmful to the state and its citizens would occur
ii. a proportionate-responsive act, undertaken subsequent to an act that inflicted harm on the state…

iii. an unavoidable act, which was beyond the control of action-takers…

iv. a necessary act, undertaken to safeguard the essential interest of the state and its citizens, provided the action-takers had not contributed to the situation in which the necessity for the action arose (Dixon, Spehr and Burke, 2013, p. 22).

The author's construction of SCADs – based on a shared conversation with civil society organisations – implies:

i. a state principal or a state agent, appointed or elected, who issues authoritative instructions in the name of the state, that constitute an abuse of power, or who tolerates, permits, and encourages unauthorised actions as defined below;

ii. an act of commission or omission, whereby the state (agent) either:

   a. acts in a way which is congruent with an abuse of power, whereby individuals are systematically deprived of their rights;

   b. fails to adhere to its primary responsibility to protect the physical security, material wealth, and life of its citizens; or in other ways attempts to re-allocate the aforementioned responsibilities to third parties.

It has been argued that, in order to avoid the unnecessary conceptual overlap between state crimes and SCADs in democratic states, where all crimes by the state may arguably be categorised as crimes against democracy – since all abuses of power obstruct democracy by definition – one should restrict the definition to politically-motivated action when considering the range of activities that amount to SCADs, and only take into account actions, inactions and practices which impede political liberty in a democracy (Uibariu, 2017). In this sense, the array of 'acceptable' SCADs encompasses electoral fraud, political unaccountability, lack of government transparency, media censorship, and other attempts to manipulate the electorate for the purposes of either preserving the political status quo, determining a political shift that would in some way be detrimental to the public interest, or simply causing a change in the power structure that is not desired by the electoral majority in a polity (Uibariu, 2017).

The author argues that systematic attempts by the state to reinforce and propagate social cultures which lead to the disempowerment of minorities on the political scene ought to be promoted to the category of SCADs (see Uibariu, 2017). Such practices are not only fundamentally incompatible with the principle of egalitarianism, but also impede appropriate representation for groups within society, thus limiting the scope of democracy. The array of processes associated with the model range from the adoption of neoliberal market principles, to the rising tide of populism characteristic to Western democracies post September 11, and its afferent practices of systematic exclusion, structural violence, and scapegoating directed at minority groups in any one society, largely based on their shared social and biological characteristics (Bleich, 2011; Council of Europe [CoE], 2013; European Court of Human Rights, 2015; Waldron, 2012). Today, the same governments which are actively drafting hate crime legislation are also increasingly attempting to criminalise migration (CoE, 2011), refusing to host asylum seekers and refugees (Pakes, 2013), and breaching fundamental human rights in the name of national security (Norchi, 2004), thus condemning populations beyond their borders to a life in poverty and violence (Beck, 2003; Brock, 2009; Miller, 2008; Nagel, 2005).

In the meantime, discriminatory state policies against 'potential terrorists' and 'Schrödinger's immigrants' – the ones who steal the jobs of 'proper' citizens, whilst simultaneously laz-

ing around on state benefits – are justified by political rhetoric and the reiteration of *threats* posed by migration to the economic stability, physical safety, and cultural heritage (Human Rights Watch, 2016) of Western citizens. The divisive bearing of prejudice on communities does not only lead to an erosion of social trust among citizens, but also distracts the citizenry from the true causes of race, gender and class inequality, thus undermining their capacity to make *informed* democratic choices. In turn, divided communities fuelled by social distrust are considerably less likely to assemble as a whole, functional, and competent civil society, and cooperate for the purposes of achieving the common good, as defined by reference to democratic principles. Nor is a divided civil society likely to succeed in overseeing the actions of its political representatives, and demand accountability and redress when this fails to meet expectations.

Previous research undertaken by Uibariu (2017) shows that members of civil society associations frame state crimes as occurring when at least one of the offenders is a state principal (who has the legal authority to act in the name of the state), or an appointed or elected state agent who has the authority to issue instructions that constitute an abuse of power, or to tolerate, permit, or encourage the development of shared values that legitimise (un)authorised actions which amount to SCADs (see also Dixon, Spehr and Burke, 2013; Doig, 2011).

In light of the aforementioned, SCADs come to be defined as:

i. actions by state agents, as previously outlined, if they amount to:
    a. efforts to manipulate the electorate;
    b. attempts to undermine popular sovereignty;
    c. a change in the political *status quo* that is, in some way, detrimental to the collective well-being; and

ii. inactions by the aforementioned actors, if the inaction threatens to leave unchanged a situation which results:
    a. in a lack of governmental transparency;
    b. in a social group's incapacity to effectively participate in democratic politics;
    c. in the deterioration of principles characteristic of, and fundamental to a democracy – such as egalitarianism, universalism, and representation (Uibariu, 2017, pp. 84-85).

Nevertheless, one should not assume that the above imply an *individual* criminal responsibility. The centre of state criminality is the state, not the individual; and while the individual may come to commit the said crime, it is the combination of structural and organisational conditions with personal predilections, which generates these offences, rather than the individual's intrinsic conditions (Uibariu, 2017). Kauzlarich, Mullins and Matthews (2003) propose that one should recognise the dualistic nature of political institutions and acknowledge that albeit states can – and do – act in their self-interest, for the purposes of either expanding or preserving their influence and legitimacy, not all state crimes have their primary motivation within the polity itself. Crimes committed by the state are reflective of the ideological needs of an elite which creates and re-creates epistemologies meant explicitly to serve its interests, whilst also potentially addressing the specific needs of the state as an institution. Often, then, the benefits derived from the application of state power… advance specific group interests and

harm others, rather than serving the public good that is the presumed basis of state legitimacy (Michalowski, Chambliss and Kramer, 2010, p. 3).

A SCAD constitutes an abuse of the coercive power of the state, and has consequences that diminish a democratic society, by:

i. curtailing the economic, political and social rights of its members
ii. inflicting harm on its members
iii. threatening the life and liberty of its members
iv. restricting the capacity of its members to hold their elected representatives and appointed public officials accountable for their decisions and actions
v. limiting the participation of its members in the political life of their democratic society (Dixon, Spehr and Burke, 2013, p. 22).

Based on a cross-reference between participants' categorisation of SCADs, and Kauzlarich, Mullins and Matthews' (2003) state crime continuum (depicted in Figure 3 below), the author provides a representation of crimes against democracy which can be, to some extent, used in advancing a typology of crimes against democracy, based on the deviance's requirements of state (in)action.

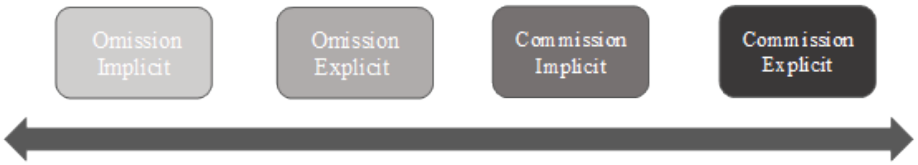


Figure 3: The State Crime Continuum (adapted from Kauzlarich, Mullins and Matthews, 2003)

SCADs can be classified on an omission-commission continuum in crimes of:

i. *implicit omission*, whereby the state fails to accomplish its duties in upholding the requirements of international treaties and moral norms;
ii. *explicit omission*, whereby the state disregards conditions which may prevent its citizens from being educated in the spirit of democratic practice, and from engaging in democratic processes;
iii. *implicit commission*, whereby the state intentionally omits to do something that it is required to do in order to ensure that citizens can effectively exercise democracy; for example, through voting in free, fair and periodic elections, with real consequences;
iv. *explicit commission*, whereby the state overtly undermines enlightened citizen choice by engaging in activities which constitute the abuse of popular sovereignty, as is the case of political assassinations.

Thus SCADs encompass all actions, omissions and implicit practices, which are conducted, undertaken, allowed or disregarded by state officials acting in the name of the nation, and which reproduce social realities which impede effective public representation and control of government (Uibariu, 2017). SCADs are politically and ideologically motivated breaches of assigned

and implied trusts and duties of the government by organisational units of the state and by individual officials acting in the name of the state, as well as failures by states to act in relation to something that poses a threat to the citizenry; which generally lead to the production of other forms of criminality (Uibariu, 2017).

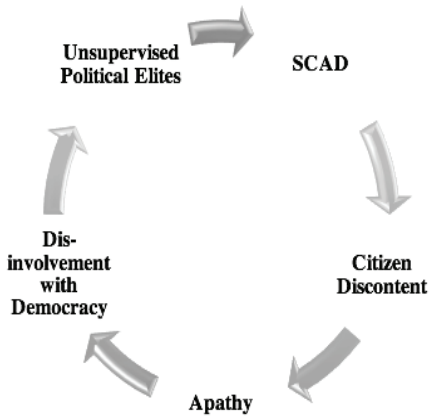


Figure 4: The Re-Victimisation Cycle

In the absence of a citizenry that is committed to the democratic project, unsupervised political elites are bound to perpetuate the vicious cycle of SCADs, whereby popular discontent with democracy translates in apathy and disengagement, and threatens to continue the process of re-victimisation (see Figure 4). In turn, authorities' lenient stance towards political criminality builds apathy towards democratic processes, which come to be seen as mere means of empowering various autocrats (Bowler, Brunell, Donovan and Granke, 2015; Bowman and Williams, 1997; Kostadinova, 2009). SCADs (in)directly impede the citizenry from making informed and meaningful democratic choices, thus curtailing their economic, political and social rights, inflicting harm on its members; threaten the life and liberty of a polity's members, restrict voters' capacity to hold their elected representatives and appointed public officials accountable for their decisions and actions; and otherwise limit citizens' ability to engage in the political life of their democratic society. Alienation with the regime is likely to further affect protest politics through fostering unconventional activism and support for anti-state extremist movements, and promote various other types of criminality (Norris, 1999).

CONCLUSIONS

There is, nonetheless, much left to research in the area of SCADs. Collectively, we know too little to assess the boundaries of our comprehension of such crimes, and so the gaps in knowledge remain bottomless for the time being. The author contends, however, that while *all* research on SCADs should be encouraged, scholars ought to be urged to approach the topic from a pragmatic perspective, that goes beyond raising awareness, whereby current societal needs are assessed, and responses to them are sought.

It is apparent that the great political ecosystem of the state, comprising of more or less functional and successful institutions, and correspondingly more or less (dis)engaged citizens, reproduces the denial and normalisation concerning the archetype of state criminality characterised by the lazy assumption that if a government is not that of a previously identified (communist) dictator, then it must be (functionally) democratic. Nevertheless, since contemporary diplomatic events stand as proof that even the oldest of democracies engage in, and allow for processes which undermine basic democratic principles in the name of private political and economic interests, often at the expense of their citizens, it is crucial that criminology scholars commence to (re-)engage in the theorising of SCADs.

Firstly, then, an acknowledgement of SCADs necessarily implies and acknowledgement that individuals do not operate in a vacuum – rather, their actions, motivations and responses are situated within endemic cultures that foster and facilitate crimes of the powerful (Rothe and Kauzlarich, 2016), where the symbiosis between neoliberal market policies, the abstraction of the perpetrator – the 'state' – along with the dehumanisation of the concerning actors, where victims are dismissed as vague entities such as 'the public' or 'the consumer', lead to a situation whereby each of the aforementioned re-frames the other in a cyclical fashion (Uibariu, 2017). It is a shared responsibility, then, that individuals take active steps in deconstructing and demolishing the dialectical complexity surrounding state crime, which had previously led to slow, and often feeble, theoretical progress (Uibariu, 2017).

Secondly, one must also concede that no research would be able to assess (and address) SCADs effectively unless it is inter-disciplinary in nature, and mindful that types of SCADs are largely dependent on their 'crime scene'. In other words, research on SCADs must recognise that the interplay between history, culture, society and economy facilitates different types of crimes against democracy, in different regions of the world, and that research outputs are unlikely to be of any real use unless they refrain from following the academic tradition of long-shot generalisations and inadequate claims to knowledge.

Thirdly, civil society groups and academics must cooperate in contesting state power, and in 'opening doors' towards the blocking of imperial policies, the development of progressive alternatives, and the creation of structural changes in the capitalist political economy. It is, then, time that the criminologists who have failed to acknowledge state crime, do so; and that those who have already done so "invest time in translating their own research" (Uggen and Inderbitzin, 2010, p. 738) and in sharing their findings with the larger public, for the benefits of the wider community. As iterated by Bellah, Madsen, Sullivan, Swidler and Tipton (1985, pp. 303-304), [s]ocial science as a public philosophy is public not just in the sense that its findings are publicly available or useful to some group or institution outside the scholarly world. It is public in that is seeks to engage the public in dialogue. It also seeks to engage the "community of the competent", the specialists and the experts, in dialogue, but it does not seek to stay within the boundaries of the specialist community while studying the rest of society from outside.

REFERENCES

- Adorno, T. W., Frenkel-Brunswik, E. and Levison, D. J. (1950). *The Authoritarian Personality.* New York: Harper.
- Altemeyer, B. (1996). *The Authoritarian Specter.* Cambridge, MS: Harvard University Press.
- Arblaster, A. (2002). *Democracy* (3rd ed.). Maidenhead: Open University Press.
- Axtmann, R. (2007). *Democracy: Problems and Perspectives*. Edinburgh: Edinburgh University Press.
- Ayers, A. J. and Saad-Filho, A. (2015). Democracy against Neoliberalism: Paradoxes, Limitations, Transcendence. *Critical Sociology, 41*(4-5), 597-618. DOI: 10.1177/0896920513507789.
- Barak, G. (1990). Crime, Criminology and Human Rights: Towards an Understanding of State Criminality. *Journal of Human Justice, 2*(1), 11-28. DOI: 10.1007/BF02637528.
- Barak, G. (1991). *Crimes by the Capitalist State.* New York: SUNY Press.
- Beck, U. (2003). The Analysis of Global Inequality: From National to Cosmopolitan Perspective. In M. Kaldor et al. (Eds.), *Global Civil Society*. London: Centre for the Study of Global Governance.
- Bell, A. F. (1997). *Ethics, Conflicts, and Offices: A Guide for Local Officials*. Chapel Hill, NC: Institute of Government.
- Bleich, E. (2011). The Rise of Hate Speech and Hate Crime Laws in Liberal Democracies. *Journal of Ethnic and Migration Studies, 37*(6), 917-34. DOI: 10.1080/1369183X.2011.576195.
- Bossaert, D. and Demmke, C. (2005). *Main Challenges in the Field of Ethics and Integrity in the EU Member States*. Maastricht: European Institute of Public Administration.
- Bowden, P. (2014). *In the Public Interest: Protecting Whistle-blowers and Those Who Speak Out.* Prahran: Tilde.
- Brock, G. (2009). *Global Justice: A Cosmopolitan Account.* Oxford: Oxford University Press.
- Brown, W. (2006). American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization. *Political Theory, 34*(6), 690-714. DOI: 10.1177/0090591706293016
- Casanova, P. G. (1996). Globalism, Neoliberalism and Democracy, *Social Justice, 23* (1-2), 39-48. Retrieved from: http://www.jstor.org/stable/29766924
- Chambliss, W. (1989). State-Organized Crime. *Criminology, 27*(2), 183-208. DOI: 10.1111/j.1745-9125.1989.tb01028.x
- Chomsky, N. (1996). *Power and Prospects: Reflections on Human Nature and the Social Order.* London: Pluto Press.
- Chomsky, N. (2010). *The Corporate Takeover of US Democracy*. Retrieved from:www.inthesetimes.com/article/5502/the_corporate_takeover_of_u.s._democracy/
- Cooper, T. L. (1991). *An Ethic of Citizenship for Public Administration*. Englewood Cliffs, NJ: Prentice Hall.
- Council of Europe. (2013). *The Hate Factor in Political Speech: Where Do Responsibilities Lie?* Retrieved from: https://www.coe.int/t/dghl/standardsetting/media/Belgrade2013/MC(2013)002_en_Report_F%20Tulken.pdf.

- Cowell, R., Downe, J. and Morgan, K. (2011). The Ethical Framework for Local Government in England: Is It Having Any Effect and Why? *Public Management Review, 13*(3), 433–57. DOI: 10.1080/14719037.2011.553292
- Crouch, C. (2004). *Post-Democracy*. Cambridge: Polity Press.
- Dahl, A. and Soss, J. (2014). Neoliberalism for the Common Good? Public Value Governance and the Downsizing of Democracy, *Public Administration Review, 74*(4), 496-504. DOI: 10.1111/puar.12191
- Dahl, R. A. (1971). *Polyarchy: Participation and Opposition.* New Haven: Yale University Press.
- deHaven-Smith, L. (2006). When Political Crimes Are Inside Jobs: Detecting State Crimes Against Democracy. *Administrative Theory and Praxis, 28*(3), 330-55. Retrieved from: http://www.jstor.org/stable/25610803
- deHaven-Smith, L. (2011). Myth and Reality of Whistleblower Protections: Official Behavior at the Top, *Public Integrity, 13*(3), 207-20. DOI: 10.2753/PIN1099-9922130302
- Diamond, L. (2016). *Democracy in Decline: How Washington Can Reverse the Tide.* Retrieved from: https://www.foreignaffairs.com/articles/world/2016-06-13/democracy-decline
- Dixon, J., Spehr, S. and Burke, J. (2013). State Crimes Against Democracy: A Clarification of Connotations. In A. Kouzmin, M. T. Witt, and A. Kakabadse (Eds.), *State Crimes Against Democracy: Political Forensics in Public Affairs* (pp. 10-26). Basingstoke: Palgrave Macmillan.
- Doig, A. (2011). *State Crime*. Cullompton: Willan.
- European Court of Human Rights (2015). *Factsheet: Hate Speech.* Retrieved from: www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf
- European Economic and Social Council (2013). *Flash Eurobarometer 373 Europeans' Engagement in Participatory Democracy.* Retrieved from: http://www.eesc.europa.eu/?i=portal.en.publications.27060
- Fishkin, J. (1991). *Democracy and Deliberation: New Directions for Democratic Reform.* New Haven: Yale University Press.
- Foucault, M. (1977). *Discipline and Punish: The Birth of the Prisons*. New York: Vintage. Foucault, M. and Gordon, C. (1980). *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*. New York, NY: Pantheon Books.
- Freedom House (2019). *Freedom House 2018: Democracy in Crisis.* Retrieved from: https://freedomhouse.org/sites/default/files/FH_FITW_Report_2018_Final_SinglePage.pdf.
- Friedrichs, D. O. (1998a). *State Crime, Vol. 1: Defining, Delineating and Explaining State Crime.* Aldershot: Ashgate.
- Friedrichs, D. O. (1998b). *State Crime,Vol. 2*. Aldershot: Ashgate.
- GESIS (2017). *Eurobarometer Data Service: Democracy Satisfaction.* Retrieved from: http://www.gesis.org/eurobarometer-data-service/search-data-access/eb-trends-trend-files/list-of-trends/democracy-satisf/.
- Ghosh, J. (2012). The Emerging Left in the 'Emerging' World. *Economic and Political Weekly, 47*(24), 33-8. Retrieved from: http://www.networkideas.org/alt/jun2012/Emerging_World.pdf

- Giraudy, A. (2015). *Democrats and Autocrats: Pathways of Subnational Undemocratic Regime Continuity within Democratic Countries.* Oxford: Oxford University Press.
- Giroux, H. A. (2008). *Against the Terror of Neoliberalism: Politics beyond the Age of Greed.* Boulder: Paradigm.
- Gowder, P. (2015). What the Laws Demand of Socrates – and of Us. *The Monist, 98*(4), 360-74. DOI: 10.1093/monist/onv018.
- Green, P. and Ward, T. (2004). *State Crime: Governments, Violence and Corruption*. London: Pluto Press.
- Guarneros-Meza, V. and Geddes, M. (2010). Local Governance and Participation under Neoliberalism: Comparative Perspectives. *International Journal of Urban and Regional Research, 34*(1), 115-29. DOI: 10.1111/j.1468-2427.2010.00952.
- Gutmann, A. and Thompson, D. (1998). *Democracy and Disagreement*. Cambridge, MA: Harvard University Press.
- Habermas, J. (1975). *Legitimation Crisis*. Boston: Beacon Press.
- Held, D. (2006). *Models of Democracy* (3rd ed.). Cambridge: Polity Press.
- Hillyard, P. and Tombs, S. (2007). From 'Crime' to Social Harm? *Crime, Law and Social Change, 48*(1-2), 9-25. DOI: 10.1007/s10611-007-9079-z
- Horkheimer, M. and Adorno, T. W. (1972). *Dialectic of Enlightenment.* New York: Herder and Herder.
- Human Rights Watch (2016). *World Report 2016: Politics of Fear Threatens Rights. Terror Attacks, Refugee Crisis and Broad Global Crackdown.* Retrieved from: https://www.hrw.org/news/2016/01/27/world-report-2016-politics-fear-threatens-rights
- Institute for Democracy and Electoral Assistance (2008). *Assessing the Quality of Democracy: A Practical Guide.* Retrieved from: http://www.idea.int/publications/catalogue/assessing-quality-democracy-practical-guide?lang=en
- Jorgensen, N. H. B. (2000). *The Responsibility of States for International Crimes.* Oxford: Oxford University Press.
- Kaplan. T. (2015). *Democracy: A World History.* Oxford: Oxford University Press.
- Kauzlarich, D. and Kramer, R. (1998). *Crimes of the American Nuclear State: At Home and Abroad.* Boston, MA: Northeastern University Press.
- Kauzlarich, D., Mullins, C. and Matthews, R. (2003). A Complicity Continuum of State Crime. *Contemporary Justice Review, 6*(3), 241-54, DOI: 10.1080/1028258032000115895.
- Kincheloe, J. L. (2005). *Critical Constructivism Primer*. New York, NY: P. Lang.
- Kincheloe, J. L. and McLaren, P. (1994). Rethinking Critical Theory and Qualitative Research. In N.K. Denzin and Y.S. Lincoln (Eds.), *The Landscape of Qualitative Research: Theories and Issues* (pp.195-220). Thousand Oaks, CA: Sage.
- Kincheloe, J. L., and McLaren, P. (2005). Rethinking Critical Theory and Qualitative Research. In N. K. Denzin and Y. S. Lincoln (Eds.), *The Sage Handbook of Qualitative Research* (3rd ed., pp. 303–342). London: Sage Publications.

- Kincheloe, J. L., McLaren, P., and Steinberg, S. R. (2011). Critical Pedagogy and Qualitative Research. In N. Denzin and Y. Lincoln (Eds.), *The Sage Handbook Qualitative Research* (4th ed., 163–177). London: Sage.
- Knight, W. A. (2007). Democracy and Good Governance. In T. G. Weiss and S. Daws (Eds.), *The Oxford Handbook on the United Nations* (pp. 620-633). Oxford: Oxford University Press.
- Kramer, R. C. and Michalowski, R. (2005). War, Aggression and State Crime. *British Journal of Criminology, 45*(4), 446-69. DOI: 10.1093/bjc/azi032.
- Kramer, R. C., Michalowski, R. and Chambliss, W. J. (2010). Epilogue: Toward a Public Criminology of State Crime. In W. J. Chambliss, R. Michalowski and R. C. Kramer (Eds.), *State Crime in the Global Age* (pp.247-261). Portland, OR: Willan Publishing.
- Krimerman, L. I. and Perry, L. (Eds.) (1986). *Patterns of Anarchy.* New York: Anchor.
- Kulish, N. (2011). As Scorn for Vote Grows, Protests Surge around Globe. *New York Times*. Retrieved from: http://www.nytimes.com/2011/09/28/world/as-scorn-for-vote-grows-protests-surge-around-globe.html?pagewanted=all
- Lasswell, H. D. (1977). *Psychopathology and Politics*. Chicago: University of Chicago Press.
- Lemke, T. (2002). *Foucault, Governmentality and Critique.* Retrieved from: http://www.andosciasociology.net/resources/Foucault$2C+Governmentality$2C+and+Critique+IV-2.pdf .
- Lewis, C. W. (1991). *The Ethics Challenge in Public Service.* San Francisco, CA: Jossey-Bass.
- Lewis, C. W., and Gilman, S. C. (2005). *The Ethics Challenge in Public Service: A Problem-Solving Guide* (2nd ed). San Francisco: Jossey Bass.
- Macpherson, C. B. (1977). *The Life and Times of Liberal Democracy*. Oxford: Oxford University Press.
- Manwell, L. A. (2010). In Denial of Democracy: Social Psychological Implications for Public Discourse on State Crimes Against Democracy Post-9/11. *American Behavioral Scientist, 53*(6), 848-84. DOI: 10.1177/0002764209353279
- Martin, B. (2000). Eliminating State Crime by Abolishing the State. In I. J. Ross (Ed.), *Controlling State Crime* (pp.389-417). New Brunswick, NJ: Transaction Publishers.
- Matthews, R. A. and Kauzlarich, D. (2007). State Crimes and State Harms: A Tale of Two Definitional Frameworks. *Crime, Law and Social Change, 48*(1-2), 43-55. DOI: 10.1007/s10611-007-9081-5
- McNevin, A. (2006). Political Belonging in a Neoliberal Era: The Struggle of the Sans Papiers, *Citizenship Studies, 10*(2), 135-51. DOI: 10.1080/13621020600633051
- Menzel, D. C. (2015). Research on Ethics and Integrity in Public Administration: Moving Forward, Looking Back. *Public Integrity, 17,* 343-70. DOI: 10.1080/10999922.2015.1060824.
- Michalowski, R. (1985). *Order, Law and Crime.* New York: Random House.
- Michalowski, R. (2010). In Search of 'State and Crime' in State Crime Studies. In W. J. Chambliss, R. Michalowski and R. C. Kramer (Eds.), *State Crime in the Global Age* (pp.13-30). Portland, OR: Willan Publishing.

- Michalowski, R., Chambliss, W. J. and Kramer, R. C. (2010). Introduction. In W. J. Chambliss, R. Michalowski and R. C. Kramer (Eds.), *State Crime in the Global Age* (pp.1-12). Portland, OR: Willan Publishing.
- Miller, D. (2008). National Responsibility and Global Justice. *Critical Review of International Social and Political Philosophy, 11*(4), 383-99. DOI: 10.1080/13698230802415862.
- Monaghan, M. and Prideaux, S. (2016). *State Crime and Immorality: The Corrupting Influence of the Powerful.* Bristol: Policy Press.
- Monbiot, G. (2016, April 15). Neoliberalism – The Ideology at the Root of All Our Problems. *The Guardian.* Retrieved from: https://www.theguardian.com/books/2016/apr/15/neoliberalism-ideology-problem-george-monbiot
- Morlino, L. (2009). Legitimacy and the Quality of Democracy. *International Social Science Journal, 60*(196), 211-22. DOI: 10.1111/j.1468-2451.2010.01717.x
- Nagel, T. (2005). The Problem of Global Justice. *Philosophy & Public Affairs, 33*(2), 113-46. DOI: 10.1111/j.1088-4963.2005.00027.x.
- Norchi, C. (2004). Human Rights: A Global Common Interest. In J.E. Krasno (Ed.), *The United Nations: Confronting the Challenges of a Global Society* (pp. 79-114). London: Lynne Rienner Publishers, Inc.
- Norris, P. (2012). *Making Democratic Governance Work: How Regimes Shape Prosperity, Welfare and Peace*. Cambridge: Cambridge University Press.
- Pakes, F. (2013). Parochialism and Globalisation: The Rise of Anti-Immigration Parties in Europe. In F. Pakes (Ed.), *Globalisation and the Challenge to Criminology* (pp.165-178). London: Sage Publications.
- Ross, J. I. (Ed.) (1995). *Controlling State Crime*. New York: Garland Publishing.
- Ross, J. I. (1998). Situating the Academic Study of Controlling State Crime. *Crime, Law & Social Change, 29,* 331-40. DOI: 10.1023/A:1008248216731.
- Ross, J. I. (2000). Controlling State Crime: Toward an Integrated Structural Model. In I. J. Ross (Ed.), *Controlling State Crime* (pp.3-32). New Brunswick, NJ: Transaction Publishers.
- Ross, J. I. (2003). *The Dynamics of Political Crime.* London: Sage.
- Ross, J. I., Barak, G., Ferrell, J., Kauzlarich, D., Hamm, M., Friedrichs, D. O.,… Kappeler, V. (1999). The State of State Crime Research: A Commentary. *Humanity and Society, 23*(3), 273-81. DOI: 10.1177/016059769902300306
- Rothe, D. L. and Kauzlarich, D. (2010). State Crime Theory and Control. In H. Barlow and S. Decker (Eds.), *Criminology and Public Policy* (pp. 166–187). Philadelphia: Temple University Press.
- Rothe, D. L. and Kauzlarich, D. (2016*). Crimes of the Powerful: An Introduction*. London: Routledge.
- Schaar, J. H. (1981). *Legitimacy in the Modern State.* New Brunswick, NJ: Transaction Press.
- Schumpeter, J. R. (1976). *Capitalism, Socialism and Democracy.* New York: Harper and Row.
- Tittle, C. (1995). *Control Balance Theory*. Boulder, CO: Westview.

- Tombs, S. and Whyte, D. (2003). Scrutinizing the Powerful: Crime, Contemporary Political Economy, and Critical Social Research. In S. Tombs and D. Whyte (Eds.), *Unmasking the Crimes of the Powerful: Scrutinizing States and Corporations* (pp. 3-45). Oxford: Peter Lang.
- Turk, A. T. (1982). *Political Criminality: The Defiance and Defense of Authority*. Beverly Hills: Sage Publications.
- Uibariu, A. M. (2017). *Training the Watchdogs to Bark: A Theoretical Framework to Assist Public Sector Practitioners in Identifying, Reporting and Taking Action against State Crimes Against Democracy.* Retrieved from: https://www.researchgate.net/publication/319344917_Training_the_Watchdogs_to_Bark_A_Theoretical_Framework_to_Assist_Public_Sector_Practitioners_in_Identifying_Reporting_and_Taking_Action_against_State_Crimes_Against_Democracy
- Van Doeveren, V. (2011). Rethinking Good Governance. Public Integrity, *13*(4), 301–18. DOI: 10.2753/1099-9922130401.
- Vazquez-Arroyo, A. Y. (2008). Liberal Democracy and Neoliberalism: A Critical Juxtaposition, *New Political Science, 30*(2), 127-59. DOI: 10.1080/0739140802063192.
- Waldron, J. (2012). *The Harm in Hate Speech.* Cambridge, MA: Harvard University Press.
- Warren, M. (1999). Democratic Theory and Trust. In M. Warren (Ed.), *Democracy and Trust* (pp. 310-345). Cambridge: Cambridge University Press.
- Weber, M. (1972). Politics as a Vocation. In: Gerth, H. H. and Mills C. W. (Eds.), *From Max Weber* (pp. 77-128). New York: Oxford University Press.
- Weber, M. (1978). *Economy and Society*. Berkeley: University of California Press.
- Weldes, J. (1998). Bureaucratic Politics: A Critical Constructivist Assessment, *Mershon International Studies Review, 42*(2), 216-25. Retrieved from: http://www.jstor.org/stable/254413
- Witt, M. T. (2010). Pretending Not to See or Hear, Refusing to Signify: The Farce and Tragedy of Geocentric Public Affairs Scholarship, *American Behavioral Scientist,53*(6), 921-39. DOI: 10.1177/0002764209353281
- Wood, E. M. (1995). *Democracy Against Capitalism: Renewing Historical Materialism*. Cambridge: Cambridge University Press.
- Young, I. R. (2007). Power. Violence and Legitimacy: A Reading of Hannah Arendt in an Age of Police Brutality and Humanitarian Intervention. In I. R. Young (Ed.), *Global Challenges: War, Self-Determination and Responsibility for Justice* (pp. 260-302). Cambridge: Polity Press.
- Zakaria, F. (1997). The Rise of Illiberal Democracies, *Foreign Affairs, 76*(6), 22-43. Retrieved from: http://media.library.ku.edu.tr/reserve/resfall15_16/Sosc116_SEaytac/Week3.pdf

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 417-428
ISSN 1512-5505

THE CRIME OF GENOCIDE. QUESTIONS ABOUT THE MENS REA

Federico C. La VATTIATA

Abstract

The definition of genocide established in the 1948 UN Convention has been totally adopted by the international lawmakers when formulating the corresponding provisions of the Ad Hoc Tribunals' Statutes, and, more recently, also article 6 of the Rome Statute of the International Criminal Court. In my oral presentation, I will try to address the topic of the genocidal specific intent. The theme of the genocidal dolus specialis is certainly among the most debated, not only because it is relevant to the crime itself, but also because it can well represent the occasion for the emergence of the various opinions concerning, upstream, the reconstruction of a theory of guilt in international criminal law (and, more specifically, in the ICC Statute's system).

Moreover, pursuant to a rigorous approach, I will try to rebut the thesis according to which the genocidal mental element can also be fulfilled by two psychological standards which are, in my opinion, wrong: i.e. the recklessness and the wilful blindness. Such a contradiction is generated by a misunderstanding of the normative provision: indeed, it is caused by a separate analysis of the two components (knowledge and intent) which constitute (as a whole) the standard provided for by article 30 of the Rome Statute. Concentrating all the efforts on the binomial knowledge-intent, one completely loses sight of the (previous in the text) clause "unless otherwise provided".

1. INTRODUCTION

The proper analysis of the crime of genocide, and in particular of its mental element, requires us to start from article II of the 1948 UN Convention on the prevention and punishment of the crime.

The definition established therein has been totally adopted by the international lawmakers when formulating the corresponding provisions of the Ad Hoc Tribunals' Statutes, and, more recently, also article 6 of the ICC Statute.

The Rome Statute of the International Criminal Court provides for four categories of crimes falling within the scope of jurisdiction of the Court. Among these, the crime of genocide stands out for importance – so much so as to be the first in order of codification. A few weeks after the Statute's adoption, the International Criminal Tribunal for Rwanda confirmed the relevance of the crime in the leading case *Akayesu*[1], in which it was referred as « the crime of crimes ». This precedent also gave a significant contribution to develop the crime's structure[2].

Moreover, it should be noted that the International Court of Justice has ruled that the definition of genocide provided for in the various conventions codifies a rule of customary international law[3].

Article II of the UN Convention (article 6 ICC St.) establishes that:

[...] "Genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- *a) Killing members of the group;*
- *b) Causing serious bodily or mental harm to members of the group;*
- *c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- *d) Imposing measures intended to prevent births within the group;*
- *e) Forcibly transferring children from a group to another group.*

The choice to dedicate this work to the topic of the *mens rea* is not fortuitous. It is the most controversial topic, and therefore, perhaps, the most interesting.

The theme of the genocidal specific intent is certainly among the most debated, not only because it is relevant to the crime itself, but also because it can well represent the occasion for the emergence of the various opinions concerning, upstream, the reconstruction of a theory of guilt in international criminal law (and, more specifically, in the Rome Statute's system).

2. THE PRINCIPLE OF GUILT IN INTERNATIONAL CRIMINAL LAW

From the point of view of international criminal law, as for the concept of guilt, there is the need for a synthesis of the choices made by the various national lawmakers.

At a national level, the elaborations concerning the relationship between the principle of guilt and the functions attributable to punishment are valuable.

In modern liberal-democratic societies, criminal law is now conceived as an instrument for the protection of fundamental legal interests, which are essential to the peaceful existence of the community. The criminal sanction therefore assumes the role of useful vehicle in making such a protection effective, on the one hand dissuading the people from the commission of crimes

---

1 Akayesu (ICTR-96-4-T), Judgment, 2Nd September 1998. Affirmed: Akayesu (ICTR-96-4-A), Judgment, 1St July 2001.

2 Antonio Cassese, International Criminal Law, p. 100 – Oxford University Press, 2003.

3 Case concerning Application of the Convention on prevention and Punishment of the Crime of genocide [Bosnia and Herzegovina V-Yugoslavia (Serbia and Montenegro)], Judgment 26Th February 2007, § 161.

(so-called general prevention), and, on the other hand, avoiding the recidivism of those who have already been recognized as perpetrators of a criminal offence (so-called special prevention). And, given the need for the agent's will and his/her ability to self-determine future behaviours, the mental aspect is a necessary element of justification (albeit not the only one) for the punishment's infliction. If it was not, the deterrent function would certainly not be fulfilled, inflicting sanctions on persons who, when carried out a certain conduct, were not *in dolo* or, at least, *in culpa*[4].

The use of such arguments at an international level is controversial, and the doctrine is divided essentially into two fronts. Apart from those in favour[5], not few are the critical voices. The latter support the need to consider the specific aims of the punishment at an international level[6]. The solution of this question necessarily presupposes the identification of the international *potestas puniendi*'s grounds. The latter are by the best doctrine identified in the need to preserve the conditions of existence of the international community. Ultimately, the aims pursued by international criminal law must be identified, directly, in the maintenance of international peace and security, as well as in the wellness of the communities, and, indirectly, in the reconciliation/peace-making of conflicting populations[7].

However, such a conclusion needs to be further specified by reference to the notion of international public order, within which fundamental rights have progressively assumed a central role, thus becoming not only the main object of protection (in a positive sense) – going beyond their traditional nature of limit (in a negative sense) to the repression, which however must be assured[8] – but also the justification for the punitive claim of what has been well defined « a criminal law system without a State»[9].

---

4 Giovanni Fiandaca, Considerazioni su colpevolezza e prevenzione, in Rivista italiana di diritto e procedura penale, p. 836 ss., 1987; Giovanni Fiandaca/Enzo Musco, Diritto Penale. Parte Generale, p. 316 ss. – Zanichelli, 2014; Vincenzo Militello, Prevenzione generale e commisurazione della pena, p. 141-173 – Milano, 1982; Tullio Padovani, Teoria della colpevolezza e scopi della pena, in Rivista italiana di diritto e procedura penale, p. 798 ss., 1987; Mario Romano, Pre-Art. 1, in Commentario sistematico al codice penale – Giuffrè, 2004.

5 Kai Ambos, On the Rationale of Punishment at the Domestic and International Level, in Henzelin-Roth, Le droit penal à l'éprauve de l'internationalisation, p. 305 ss., Paris-Geneve-Bruxelles, 2002; Otto Triffterer, The Preventive and Repressive Function of the International Criminal Court, p. 173, 2001

6 Mirjan Damaška, L'incerta identità delle Corti penali internazionali, in Criminalia, p. 9 ss., 2006; Giovanni Fiandaca, I crimini internazionali tra punizione, riconciliazione e ricostruzione, in Criminalia, p. 41 ss., 2007; Hanna Arendt, Responsabilità e giudizio, p. 21 ss., Torino, 2003.

7 Nicoletta Parisi, Problemi attuali del diritto internazionale penale, in Diritto e forze armate. Nuovi impegni, p. 194 – Padova, 2001.

8 Rosaria Sicurella, Per una teoria della colpevolezza nel sistema dello Statuto della Corte Penale Internazionale, in Università di Catania – Pubblicazioni della Facoltà di Giurisprudenza – Giuffrè Editore, 2008.; Lorenzo Picotti, I diritti fondamentali come oggetto e limite del diritto penale internazionale, in Indice Penale, n. 1, p. 259 ss., 2003.

9 Gaetano Insolera, Un diritto penale senza Stato?, in Delmas-Marty/Fronza/Lambert-Abdelgawad, Les sources du droit International pénal: l'expérience des tribunaux pénaux internationaux et le Statut de la Cour pénale internationale – Mission de Recherche Droit & Justice, 2004.

The *mens rea* is unanimously considered a constitutive element of international crimes[10].

Nevertheless, there is a lack of sufficient legal references for a full outline of the culpability's main grounds at an international level, i.e.: the imputability, the criteria by which a conduct can be psychologically ascribable to someone, the grounds for excluding guilt.

In fact, even at the domestic level, on the one hand, the concept of guilt is unanimously recognized as a constitutive element of the crime, but, on the other hand, contrasts arise about what guilt means[11]. In particular, within the Italian doctrine[12] (as well as within the German-Austrian one[13]), scholars debate on whether, in order for the *mens rea* to be fulfilled, additional elements (i.e. in addition to the mental element in the strict sense of *dolus* or *culpa*) are needed: that is, the capacity of someone to fully understand his/her conduct's meaning, and to activate psychological criteria of impulse or inhibition in application of decisions taken in accordance with his/her knowledge of reality.

The international jurisprudence and the subsequent normative practice have addressed the fluidity of contours of *mens rea*. The point is that very different figures are usually referred to the same category, i.e. the so-called circumstances excluding guilt: the justifications (which exclude the anti-legality of an *actus reus*) and the so-called *defences*[14].

International crimes are usually characterized by the involvement in their commission of the political and military leaders of a State. It should not be ignored that the criminal intent gradually lessens as we consider the moment of the material realization of the conduct, instead of the criminal plan's conception. Thus, the criminal conduct is the result of a decision-making process that is individually ascribable to no one. Therefore, for the purposes of a declaration of liability, the Prosecutor needs to subdivide such a decision-making process in order to highlight (and prove) the different mental profiles[15].

A structural character of international crimes in general, but of genocide in particular, is the pluri-subjectivity, from the point of view of both the perpetrators and the victims[16]. Because of this character, cases that can be abstractly qualified as common *figurae criminis* are instead considered as international crimes, in relation to the so-called *contextual element*.

As for the pluri-subjectivity on the perpetrators' side, two questions have to be addressed.

First, the objective imputability. We need to correctly frame how each agent contributed to the crime.

---

10 Antonio Cassese, International Criminal Law, p. 159 – Oxford University Press, 2003.

11 Rosaria Sicurella, Ibidem.

12 Giovanni Fiandaca, Considerazioni su colpevolezza e prevenzione, p. 836 ss., cit.; Giorgio Marinucci, Politica criminale e codificazione del principio di colpevolezza, in Rivista italiana di diritto e procedura penale, p. 423 ss., 1996.

13 Bernd Schünemann, L'evoluzione della teoria della colpevolezza nella Repubblica Federale Tedesca, in Rivista italiana di diritto e procedura penale, p. 3 ss., 1990; Manfred Maiwald, La colpevolezza quale presupposto della pena statuale: necessità dell'istituto o realtà metafisica?, in Rivista di Polizia, p. 705 ss., 1992.

14 Rosaria Sicurella, Ibidem.

15 Rosaria Sicurella, Ibidem.

16 Giuliano Vassalli, La giustizia internazionale penale. Studi, p. 28 – Giuffrè Editore, 1995.

Second, the subjective imputability. It is essential in order to avoid two extremes, i.e. the depersonalization of punishment on the one hand, and its artificial personalization on the other. This is a goal which, although strongly desirable, is difficult to achieve. For example, the so-called "joint criminal enterprise" doctrine can be cited here.

The paradigm of the joint criminal enterprise was developed by the Ad Hoc Tribunals. It is a model of collective responsibility without a real normative basis. It is also characterized by an exaggerated simplification of the Prosecutor's *onus probandi*, that, in my opinion, violates the safeguards given by the principles of legality (*nullum crimen, nulla poena sine lege*) and guilt (*nullum crimen, nulla poena sine culpa*)[17].

---

[17] The paradigm of the joint criminal enterprise was created by the ICTY. The Appeals Chamber in Tadic´ established its atus reus, namely: a plurality of persons; the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute; the participation of the accused in the common design involving the perpetration of one of the crimes provided for in the ICTY Statute.
« The Appeals Chamber in Tadic´ elaborated on these criteria. For example, the plurality 'need not be organized in a military, political or administrative structure ...'. 'There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.' Participation in the common design 'need not involve commission of a specific crime under one of those provisions ... but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.' Later cases have also contributed to understanding of the actus reus. It is clear, for example, that membership in the group per se is not enough to ground liability on this basis. There has to be some form of action by the defendant to contribute to the implementation of the plan. Equally, both direct and indirect participation suffice. There is no requirement that the contribution made by the defendant is a significant one. The ICTY has inconsistent jurisprudence on whether or not those that physically commit the relevant crimes need to be parties to the joint criminal enterprise for participants in that enterprise to be found guilty through this principle. If the common plan or purpose fundamentally alters, then this is a new plan or purpose, not simply a continuation/mutation of the old one, and a person is only responsible for crimes which relate to the plan or purpose he or she subscribed to. Some doubt might be expressed about the statement in Blagojevic´ and Jokic´ that 'any ''escalation'' of the original objective must either be agreed to if a person is to entail criminal responsibility for the first category of joint criminal enterprise, or that ''escalation'' must be a natural and foreseeable consequence of the original enterprise.' This is because in the latter case, there is a risk that a person could become liable for crimes committed as a foreseeable result of the new enterprise, but not the one agreed to. […] Although the conduct element of all of the forms of joint criminal enterprise liability is the same, the distinction between them comes in through the mental element. The Appeals Chamber in Tadic´ is the standard reference on the point: ... the mens rea element differs according to the category of common design under consideration. With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which ... is really a variant of the first), personal knowledge of the system of ill treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under

As for the circumstances excluding criminal liability, in accordance with the Continental approach (instead of the Common Law one), the doctrine distinguishes between justification and excuses.

« Justifications, broadly speaking, are pleas that the conduct of the defendant was acceptable, and thus necessarily lawful. […] 'Excuses', painting again with something of a broad brush, do not seek to defend the conduct of the defendant per se, but seek to say that, in the particular instance, the defendant ought not be blamed for what he or she did »[18].

Examples of justifications are: the justified repression of civil or military enemies who are perpetrators of war crimes or crimes against humanity; the legitimate reprisals in conflicting contexts; the self-defence; the so-called consent (*volentieri non fit iniuria*); and, under certain conditions, the superior order.

Examples of excuses are: the mental disease; the state of intoxication; the mistake of fact; under certain conditions, the mistake of law; the duress; and the physical compulsion[19].

However, only the doctrine distinguishes between justifications and excuses. The international lawmakers are, instead, much less sensitive to such a categorization, as evidenced by the Rome Statute. For example, article 31 ("Grounds For Excluding Criminal Responsibility") refers indistinctly to justifications as in the case of the self-defense [§ 1 *c)*], and to excuses, such as the duress [§ 1 *d)*].

Rebus sic stantibus, it can be useful a summing-up of the ICC Statute's rules that address the hypothesis here relevant, regardless of the dogmatic category of reference.

The aforementioned article 31 provides for: the mental disease, the state of intoxication, the self-defense and the duress[20].

---

the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk » (Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmshurst, An Introduction to International Criminal Law, p. 306-307 – Cambridge University Press, 2014).

18 Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmshurst, An Introduction to International Criminal Law, p. 321-322 – Cambridge University Press, 2014.

19 Antonio Cassese, International Criminal Law, p. 219 S. – Oxford University Press, 2003.

20 Art. 31 § 1 ICC Statute: « (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law; (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court; (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph; (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death

Article 32 deals with mistake of fact and mistake of law[21].

Finally, article 33 provides for superior orders and the prescription of law. In accordance with the principle of "conditional liability"[22] [23], this responsibility will be excluded if: the person who obeys was legally obligated to do so; he/she was unaware of the anti-legality of the order; and the latter was not manifestly contrary to the law. In any case, there is an absolute presumption of manifest unlawfulness of the orders to commit genocide and crimes against humanity[24].

A question that is certainly relevant concerns the relationship between the duress and the superior order.

These are two figures abstractly different and independent. However, they can in some way complement each other, as a Judge uses the first as factual element integrated by the second, in those cases in which the subordinate seriously risks his/her or other's safety in case of disobedience[25].

The *Erdemovič* case[26] is emblematic. The defendant, accused of the famous crimes against humanity perpetrated in Srebrenica, argued that he was not morally free at the time of the crime, because of a serious threat to his life and that of his family members in case he disobeyed the superior order to savagely kill civilians. In particular, in the ICTY Statute [Article 7 (4)], the superior order not manifestly illegal represents a mere mitigation, distinct from d*uress*. The

---

or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control ».

21 Art. 32 ICC Statute: « 1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime. 2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33 ».

22 Anna Maria Maugeri, La responsabilità da comando nello Statuto della Corte Penale Internazionale, p. 314, chapter III, footnote n. 77, in Università di Catania. Pubblicazioni della Facoltà di Giurisprudenza – Giuffrè Editore, 2007.

23 C.T. Sistare, Responsibility and Criminal Liability, p. 166 ss. – Springer Science and Business Media, 2012: « […] where individual freedom and agency are premier values, conditional liability is the most suitable system. The principle of conditional liability can be expressed as the principle of responsibility for liability: that as a matter of justice, individual responsibility is required for liability. Adherence to conditional standards is one way in which a liberal society promotes and displays respect for personal agency ».

24 Art. 33 St. ICC: « 1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful ».

25 Yoram Dinstein, The Defence of Obedience to Superior Order in International Law, p. 223 ss. – Leyden, 1965.

26 ICTY Prosecutor v. Drazen Erdemovič (Case IT – 96 – 22 – T, Sentencing Judgment, 31st May 1996, § 63, 66, 67 e 86).

latter, in fact, needs an imminent threat to the agent's life in case of disobedience, regardless of a subordination link. In this case, the applicability of the mitigating circumstance was denied to Erdemovič for a number of reasons: firstly, the order to kill two hundred civilians was manifestly unlawful; secondly, the defendant was aware that he was violating the most basic laws of war; and finally, a serious threat in case of disobedience was missing[27].

3. THE GENOCIDAL SPECIFIC INTENT

From the psychological point of view the crime is characterized by the intentional element expressed by the formula « with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such ». According to the best doctrine the specific intent would distinguish the facts of genocide from those fulfilling common crimes against the person[28].

The idea of the genocidal specific intent in terms of mere intentionality is controversial[29].

Reducing the *dolus specialis* to a pure psychological phenomenon involves the risk of confusing it with motive, that is the subjective reason for action. And the motive, as a psychic phenomenon inside the agent's mind, is not necessarily connected to the material fact.

The genocidal specific intent was formulated according to a technique appearing in several national criminal systems: that is, the identification of a particular surplus of the purpose as compared to the *actus reus*¸ that is the common object of the general standard of intent and knowledge[30].

For example, we can cite the Italian notion of the so-called *dolo specifico* (*dolus specialis*), the German figure of the so-called *Absichtsdelikte* (intentional crimes), and the Austrian figure of the so-called *Delikte mit überschießendem*. Actually, also in Common Law systems – which are historically less sensitive to the dogmatic elaboration of this category – more attention is gradually being paid (at least at the doctrinal and jurisprudential level) to the crimes characterized by a weighty intentional element, in the sense of intent to commit further acts as compared to the *actus reus*.

As already mentioned, the modern doctrines, both Continental and Anglo-Saxon, reject a purely psychological understanding of the specific/further intent (in the sense of *mens rea*'s subelement). Instead, it is theorized a central role of the intent within the objective element of the crime. This additional element is part of the judgement of guilt[31].

However, the way in which such a specific intent links the protected interests of a crime's provision is controversial.

Pursuant to a rigorous approach, the agent, on the one hand, must disclose his/her intent to realize the further unlawful result, and, on the other hand, he/she must commit a base-fact

---

27 Anna Maria Maugeri, Ibidem.

28 Giovanni Grasso, Genocidio in Digesto delle Discipline Penalistiche, vol. V – Torino, 1991.

29 Lorenzo Picotti, Il dolo specifico. Un'indagine sugli elementi finalistici delle fattispecie penali – Giuffré Editore, 1993.

30 Lorenzo Picotti, Ibidem.

31 Simona ragazzi, "Pulizia etnica" in Bosnia e crimine di genocidio, in Rivista italiana di diritto e procedura penale (2003).

suitable to fulfil the forbidden future result. As for genocide, the agent must be aware of and mean to realize the *actus reus*, with the further intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

In case of murders regarding a specific protected group, if such (not purely subjective) element is missing, it will not be possible to qualify it as genocide. However, a legal framework in terms of crimes against humanity and/or war crimes cannot be ruled out.

The link that must connect the base-fact to the further event is subjective and teleological (instead of physico-naturalistic). Indeed, the second term of this relationship is only the purpose (the "psychic" cause) that brings about the agent's conduct, and not a naturalistic event etiologically linked to the latter. Since this further element (as previously expressed) concerns the *actus reus*, its validation needs the proof of the finalistic nexus between the agent's conduct and its ultimate purpose in the context of the objective element's ascertainment, but by means of the further elements as compared to the (materially considered) conduct[32].

Given that, as for genocide, the minimum threshold of the *dolus specialis*' fulfilment widely alters by reason of a broad or restrictive interpretation of the provision's protected interest[33]. In the opinion of the prevailing doctrine and jurisprudence, it is the group's existence or survival[34]. However, isolated voices object that the concept of "existence" evokes an unrealistic idea of hereditary transmission of the group's identity, which would instead be a fluid entity in constant transformation, so they affirm that the protected interest is the group's development[35]. The second approach, in some way, can be considered a hegelian-dialectic vision.

4. CONCLUSIONS

In conclusion, another question must be solved: what is the degree of intensity of the volitional component that must cover the further element?

An authoritative doctrine asserts a controvertible theory[36].

Professor William Schabas takes as a normative reference article 30 of the Rome Statute of the International Criminal Court, namely "Mental element", that establishes as follows: « Unless otherwise provided, a person shall be criminally responsible and reliable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. For the purposes of this article, a person has intent where: (a) in relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. For the purposes of this article, 'Knowledge' means awareness that a circumstance ex-

---

32 Lorenzo Picotti, Ibidem.

33 Simona Ragazzi, Ibidem.

34 Daniel David Ntanda Nesereko, Genocide, in Kirk Mc Donald-Swaak Goldman, Substantive and Procedural Aspects of International Criminal Law, vol. I – Dordrecht, 2000.

35 Emanuela Fronza, Genocide in the Rome Statute, in Schabas-Lattanzi, Essays on the Rome Statute of the International Criminal Court – Il Sirente, 1999.

36 William A. Schabas, Genocide in International Law, p. 206 ss. – Cambridge University Press, 2000.

ists or a consequence will occur in the ordinary course of events. 'Know' and 'Knowingly' shall be construed accordingly ».

It is correctly argued that a genocidal conduct hardly can be committed by a single agent and that, therefore, a plan is needed in order for the crime to be fulfilled, although this element is not expressly required in the normative provision. Such a requirement is also confirmed by the jurisprudence[37]. As much correctly it is stated that: it is not necessary that the author has personally devised the plan, provided that – of course – he/she have known it; the knowledge of the plan/policy (and of the broader context in which the conduct is carried out) should not be confused with the knowledge that all these elements fulfil the crime of genocide.

Nulla quaestio, so far.

But this doctrine makes a serious mistake by stating that the genocidal mental element can be fulfilled even by two psychological standards which are, in my opinion, wrong.

In primis, the so-called *recklessness*, that is, the agent is aware that his/her conduct, in the ordinary course of events, unreasonably puts the protected interest in danger, or, in other words, he/she knows the risky consequences of his/her conduct. For this purpose, he cites the maxim – wrong as well – affirmed in *Akayesu*: « the perpetrator is capable because he *knew or should have known*[38] that the act committed would destroy, in whole or in part, a group »[39]. This stance is likely to be conditioned by the legal culture to which the scholar belongs. Indeed, by distinguishing different degrees within the *recklessness*, it rules out relevance only to those that are in some way at the basis of this ideal "intentional ascending scale". Nonetheless, these conclusions must be rejected, mainly because any attempt to affirm a certain legal culture's hegemony is flawed.

Secondly, the so-called *wilful blindness*, that is, the agent deliberately does not wonder about the consequences of a certain behaviour, while being aware that such a judgment is mandatory[40].

---

37 ICTY Prosecutor v. Rodovan Karadžić and Ratko Mladić (Case No. IT – 95 – 5 – R61, IT – 95 – 18 – R61); ICTY Prosecutor v. Goran Jelisić (Case No. IT- 95 – 10 – T), Judgment, 14th December 1999, § 655; ICTR Prosecutor v. Jean Paul Akayesu (Case No. ICTR – 96 – 4 – T), Judgment, 2nd September 1998, § 477, 579, 651; ICTR Prosecutor v. Kayshema and Ruzindana (ICTR Case No. – 95 – 1 – T), Judgment, 21st May 1999, § 94, 276.

38 Italics and underline added.

39 Akayesu § 519.

40 The wilful blindness has been well analysed by the Anglo-Saxon doctrine and jurisprudence.
In the case Croyalgrange Ltd. (House of Lords, Westminster CC v. Croyalgrange Ltd [1986] 2 All ER 353, 359), the House of Lords (whose jurisdictional function has been undertaken by the Supreme Court of England and Wales, after the 2005 Constitutional Reform Act) stated the so-called "doctrine of wilful blindness": « the defendant had deliberately shut his eyes to the obvious means of knowledge or refrained from enquiry because he suspected the truth but did not want to have his suspicion confirmed ».
Moreover, in *Roper v Taylor's Central Garages (Exeter) Ltd* [1951] 2 TLR 284, 288, it has been distinguished between: the actual knowledge; the wilful blindness (knowledge in the second degree), that is the intentional refusal to verify a certain circumstance; and the constructive knowledge (knowledge in the third degree), that is the refusal to make those checks that a normally prudent and rational person would have made.

Well, what this doctrine seems to ignore is the speciality clause at the beginning of article 30 of the Rome Statute. Or, at the very least, he contradicts himself when, on the one hand, he affirms the essentiality of the specific intent in order for the crime of genocide to be fulfilled, but, on the other hand, he admits the standards of the *recklessness* and the *wilful blindness*.

The truth is that such a contradiction is generated by a misunderstanding of the normative provision: indeed, it is caused by a separate analysis of the two components (knowledge on the one hand, and intent on the other) which constitute, as a whole, the standard provided for by article 30. This doctrine, concentrating all his efforts on the binomial knowledge-intent, completely loses sight of the (previous in the text) clause « unless otherwise provided ».

In this way, the result is inevitably incoherent, and cannot be shared. This is imposed, further upstream, by a correct use of the interpretative criteria, in particular the need for an interpretation in respect of the safeguard-*ratio* that inspires the principle of guilt.

The wrongness of such an approach also comes to light from the scholar's comment to the genocidal conduct of forcible transfer of children, belonging to the target group, to another group [see article 6 *e)*]. About the maximum age for the childhood's fulfilment, the *Elements of Crimes* state that persons are considered as children if they are less than eighteen years old, adding that the offender « knew or should have known » that the victims were minors. The scholar makes a mistake again. He argues that the *Elements of Crimes*' provision is « inconsistent with article 30 of the Rome Statute, which requires that a perpetrator have actual knowledge of a relevant circumstance ». Once again, it is not adequately considered that article 30 itself is opened by the aforementioned speciality clause, which puts the *dolus generalis* standard "in offside". This also applies to the question of the agent's mistake about the victims' age. And the *Elements of Crimes*'s provision cannot be a normative reference to the theory that the recklessness and the wilful blindness are relevant. Indeed, it should not be confused, on the one hand, the specific intent required as a psychological coefficient – at least – of the principal author and, on the other hand, the question about the relevance of the mistake of fact. After all, the latter is expressly solved in the affirmative sense by the *Elements of Crimes*: in other words, given the need for the specific intent, it is logical to think that, about the mistake of fact, a lower mental element is acceptable only where expressly provided for. And the elucidation given by the *Elements of Crimes* would therefore have such primary function.

A different and further point is that those who contributed to the crime can be recognized criminally liable because of a contribution covered by a *mens rea* lower than the d*olus specialis*.

According to Andrew Simester, John Spencer, Robert Sullivan e Graham Virgo (Simester and Sullivan's Criminal Law – Theory and Doctrine – Oxford-Portland Oregon, 2013), within the category of the wilful blindness a distinction should be made, between recklessness knowledge and actual knowledge. The first sub-category is fulfilled whereas in the agent's psyche there is the knowledge or the doubt of a certain circumstance, and nevertheless he/she avoids to further check.
The second one is fulfilled whereas in the agent's psyche there is the intent to not check the truthfulness of a certain circumstance, since he/she does not have any doubt about it.
Finally, according to David Ormerod e Karl Laird (Smith and Hogan's Criminal Law – Oxford, 2015), the element characterizing the wilful blindness is the coexistence, in the agent's psyche, on the one hand, of the knowledge of a certain circumstance and, on the other, a blameworthy (because conscious) refusal to check his/her own conduct's consequences.

Regarding the genocidal *dolus specialis*, a final question is very complex, i.e. whether the agent must know that his/her conduct is suitable for realizing the further purpose.

As for crimes against humanity, article 7 of the Rome Statute provides for enough indications in the positive sense[41]. Instead, nothing explicit is disposed about the crime of genocide, neither by article 6 of the ICC Statute, nor by the Ad Hoc Tribunals' Statutes, nor by article II of the 1948 UN Convention.

Thus, apparently, the crime could be fulfilled even in case of an isolated and structurally unsuitable (with regard to the purpose) conduct[42] [43]. In other words: *Ubi Lex Voluit Dixit, Ubi Noluit Tacuit*.

However, it must be remembered that, since the genocidal intent complements the so-called contextual element, the latter objectively and subjectively defines the specific harmfulness of the crime, as a conflicting link between the agent(-group) and the victim(-group)[44].

Therefore, from the agent's points of view two elements are essential to the crime's fulfilment: the fact that the *actus reus* is realized in order to achieve the further purpose and, psychologically, its knowledge.

Actually, in the doctrine and the jurisprudence, it is unanimously affirmed that the genocidal specific intent presupposes the agent's knowledge of his/her conduct's relevance to a plan/policy and to a criminal context on a large scale[45].

In conclusion, the approach suggested here aims at a good use of the rule of law "tools". In other words, we cannot "step back" when we talk about safeguards, such as the principles of legality and guilt. The jurist's task is not to make rough justice. It is to interpret and apply the law rigorously, correctly and in good faith.

---

41 Antonio Vallini, L'elemento soggettivo nei crimini di competenza della Corte Penale Internazionale, in Cassese/Chiavario/De Francesco, Problemi attuali di giustizia penale internazionale – Torino, 2005.

42 Rosaria Sicurella, Ibidem.

43 In fact, within many national systems, the contextual element is not provided for; instead, within others, it has been established that the conduct needs to be part of a broader criminal sequence of events (e.g. art. 211-1 of the French criminal code: « en exécution d'un plan concret étendant à la distruction totale ou partielle d'un groupe national, ethnique, racial ou religieux »).

44 Lorenzo Picotti, I diritti fondamentali come oggetto e limite del diritto penale internazionale, p. 282 ss., in Indice Penale, n. 1 – 2003.

45 William A. Schabas, Genocide in International Law p. 207 ss. cit.

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 429-437
ISSN 1512-5505

WHAT ABOUT RESTORATIVE JUSTICE PRACTICES IN ITALY AFTER THE EU DIRECTIVE 29/2012? A LONG STORY OF CULTURAL DIFFICULTIES AND MISUNDERSTANDING

Susanna VEZZADINI

Abstract:

While in more recent years the attention for victims of crime in Italy has known an increasing (but often ambivalent in contents and effectiveness) consideration on political agenda and media interest, the concrete opportunity to intervene in the criminal justice system – and on the procedural criminal scene - is still partial and in some cases actually lacking. In particular, some obstacles of different nature still remain with regards to the implementation of restorative justice practices despite the spread consideration they benefit among professionals and, above all, the almost numerous laws promulgated on this matter also before the EU Directive 29/2012 (see: art. 47 of the Italian Penitentiary Code in 1975; art. 28 of the Juvenile Criminal Procedural Code in 1988; Law No. 274/2000 on the penal competences of the "Judge of the Peace"; and again: Law No. 67/2014 on probation in the adult criminal justice system; Law No. 212/2015 for the implementation of the EU Directive; Law No. 103/2017 introducing changes on Penal, Procedural and Penitentiary Codes).

The contribution aims to explore the reasons why the building of a "real" culture for all victims and the implementation of the restorative justice paradigm still encounter difficulties and misunderstanding, also taking into consideration the point of view of judges and lawyers, as well as the perception of victims of crime and the Italian public opinion.

INTRODUCTION

The Directive 2012/29/EU of the European Parliament and the Council, establishing "Minimum standards on the rights, support and protection of victims of crime", offers a peculiar and yet revolutionary definition of who is the victim. Actually, at *considerandum No. 9* is reported that *"Crime is a wrong against society as well as a violation of the individual rights of victim"*: by this way considering this subject as an actor of primary importance on the criminal scene, promoting a substantial change in the perspectives of Member States. A subject for a very long time considered as a mere object on which the offence fell back or, from a penal point of view,

a secondary, marginal figure on the criminal justice scene - where the most important actors were the State (represented by the prosecutor) and the offender.

As a consequence of this important modification – that is social as well as penal and political – one of the most important issue discussed in the Directive concerns the condition of vulnerability experienced by victims. A vulnerability grounded in the violation of personal rights, dignity and identity; in the lacking of reconnaissance of victims' peculiar needs by society and public institutions; in the partial and often instrumental attention paid by media to the emotions originated from victimization.

Starting from these general considerations, the EU Directive emphasizes some fundamental rights to be guarantee to victims after the offence, that could be summarized with respect to four main aspects: the right to be informed, the right to receive support, the right to be protected, and the right to participate to criminal proceedings. The first three are subjected to strong guarantees, the last one to what could be defined as "soft law" – because, according to *considerandum No. 20*, *"The role of victims in the criminal justice system and whether they can participate actively in criminal proceedings vary across Member States, depending on the national system"*. In the same time, the articles of the EU Directive let emerge the importance of four types of needs. Shortly, they can be described as following, in the belief the Law does not own all the instruments able to respond to the complexity of victim's condition:

- the need for truth, in the double sense of judicial and historical truth, as preliminary to any form of reconnaissance (acknowledgement) of victims' condition of suffering and restoration of the harm;
- the need for justice, not only as the result of the criminal proceeding but also as a concrete manner to restore the symbolic order violated by the crime;
- the need for knowing, because for victims is essential to understand how and why that event could happened, and particularly happened to his/her; but essential is also the need to be understood, giving voice to victims' point of view, feelings and emotions;
- the need for changing, because for the rebuilding of identity is necessary to have the opportunity of image an alternative condition to the one of victim giving a different narration of its own story in the present and, most of all, in the future.

These needs are strictly connected to the emotions felt by victims of crime, but also abuse of power, social exclusion and marginalization, repression: emotions like rage, shame, humiliation, solitude and loneliness, sense of culpability and sense of helplessness; emotions not rarely experienced also by offenders, in particular when condemned to a prison sentence: so they can be considered as aspects in common (or points of similarity) in both tragic experiences [Vezzadini 2016]. The EU Legislator was well aware of that when promoting restorative justice practices – not only mediation – at all levels of the criminal justice system, stressing the participation of communities to restorative programs. Nevertheless, considering the potential risks of secondary victimization, the EU Legislator required restorative practices would be applied first "in the best interest" of victims: *"Restorative justice services, including for example victim-offender mediation, family group conferencing and sentencing circles, can be of great benefit to the victim, but require safeguards to prevent secondary and repeat victimization, intimidation and retaliation. Such services should therefore have a*

primary consideration the interests and needs of the victim, repairing the harm done to the victim and avoiding further harm" as reported in *considerandum No. 46*. In the same direction were the previous EU Recommendations (see No. R (85)11 on the position of the victim on the framework of criminal law and procedure; No. R (87)21 on assistance of victims and the prevention of victimization) and the Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings.

THE POSITION OF VICTIMS OF CRIME IN THE ITALIAN LEGISLATION

It has first to be observed that the attention for victims of crime in the Italian legislation finds a relevant validation yet some years before the EU Directive. So in the Italian Penitentiary Code - art. 47, Law 354/1975 that states the possibility for offenders to act in favour of their victims and their families, too, and in the subsequent implementation of Law 230/2000, art 27[1], that promotes a reflection by the offender on his/her behavior and the harm caused, elaborating together with the Social services concrete actions to repair the consequences of the misconduct. Again this attention is clear in the Juvenile Criminal Procedural Code, DPR 448/1988, art. 28[2], that promotes probation, suggesting a wide implementation of restorative justice practices; and furthermore in the provisions of Law No. 274/2000 on the attribution of penal competences of the so called "Judge of Peace"[3], where it is clearly reported the duty for the judge to implement restorative justice programs under specific circumstances concerning the type of crime and the consequences it produced on victims.

During the last years, after the EU Directive, the suggestions there presented have been considered and formally included by the Italian Legislator at least in three important recent provisions on this matter:

- Law No. 67/2014 introducing probation in adults criminal proceedings[4];
- Law No. 212/2015 on the position of victims of crime inside criminal proceedings, in order to implement the EU Directive;[5]
- Law No. 103/2017 introducing changes to the penal, procedural and penitentiary Codes[6].

With regards to the first law here considered (No. 67/2014), it has to be noticed the introduction, for the first time in Italy, of probation for adult offenders. The treatment agreement includes some activities (defined by Social services according to the judge) such as compensation/reimbursement to victims, reparation of the harmful consequences, jobs for the community or of social utility, voluntary work of relevance. In particular, it states the opportunity that social workers suggest the implementation of restorative justice practices, promoting also victim offender mediation when in presence of the required conditions. Actually the law establishes the participation of victims of crime along to the whole process, but in concrete it largely depends – as we will say later – from judicial discretion.

The second law (No. 212/2015) is particularly important representing the implementation of EU Directive 29/2012. It includes some significant news for the Italian legislation on this matter: in particular we can mention art. 90 bis, concerning the rights of victims to be informed, to understand and being understood during criminal proceedings, the right to translation, the right to get informed about the presence of medical structures and shelters where find support and help. On the contrary, there is a still partial interpretation of the concept of vulnerability, that is generally considered "deduce" ("*desunta*" in Italian) from the peculiar seriousness of the offence and from the specific social group victims belong to (i.e. women, children, disable persons) [Bouchard 2016]. The Law do not present new instruments to guarantee the effective participation in the criminal proceedings for all victims; it does not even mention the need for the creation of a victim support national service network or assume as important to improve the diffusion of restorative justice services all over the Country (and not only in some regions), as required by the European document.

Finally, the third law here considered (No. 103/2017) presents some important changes in the penal, procedural and penitentiary Codes; in particular, at art 1, it introduces the possibility the judge declares the settlement or resolution of an offence when restorative actions result successfully realized by the offender. But exactly this pronunciation, at first glance so consistent, hides some critical aspects – in particular with regards to the words used in that context – as it will be discussed in the next paragraph.

But despite the formal consideration to victims and to restorative justice procedures suggested by this long list of rules and regulations, the proclaimed interest for their condition among politicians of all Parties and by media (an interest often ambivalent in contents and effectiveness, it has to be said), it's correct to affirm that the "real" and concrete opportunities to intervene in the criminal justice system are nowadays still partial and in some cases totally lacking.

OBSTACLES, MISUNDERSTANDINGS AND PREJUDICES: THE LONG WAY TOWARDS

---

4 Legge 28 aprile 2014, N. 67, Deleghe al Governo in materia di pene detentive non carcerarie e di riforma del sistema sanzionatorio. Disposizioni in materia di sospensione del procedimento con messa alla prova e nei confronti degli irreperibili (14G00070) (GU n. 100 del 2-5-2014)

VICTIMS' RECONNAISSANCE

In order to analyze and try to explain the discrepancy between what it is said about victims and what it is concretely done for guaranteeing the implementations of their rights - in particular concerning the possibility to accede to restorative justice practices - it could be of interest to examine some obstacles, misunderstandings, prejudices and stereotypes still remaining in the present. To this regards, it will be first take into consideration the terminology (the "words") used in the three more recent Italian Laws to represent victims' position and their rights inside the criminal proceedings (such as the possibility of direct/indirect intervention) and the opportunity to enter in restorative justice programs. Secondary, we will consider the position of penal and social operators such as judges, prosecutors and lawyers with regards to the same subject, referring to the results of some studies and researches realized in the Italian context. Finally, the considerations here presented derive also from the direct experience and observation made by the Author of this paper, who has been for six years (2008-2013) Special Judge in the Juvenile Criminal Court of the Emilia Romagna Region, in Bologna, and being from 2003 penal mediator for the "Centro Italiano di Mediazione e di Formazione alla Mediazione" (that operates on the humanistic model of mediation developed in France by Mm. Jaqueline Morineau).

The first issue to be discussed concerns what we can called a sort of lexical misunderstanding, because the Laws here considered (in particular No. 67/2014 on probation for adults who committed crimes, and No. 103/2017 introducing important changes on penal, procedural and penitentiary codes) present a critical overlap within the Italian verbs *"riparare"* (in English "to repair, to restore") and *"risarcire"* (in English "to reimburse, refund, indemnify, compensate"). While *"riparare"* means – in a broader sense – trying to rebuild emotional and interpersonal dimensions, the verb *"risarcire"* is mostly referred to an economic and financial retribution or restitution to victims.

But in the Italian texts of Laws these verbs are not considered as different; on the contrary, they are often used as similar or coincident, so that the verb *"risarcire"* (or "compensate") is often applied meaning a sort of restoration of the harm. The offence is intended to be "restored" when, as required by the judge or suggested by the lawyer, it has been compensated by the offender through financial actions: in other words, the harm is considered "repaired" when economically indemnified by the offender. To clarify this point, we propose an example brought from Law 103/2017, art. 1, where in order to be define "repaired" the damage has to be "compensated" by a payment or a sum of money (also paid in installments) by the offender as a reimbursement. So we read the following statement: *"Il giudice dichiara l'estinzione del reato, di cui al primo comma, all'esito positivo delle condotte riparatorie",* that in English sounds – more or less – in the following manner: "The judge declares the settlement of the offence (…) in front of the positive result of the restorative conduct".

In this perspective, central dimensions in the restorative justice paradigm such as victims' participation and listening do not seem to find a real acknowledgement; the negative consequences of the offence (the violation of victim's dignity or the perceived sense of insecurity) simply seem to be treated - and considered "repaired" - through a sort of monetarization of the offence. Maybe an important role in explaining the differences (also in qualitative terms) between these two actions could be played by lawyers and operators of Social services – that, nevertheless, need an accurate training on these topics.

To this regard, a second observation could be done. Actually among judges, prosecutors and

lawyers it is easy to observe an ambivalent attitude towards the restorative justice paradigm: they use to say it is very appealing "in theory", but "in concrete" they rarely apply it in the belief it seems to be too ideal, sometimes even dangerous.

Moreover, there is still the tendency to attribute to restorative justice practices different aims from the original ones, as constantly shown in the studies on this subject [Mestitz 2004; Scivoletto 2009; Vezzadini 2014, 2016, 2017]. Very frequently they are considered as a sort of "special tool" inside the traditional rehabilitative paradigm, especially in case of juvenile offenders; or, with a more pragmatic intent, they are seen as a mere instrument to reduce the huge charge of penal processes in the criminal justice system [Pavarini 2001].

So while judges, prosecutors and lawyers mostly show curiosity and a general "theoretical" interest in restorative justice (mediation in particular), they nevertheless apply it rarely, and when it happens is often for "different" motives. First, the restoration/compensation of the offence would represents a possibility to reduce or avoid a prison condemn, or other consequences for the offender. The focus of the attention is on the offender instead of the restoration of harmful consequences for victims or, at least, the interests of both parties. According to this perspective, we can assume that restorative aims are intended to be included into the traditional rehabilitative paradigm, becoming a sort of "original tools" inside that model of justice. Moreover, restorative justice measures are seen positively by judges when they contribute to better manage and organize the huge number of (pending) penal proceedings, offering an easy, "innocuous" choice to divert a significant part of them. In these cases, the offences considered are generally not very serious, sometimes they do not require the effective presence of a victim, or do not referred clearly to an interpersonal or mutual dimension of harm and reconnaissance, as it seems to be clearly stated in particular in the Law No. 67/2014 on probation for adults offenders.

Probably it could be affirmed that the very change impressed by the restorative justice paradigm is far to be completely recognized, reached and implemented in Italy in the absence of a well-rooted, but in the same time not ideological, culture "for" all victims.

To "support" and reinforce these ambiguities, we can not ignore the interpretation of a consistent part of new and traditional media, that often offer to public opinion a distort image of restorative justice as an opportunity given to offenders to close in short time penal proceedings without having their "just desert". Restorative justice is represented as a sort of soft condemn, a model of justice too benevolent or gentle towards offenders despite the harm they caused to victims. In other words, restorative justice is considered a "lacked justice", if not a form of injustice at all.

It is easy to understand that this kind of representation influences very much a public opinion generally skeptical and reluctant about "innovation" on criminal justice matters; a public opinion more and more worried by the spread of micro-criminality and agreeable to the implementation of harder sanctions – following that penal populism at this point so "popular" and common in many Western Countries [Bottoms 1995; Pratt 2007]. In this framework media play a central role in reinforcing a general, increasing perception of insecurity, hard to be argued and contrasted also by academics or social scientists. The principal risk is that victims can be used and manipulate in their request for reconnaissance and justice by politicians searching for votes and political consensus as a paradigmatic example of the (supposed) escalation of criminality and the widespread fear of crime [Fattah 1992; Garland 2001; Christie 2010]: a sympathetic discourse towards victims that leads to a perversion of the concept of justice and

its implementation [Salas 2005].

These last considerations bring us to make a final reflection on the ambivalent perception experienced among victims of crime about restorative justice practices, according to the different types of expectations concerning their own condition. If it is true that in more recent years also in Italy the interest for these alternative paths of justice has known a consistent widespread among victims, also victims of violent crimes such as sexual violence, homicide and terrorism [Bertagna, Ceretti and Mazzuccato 2015; Vezzadini 2017], still remains a variety of prejudices and feelings of mistrust. They are mostly due to the fear of receiving back any benefits (in a material or emotional sense); feeling new harm and humiliation; being wounded again; being shamed or blackmailed by the offender; not to be protected by the (justice) system; becoming instrumental to other expectations; having to re-open difficult processes of elaboration of sorrow and suffering they often managed in solitude; not to be understood, or even to be negatively judged or blamed by the social context. Of course these are only some reasons that could explained how and why victims feel disoriented about restorative justice practices, preferring to give up and withdraw into themselves, wishing silence will help to forget and being forgotten. And maybe find a different way to start a new existence.

All these reasons generally merge together in offering a distort, not positive image of restorative justice practices, influencing in a negative manner the possibility of their concrete implementation in the Italian criminal justice system as the cited Laws (seem to) required.

(IN)CONCLUSION

In conclusion, to try to image some substantial interventions to overcome the gap between "theory" and "practice", to improve victims' participation in the criminal justice system as well as in a more restorative community (as suggested by the EU Directive), four steps would be fundamental:

first, build a concrete culture of the victim far from those stereotypes and prejudices still affecting the concept, in order to overlap the enduring diffusion and consensus among politicians, media's representation and public opinion for the dichotomy between "ideal" and "real" victims [Christie 1986; Bouris 2007];

- second, clarify and propagate among the public opinion a different (but authentic, real) image of restorative justice practices, emphasizing the concrete benefits they produce for the whole community in terms of feelings of security, dialogue, rebuilding of interpersonal and institutional trust, reconciliation;
- third, improve the knowledge of restorative justice' aims among all the actors of the criminal justice system as well as their training in practices, with the financial support of the Ministry of Justice and the regional/municipality levels, too;
- last but not least, identify concrete places where victims could find attention, help and support, and for the effective implementation of restorative justice practices. Generally it is said that restorative justice practices represent a fundamental space of listening and wording for victims: now we need to transform that symbolic "space" in a real and concrete "place", with the support of public institutions, all over the Country.

But at the end this contribution, still remains a question: are these times "the good ones" for such a cultural and political change in Italy?

REFERENCES

- Bertagna G., Ceretti A. and Mazzuccato C. (a cura di) (2015), *Il libro dell'incontro. Vittime e responsabili della lotta armata a confronto*, Il Saggiatore, Milano
- Bottoms A. (1995), *The politics of sentencing reform*, in: C. M. Clarkson, R. (Ed.), *The philosophy and politics of punishment and sentencing*, Oxford University Press, Oxford.
- Bouchard M. (2016), *Prime osservazioni al decreto legislativo sulle vittime di reato*, Questione Giustizia, on the website: www.questionegiustizia.it
- Bouris E. (2007), *Complex Political Victims*, Kumarian press, Bloomfield
- Christie N. (1986), *The Ideal Victim*, in: Ezzath A. F. (Ed.), *From crime policy to victim policy. reorienting the justice system*, Palgrave Macmillan, London
- Christie N. (2010), *Victim movements at a crossroad*, Punishment & Society, April 2010, vol. 12 No. 2
- Fattah E. A. (1992), *Victims and Victimology: The Facts and the Rhetoric*, in Fattah E. A. (Ed.), *Towards a Critical Victimology*, St. Martin's Press, New York
- Garland D. (2001), *The culture of control*, Oxford University Press, Oxford
- Mestitz A. (a cura di) (2004), *Mediazione penale: chi, dove, come e quando*, Carocci, Roma
- Pavarini M. (2001), *La vittima del reato questa sconosciuta*, Torino – 9 giugno 2001, on the website: www.magistraturademocratica.it
- Pratt J. (2007), *Penal populism*, Routledge, London
- Salas D. (2005), *La volonté de punir: Essai sur le populisme pénal*, Hachette, Paris
- Scivoletto C. (2009), *Mediazione penale minorile. Rappresentazioni e pratiche*, Franco Angeli, Milano
- Vezzadini S. (2012), Per una sociologia della vittima, Franco Angeli, Milano
- Vezzadini S., (2014) Being (Almost) Invisible: Victims of crime in the Italian Juvenile Criminal Justice System, «TEMIDA» n. 4
- Vezzadini S. (2016), Il sostegno alle vittime: dal quadro normativo internazionale alla nostra realtà, in: *Vittime e autori di reato: un incontro possibile? L'esperienza della Fondazione per le vittime dei reati e del Garante dei detenuti in Emilia Romagna*, Bologna, Centro Stampa Regione Emilia Romagna
- Vezzadini S. (2017), Vittime, giustizia riparativa e reati sessuali. Processi decisionali e scelte operative del Tribunale per i minorenni dell'Emilia Romagna nei progetti di messa alla prova (cap. 8), in: Mosconi G., Pennisi C., Prina F., Raiteri M. (a cura di), *Processo penale cultura giuridica e ricerca empirica*, Santarcangelo di Romagna, Maggioli Editore

Criminal Justice Issues
Journal of Criminal Justice and Security
Year XVIII, Issue 5-6, 2018. p. 439-458
ISSN 1512-5505

CUBS OF THE CALIPHATE: MINORS AT THE SERVICE OF THE ISLAMIC STATE

Inmaculada YUSTE

Abstract

Throughout history the minors have been used in acts of violence and conflict, they have been treated as mere instruments for the struggle and have assumed different roles within the conflicts themselves, coming to fight in the front line of battle, the Islamic State poses a new form of recruitment with a clear objective of continuity for his caliphate project in which children play a crucial role which can have consequences in two aspects: on the one hand for European society and its resilience and on the other hand to put Test the security of the old continent. This paper aims to analyze the recruitment of minors by the Islamic State in order to prevent and rehabilitate these minors.

In 2017, children were victims of attacks on a scale never before seen, due to total disregard for international standards that protect the weakest on the part of the entire international community. As revealed in the latest report of the Syrian Observatory of Human Rights, in the last days of combat in 2017, ISIS suffered around 480 casualties, of which almost 300 were minors known as "the Cubs of the Caliphate". Nearly 300 children recruited by the Islamic State were killed when they were sent to the battlefront in the fight against Iraqi troops and the international coalition for control of Mosul in Iraq. In its last campaign, the United Nations Children's Agency (hereinafter UNICEF)[1], in June 2018, quantified in 1,000 children killed or injured in violent acts or recruited by one of the factions present in the conflict, only in both The first months of 2018. In the same way, it warned again that only in 2017 violent extremist groups present in this conflict had recruited three times more than in 2015, considered to be the hardest year for Syria since the beginning of the year. conflict.

Despite the provisions in international law that seek to protect and prevent the radicalization and enlistment of children in armed conflict, the recruitment of minors as a basis for various strategies and the advantages that for the extremist groups suppose make that this practice continues being habitual. More than 8 million Syrian children have been affected, both psycho-

[1] UNICEF. (2018). "Campaña 7… y no más". 03/06/2018, of UNICEF. Web: https://www.unicef.es/causas/emergencias/conflicto-en-siria.

logically and physically, by the violence and destruction of the civil war in Syria. An estimated 2.5 million children have been forced to flee their homes as internally displaced persons or refugees since 2011.

However, those children and their families who have chosen or been forced to remain within Syria face an additional threat from the jihadist insurgent organizations that compete to control the territory and the civilians living there. The Islamic State group (hereinafter EI), which is the case study for this investigation, is not the only organization operating in Syria and neighboring Iraq to recruit children into its ranks. As Mahmoud Houzan, a former Communist Party Kurdish activist, points out, "most Iraqi Shiite militias aligned with the government recruit children, while in Syria, the Free Syrian Army (FSA), the Islamic Front, the Workers' Party of Kurdistan (PKK) and Ahrar al-Sham also make up their ranks of minors. "The IS has, however, been the most prolific recruiter and has made a public dissemination of the recruitment of minors.

Regardless of the humanitarian issues that initially led to my interest in this topic, the motivations that have led to this research are mainly the lack of information and scientific literature in Spanish that we can find about minors recruited by Daesh, the lack of official figures and above, the problems of rehabilitation suffered on the one hand by minors who, after the conflict, are forced, because they have no means, to remain in Syrian territory and, on the other, those minors who, accompanied by their parents, traveled to Daesh territory and return to Europe. The objective here is to understand the recruitment process used by the IS in minors within a conflict zone in order to prevent their radicalization and help their rehabilitation and reinsertion. Another motivation of this study is the concern about the situation of minors who arrive in European territory and how both the international community and each State is treating them.

Having therefore two fronts open in this study:

- Minors recruited in the Daesh territory, methodology, consequences and alternatives to their rehabilitation in the field.
- Returned minors, born or not in Daesh territory, problems they face in European soil, but we will not go in depth to this point in this study.

In detail these are the motivations of this work:

In the first place we find two types of recruitment, which occurs in the conflict zone (Syria, Iraq) and even on the border with both countries and on the other hand the recruitment of minors in the West, not limiting us to Europe if not expanding the geographical scope to countries such as Australia, Malaysia or Pakistan.[2] In these two "typologies" of recruitment, Daesh uses different methods and tools for the recruitment of minors than for adults and therefore does not share the same approach.

Two other issues to be addressed derive directly from this situation, firstly, the fact that more and more children are traveling to the Syrian and Iraq conflict zones. This trend is highlighted by the annual report on terrorism and detainees that Europol published in June 2017, in which countries such as the United Kingdom and the Netherlands reported the decrease in the average age of children traveling to Syria with relatives related to ISIS, For its part, Holland reported that

[2] The Wilson Journal of International Affairs. . (2015). "Pakistan: IS Has Recruited at Least 400 Child Soldiers in Syria since January." . 06/07/2018, de The Wilson Journal of International Affairs. Sitio web: https://issuu.com/wilsonjournal/docs/spring_2016_wilson_journal

more than 40 children between 0-12 years old would have traveled to the conflict zone in 2016. Secondly, a significant number of children have returned with or without their parents to European territory[3], these minors were either taken to Syria by one or both parents related to the IS or were born in Syrian territory, within families loyal to the group . This fact has caused not only that they have been exposed to unprecedented violence since their birth, but also that some of these children are in a situation of statelessness since the birth certificates issued by Dáesh are not valid.

The third motivation of this study is the somewhat particular situation for which the international community has not yet known or refused to respond, and there are no international legal instruments to resolve it. We refer to the cases of minors accused of commission of a terrorist act, the only reference we have in this regard is Resolution 70/291 of the General Assembly of the United Nations on the revision of the Global Strategy against Terrorism[4], in which it is reiterated that any minor accused of the commission of a terrorist act must have a fair trial and its rights must be respected based on the Convention on the Rights of the Child (art 40), the Resolution goes on tiptoe for this issue, so there is a lack of precision when addressing this question, it is undoubtedly necessary to address it.

OBJECTIVE

Analyze to understand the recruitment of IS in minors, inside and outside their territory in order to prevent their violent radicalization in times of peace and help their rehabilitation and reintegration. Not only for a humanitarian issue but also for the possible consequences and threat that these minors with ideology can pose for European security.

HYPOTHESIS

This work establishes as initial hypothesis, the need to react to the phenomenon with a mixed strategy in which effective legal instruments are established together with soft measures on the prevention of radicalization in minors and rehabilitation of those radicalized under IS indoctrination.

METHODOLOGY

Both primary sources of law, regulations, recommendations, circulars, secondary sources, research articles and books among others have been used.

In order to have a multidisciplinary vision of the subject to be addressed, a total of 8 interviews were requested with researchers, state security forces, NGO collaborators and social workers, of which up to now 9 have been made Specifically, the Head of an Investigation Group of the Provincial Information Brigade of the CNP of Granada, a Médecins Sans Fron-

---

3 CONFERENCE PAPER. "Radicalization in Prison. Risk assessment tools ". Working meeting with experts - General Directorate of Justice. Brussels, February, 2018.

4 General Resolution of the United Nations of July 1, 2016, whereby the United Nations Global Counter-Terrorism Strategy is examined. Available at http://www.un.org/es/comun/docs/?symbol=A/RES/70/291, (last accessed 05.04.2018).

tières worker who worked in Syria in 2013, the Head of Security Operations of ACTED (a private non-profit organization that operates in Iraq), a worker of the PREVENT plan in the United Kingdom and after trying it with the Civil Guard at the border of Ceuta and Melilla without having satisfactory results, it was decided to request an interview with the agency FRONTEX, which led to a response and explanations institutions without too much investigative value, but that in some way has been useful to the investigation because it has allowed to establish a first contact with on the agency. It has also contacted the EASO agency in Malta, closing an interview for 01. 02.2019. The content of these interviews have been integrated and used during this work and undoubtedly have contributed dynamism and freshness to this research, as well as a highly relevant and truthful content based on the experiences of the professionals interviewed. Unfortunately not all the interviews have been carried out due to an agenda issue so both Nikita Malik (former senior researcher at Quilliams), current director of the Center on Radicalization and Terrorism in London and the PREVENT plan worker specialist deradicalization actions in minors and adolescents, in the United Kingdom, (who prefers to remain anonymous), they have postponed the interview until the end of January 2019, which will make their contributions can not be collected in this work but they will surely see the light in future studies.

MINORS AT THE SERVICE OF THE ISLAMIC STATE

The deaths of children in Syrian and Iraqi territory have been a constant throughout the conflict that has lasted seven years, organizations like UNICEF and the Syrian Observatory of Human Rights,[5] located in the United Kingdom, have sounded the alarm for several years in the brutal treatment that minors were suffering in this armed conflict but above all echoed the cruelty with which the IS recruits, trains and sends to the battlefront to said children. UNICEF emphasized that the numbers for 2018 could be even worse, so in the presentation of the report called on the agents involved to end the "attacks on schools and hospitals" which suggests that there is is respecting the International Humanitarian Law by which prevails in times of war the duty to treat the wounded and sick, as well as the protection of medical personnel and facilities, these foundations have been at the center of International Humanitarian Law (IHL) since its creation in 1864. These principles are further enshrined in the four Geneva Conventions of 1949 and the Two Additional Protocols of 1977. The protection of medical services in war zones is also part of the International Customary Humanitarian Rules and is reflected or it should be reflected in domestic law and military codes of all countries in the world. Despite International Humanitarian Law, UNICEF, called for efforts to rebuild "prioritizing the needs of children, including people with disabilities."[6]

One more sign that it is the International Agencies and the NGOs that are taking the reins in these matters and that prove that the rules of Humanitarian Law have not been met.

---

5 The SOHR was founded in May 2006. It cooperates with human rights organizations in Syria, the Arab world and the international community. Web available at http://www.syriahr.com/en/, (last seen on 09.04.2018).

6 The Guardian, "2017 was the deadliest year of Syrian war for children, says Unicef", March 2018. Available at: https://www.theguardian.com/world/2018/mar/12/2017-deadliest-year- of-syrian-war-for-children-says-unicef-psychological-ruin, (last seen on 08.05.2018).

But UNICEF is not the only voice that has risen in this regard, think - tanks such as Quillian (United Kingdom) and CTC Sentiel (United States) have issued reports in which the figures speak for themselves and point to the issue of minors used in the Syrian conflict as a matter of concern.

In other cases, minors have served as messengers, carriers of materials, smugglers or spies, they have even been treated as slaves and systematically subjected to sexual abuse and exploitation, the latter supposed above all in the case of girls. In this context of exposure to violence suffered by children in conflict zones, it is not surprising that UNICEF echoed again in August 2017 the use of minors this time by another of the IS factions. The organization claimed that since January 1, 2017, Boko Haram (organization that adopts the name of EI in West Africa since the oath of allegiance to Abu Bark Al Bagdadi in March 2015 and based in the northeast of Nigeria, also active in Chad, Niger and northern Cameroon) had used 83 children to carry out explosive attacks in northeastern Nigeria, which is four times more than during all of 2016.

Proof of the different roles that children assume once they enroll in the ranks of the IS reflects the report published by the CTC Sentinel in February 2016 that focusing on the Syrian conflict, states that of the 89 cases of children studied, the 39 % died by detonating an improvised explosive device transported by a vehicle (VBIED) against its target. 33% were killed as infantry soldiers in unspecified operations in the battlefield, 6% died while working as propagandists integrated in units / brigades, and 4% committed suicide in massive attacks against civilians. The final 18% were the so-called Inghimasis (derived from the Arabic "dip"), which means that they died in what we commonly call assault operations in which a group of mostly adult fighters infiltrates and attacks an enemy position. using light automatic weapons before committing suicide detonating suicide belts, for the Inghimasis, the aim is to die for Allah and this is reflected in the modus operandi of their actions. Depending on the role the child was performing, according to the report forty percent of the time, the children and young people died in operations aimed at the state's security forces (including military and police targets). 21% died fighting against paramilitary forces (militias and non-state opposition) and only 3% perpetrated suicide attacks against civilians. No target was specified for the remaining 36%.

In other cases, minors have been used in support work, assuming the roles

of messengers, smugglers or spies, they have even been and are treated as slaves being systematically subjected to abuse and sexual exploitation.

We can also have proof of the growth of the recruitment of minors in conflict areas such as Syria, since according to the CTC Sentinel report, from January 1, 2015 to January 31, 2016, 89 children and young people were praised in the propaganda of the Islamic State. As for the countries, the study concludes that 51% died in Iraq, while 36% died in Syria. The rest died during operations in Yemen, Libya and Nigeria. 31% were Syrians, 25% Syrian / Iraqi and 11% Iraqi. The remaining 33% came from Yemen, Saudi Arabia, Tunisia, Libya, the United Kingdom, France, Australia and Nigeria.

These figures reveal that in some circumstances children are less aware than the elderly of the risks involved in these situations, so they can handle anxiety much better and, in some cases, can be more effective than adults. From the cases and figures presented, we can see that the use of children to carry out terrorist attacks, both in conflict situations and in times of peace, is gaining more prominence and this undoubtedly occurs due to the ease of recruiting

a child and shows how little protection they have, including from the international community. If we focus on the crisis in Syria, to date it has left more than 470,000 deaths, (according to the Syrian Center for Policy Research, 2016), which includes more than 12,000 children and more than 7.6 million internally displaced people. According to UNICEF, there are 8.4 million children affected by the conflict, either within the country or as refugees. In addition, there are 6 million Syrian children who need humanitarian assistance and more than 2 million can not receive them because they live in areas of difficult access or are besieged.

This situation is the result of the constant violation of international norms and the Law to protect children, of course, in the case of Syria, humanitarian law and its repeated prohibition of attacking civilian objects such as hospitals or schools, not only not They have been respected, but they have been systematically violated. Therefore, it is necessary to recognize that the safeguarding of the rights of children that was also included in the Convention on the Rights of the Child has been a failure in the light of the figures.

WHY RECRUIT MINORS?

Already in 1999, Taylor and Horgan predicted that the future direction of state and non-state violence would imply the deliberate victimization of children, as an indicator and result of an increased willingness to escalate the general climate of fear and the severity of violence. [7]On the other hand Benotman and Malik reinforce this observation, arguing that, "while in the scenarios of previous conflicts children were used despite their youth, they are increasingly used for their youth".[8]

According to Benotman and Malik, children continued to play an important role in the insurgency that followed the invasion of Iraq, referring to some reports of US military intelligence. UU They highlighted the role they played as attackers and observers in ambushes. Already in 2004, the 'Mahdi Army' of the radical cleric Muqtada al-Sadr employed child soldiers, who could be seen in battle by British and American forces. They were clearly and strongly indoctrinated; a 12-year-old boy who was fighting with the group proclaimed that, "Americans are weak. They fight for money and status and scream like pigs when they die. But let's kill the infidels because faith is the most powerful weapon. " As the security situation deteriorated, the UN was forced to establish a working group on children and armed conflict in Iraq in March 2009, after Al-Qaeda in Iraq (predecessor of the Islamic State) was included by the Secretary General as a recruiting organization for minors.[9]

On the other hand, some authors point out that the legacy of Saddam Hussein it is at the base of the administrative and bureaucratic structures of the Islamic State. This fact can be sure to be largely due to the decision made by Paul Bremenr, who was director of the Reconstruction and Humanitarian Assistance in Iraq (Coalition Provisional Authority)

---

7 Tailor M. and Horgan J. Future Developments of Political Terrorism in Europe, Terrorism and Political Violence, 1999, pp. 83-93.

8 Benotman N.and Malik N., The Children of Islamic State, Londres. Quilliam Foundation, 2016.

9 Report of the Secretary-General of the United Nations on children and armed conflicts in Iraq ", United Nations Security Council, November 9, 2015, p.2, available at http://www.un.org/ga /search/view_doc.asp?symbol=S/2015/852&Lang=E&Area=UNDOC, (last seen on 05.25.2018)

appointed by Bush in 2003, made the decision to demobilize the Iraqi military and dismiss all Baathist officials from civil service posts, leaving more than 100,000 Iraqis unemployed, angry and in many armed cases.

As a result, many former Baathist officers and officials joined IE at the highest levels, bringing with them their military and organizational skills, network of experienced bureaucrats, and perhaps most importantly, their knowledge of the smuggling networks Established to bypass sanctions in the 1990s, and now facilitate the institutional strengthening of illegal oil trade. This Baathist influence is evident in all aspects of the recruitment of children by IS, from the terminology (Saddam's Lion cubs to Cubs of the Caliphate), to military-style training camps and techniques such as desensitization to violence that they are used to train children. Beyond the ideological ones, the reasons why minors are an easy target for organizations such as the IS can be collected in four which in turn can be divided into two groups: on the one hand the reasons that obey a purely strategic aspect part of certain extremist violent groups and, on the other, those whose raison d'être is the very nature of the minor and his vulnerability.

- STRATEGIC SENSE

First, we must bear in mind that in some regions or collectives, this group is seen as a salvation against the threat of the government or the "Western enemy", including other violent local groups that are called infidels. In this sense, joining their ranks guarantees survival and protection. In some cases, it is their own families that push and encourage the child to be part of the EI. On the other hand, in populations where IS is no longer strong or has lost most of the support of the local population, adults are likely to be difficult to recruit, while the recruitment of minors guarantees geographic expansion and control of the population. area although its support at the beginning weakens. We must admit that in terms of strategy it is very practical and useful, since it allows the IS to continue with the control of a region or at least not disappear from it, apart from gaining time to change tactics and direct it towards the recovery of territory.

Secondly, some groups such as EI and their voice in Africa, Boko Haram, have intensified in recent years in the recruitment of children and the publication of videos and images on the Internet. These videos and images are material in which children are the authors of cruel and extremely bloody scenes. The main objective of these images in these cases is to generate alarm in the international community and, at the same time, show the power and cruelty of the group. The third of the strategic approaches is economic, since it is much more profitable to feed and care for a child than an adult, for the simple fact that children need less food than adults, therefore the cost of maintenance is more cheap for the group. In addition, the market for small arms in such countries, especially in areas of conflict, is also a relevant factor, since it is little regulated or at least easier to circumvent the laws that regulate it. Small arms become more accessible to children who can handle them much more easily than large caliber weapons, in this case the use of children as killers and perpetrators of a terrorist attack reduces the cost of the attack, which does not necessarily mean reducing the effectiveness of a child that is used to apply violence.

- NATURE OF THE CHILD

The fourth of the reasons related to the nature of the child, is that which focuses on that we must not forget, on the other hand, that children tend to be easier to manipulate than adults and that it is relatively easy to generate a feeling of dependency and affectivity, especially with unaccompanied minors. These minors, on numerous occasions, do not have a family atmosphere that could dissuade them from joining the ranks of any of these violent extremist groups. In addition, children tend to show their loyalty and respect towards the leaders they admire and respect relatively quickly, which is a particularly relevant element when families intervene in the recruitment process, that is, when they are a brother or a member of the family. family is the one who recruits.

MODELS OF RECRUITMENT IN MINORS BY THE ISLAMIC STATE

The need for minors to become in the long term symbols and bastions of radical values and the vision of the extremist world posed and defended by IS has altered how the tools and methods used for recruitment could not be otherwise.

We can find several authors who have tried to limit and describe this recruitment process. Singer, delved into the militarization of children in his book Children at War 2005, reducing to three the key phases suffered by a minor involved in armed conflict: selection, mental preparation or indoctrination, and action. This model is useful in a first approach to the phenomenon but it is necessary to specify and define the long-term model, this is just what Horgan et al. In his book: From Cubs to Lions: A Six Stage Model of Child Socializationinto Islamic State of 2016, which also serves as a reference to the RAN in its treatment of returned children. Instead, they propose six stages of child recruitment: seduction (initial exposure to ideas and staff); schooling (routine, direct exposure and intensive indoctrination); selection (institutionalized preparation for military and other functions); subjugation (physical and psychological training and brutalization to deepen commitment and loyalty); specialization (promotion of experience in specialized training); and consolidation (assignment of functions, deployment and recruitment of new members). The investment in the model by Horgan[10] et al. of the steps that Singer proposes in his model, that is, indoctrination techniques precede those of selection imply a change in the critical development of the recruitment process, particularly in the case of IS. This change clearly occurs in light of the long-term objective pursued by the IS, ensuring long-term group security and reducing the likelihood of desertion or betrayal.

It is vital for terrorist organizations like EI to build trust, meet emotional needs and isolate potential recruits from compensatory influences. Changing the moral point of view of people before enlistment is essential to ensure the selection of more loyal members, and therefore more committed. In order to analyze the contacts of minors with the EI and the factors that motivate them to enlist, this chapter focuses on the first two stages of Horgan's model: seduction and schooling. It could be said that, however, these two modes of indoctrination do not reflect the reality of the reach and radicalization of children in their territory since the IS combines formal and informal, direct and indirect, cooperative and coercive recruitment in addition to individual methods and systematic scope to create a holistic and immersive strategy that radicalizes children under its territory.

Researchers have identified a number of IS methods to initially influence and recruit children, including kidnapping, public promotion events, incentive and gifts, and influence of other supporters of EI. In the interview with an Spanish Doctor Without Borders worker in Siria, Héctor Caballero, who worked in Syria during the conflict, specifically in 2013 it also includes the controversial issue of radicalization of children and "voluntary" participation in IS systems and activities. Highlights in the interview the various factors that encourage minors to actively seek and join the ISIS to "escape from difficulties at home or at school, often as a result of insecurity, boredom and war-induced poverty " In this interview the aid worker explains the way in which the IS gains power in Syria to conquer Aleppo and how the minors in most cases enlist in the ranks of the ISI for a matter of prestige and social recognition dragged by the lack of prospects of futures that exist and that the international community seems to be neglecting, which will undoubtedly have an impact on the future of these generations.

The factors of concurrent attraction may be the promise of food, the possibility of fighting for an ideology, acquire an income, seek social credit, obtain protection, and sometimes simply entertainment. Therefore, while recognizing the difficulties in determining the motives of individuals for joining extremist groups, this chapter seeks to examine the plausible pathways of IS influence on minors: direct and indirect; voluntary and coercive: under a "first contact" stage. Unifying and focusing on the first two stages of Horgan's "seduction" and "schooling", considering them the most important to understand this process and be able to act on it. Seven subcategories are presented under the "first contact" stage:

1. Forced enlistment;
2. Questionable voluntary membership and voluntary enlistment;
3. International recruitment;
4. Desensitization to violence;
5. Pseudo-State and "governance";
6. Social factors;
7. Loss of adult models of reference and loss of confidence

Although these lines proceed to examine each category in turn, it is important to note that the radicalization and recruitment of adults or children can not be attributed to single or isolated events or factors, but is often the product of combined influences and pressures that lead to the adoption of extremist beliefs and / or active enlistment.

1. FORCED ENLISTMENT

Although much of the recruitment of IS is voluntary, the recruitment of children by IS has been extended to the means of force. Similar to the traditional recruitment techniques used with child soldiers, the terrorist group has separated from their families and forcibly recruited children by force, has also carried out kidnappings in refugee camps and orphanages. The most prominent and devastating example of this tactic was the genocide of Yazidis on Mount Sinjar in August 2014. The United Nations and Kurdish officials estimated that a total of 400,000 Yazidis[11] lived in Sinjar at the time of the attack. An approximate number of

[11] The Yazidis form a pre-Islamic minority whose roots go back to 2000 BC.

9,900 dead and 6,800 kidnapped are estimated, those under 14 years constitute 33.7% of the kidnapped.[12]

Although obviously it is impossible to determine the fate of each child captured by EI, there is a general consensus that the roles assigned to children are gender specific, with girls being sold as sex slaves to combatants, and children trained as first-line combatants or suicide bombers.

Gawry Rasho, a Yazidi woman released by the IS in April 2015, testified that the terrorist organization had thousands of Yazidis in captivity.[13] She was released after 8 months, but her 7-year-old daughter was detained. While the IS liberated some young and elderly Yazidis, Gawry mentions that children are often taken by force, forced to marry and selected for sex. In the same way, he said: "They treated girls and young women very badly, I saw them choose and take them, and if they refused, they would be defeated." Minority youth are vulnerable targets of this type of "recruitment" of IS, while children assume a variety of functions. The boys kidnapped by the IS are trained later, after which they are released or assigned a position in the ranks of the Islamic State, explained the woman. But for the IS, the "forced recruitment of children" has not been limited to minority populations. In January 2016, a joint report of the United Nations Assistance Mission for Iraq (UNAMI) and the Office of the United Nations High Commissioner for Human Rights (OHCHR) confirmed that a total of 800-900 children between 9 and 15 years old were kidnapped in Mosul,[14] along with other sources, reported abductions of children in orphanages, family homes, schools and recreation areas.

Although the use of force by IS does not allow families and communities to resist the kidnapping, enlistment and enslavement of children, the selection of the group of the most innocent and vulnerable members of the community could discredit the image of the caliphate as the model ideal of Islamic society. In fact, it is important to note the IS legacy of this tactic of Saddam Hussein's Baathist regime, which by the end of the 1970s, the Futuwah (Youth Vanguard) movement was formed and, in the mid-1990s, extensive military training camps were established for children and the special Saddam's Saddam's Lion Cubs.

Efforts to reduce support for ISIS and other jihadist organizations that forcefully recruit children can undoubtedly be strengthened by highlighting the hypocrisy of the tactics they employ and the constant violations of human rights that transform children from the hopes of the child future to the current war booty in which they have become.

2. QUESTIONABLE VOLUNTARY MEMBERSHIP

Despite the ambiguity regarding the number of opinions on why minors join the IS, it is a fact that these minors join their ranks voluntarily, although after having been attracted by the organization by different tactics that we will see below. The ability of the IS to convince children to join their ranks is noteworthy. The success of the terrorist organization in convincing the minors reflects the organization's greatest success in recruiting and its impressive ability to reach people from all over the world.

The minors who are recruited and taken to the front of battles are related to adults involved with the EI, especially the case of children of combatants. [15]Either because the parents are originals of Syria or Iraq or because their parents travel to the Islamic State, where they, as well as their children, become citizens of the Islamic State. Apparently, the group encourages parents to send their children to training camps.[16]

The question that arises in these cases is to what extent it is clear the voluntariness and the participation and the motivation of a minor to be part of the terrorist organization in situations in which the minors start in the ranks of the IS through family connections. While the group describes the children as "happy" in their training and subsequent indoctrination, this type of recruitment leaves unanswered questions about the conscience of the children about the nature of the activities in which they have been immersed. Undoubtedly, the role of parents and other adult figures of reference in a child's life is an important factor in determining the way in which children are involved in the organization.

2.1 VOLUNTARY ENLISTMENT

Despite the ambiguity regarding the number of opinions that children have when they join the EI when their parents are the ones that lead them to be part of the terrorist group, the children also join voluntarily, although after having been attracted by the organization. In the past, terrorist groups and other armed groups that recruited and continued to recruit child soldiers in the vast majority of cases were forced or abandoned to be praised as martyrs. In this case, the success of the EI in reaching children and choosing to join the filar of the terrorist group reflects the success of the organization in the recruitment and its impressive ability to reach people around the world.

2.2 CAPTATION THROUGH MATERIAL COMPENSATION

Children are vulnerable targets: as a general rule they feel more attracted by the material and psychological benefits offered by the EI and that is a factor that the organization takes advantage of. Materially, it offers children a variety of gifts. Abu Hassan, a resident of Mosul, declared: "They are providing their fighters everything: gasoline, wages, supplies and women to get married, gifts". Especially in Iraq and Syria, devastated by war, IS simply offers a better standard of living for children. It is important to stop at this point and mention the positioning that the group made in the region in 2013, which has allowed it to establish itself as an organization capable of offering these incentives for young people to join their cause. As reflected in the interview with the MSF worker, it was in mid-2013, specifically in May of that year, when the presence of Dáesh in the region began to be heard, at least in the area of Sheik Najjar,

Aleppo,[17] according to explained the cooperator at that time ISI or ISIL, arrived in the region in small groups and specific areas, "and initially it was said among the local people they assumed that they were coming to throw a cable in the fight against the enemy (Al Assad) and that they were going to collaborate with the FSA without any conquering intentions. " In the words of the aid worker, everything changed very quickly, in a matter of days the battles between the different rebel factions and ISIS for the control of the border areas were heard; what should have been a high source of income while at the strategic level.

2.3 PSYCHOLOGICAL APPROACH

The psychological aspect of IS recruitment is crucial to understanding the group as a whole and its success in recruiting people from around the world. Although the psychological aspect of recruitment is not new and was systematized under Osama Bin Laden's Al-Qaeda organization, which recognized the relevance of creating recruitment videos, web pages and even a recruitment manual, the group's global recruiting success through psychological methods is unprecedented throughout history. Much of the skill, especially in the West, can be attributed to the global reach and influence they have achieved. The American fears of terrorism as of December 2015 were as high as those that were generated after 9/11, which can certainly be attributed to the striking psychological appeal. This characteristic, therefore, can not be underestimated. Children are by no means immune to this aspect of recruitment. In particular, the group offers young people a new identity, a sense of belonging as well as a different set of values and beliefs, which means a Salafi and jihadist interpretation of Islam.

Because the IS operates as a pseudo-state, it helps provide welfare, education and religious services to people who live in areas under its control. The EI, therefore offers a restoration (although incomplete) of these systems, and is more appropriate to provide the necessary structure and order in the life of a child. In addition, the group receives and attends children suffering from congenital malformations. Although this strategy appeals to your desire for a better standard of living and a more promising future, it also attracts a recruit's sense of identity and community. The repair of congenital malformations allows a recruit to be more fully accepted in society. In addition, in this way the group seeks to evoke jealousy among children, a strategy to recruit children. When the group deliberately shows children who have new clothes, weapons and medals, other children who are not involved in a group want the same thing and feel more discriminated against. This feeling of jealousy can make children choose to join the organization and consolidate their reasoning and justification to join the group. The psychological appeal of IS, especially as seen in young adults and adolescents in the Western world, should not be underestimated in children living in areas affected by the organization. The group can use a variety of psychological methods to reach the audience they want to reach.

3. INTERNATIONAL RECRUITMENT

The threat of IS in children is real even outside the Middle East. The recruitment of children outside the Middle East is mostly psychological, not material. The organization makes these children feel loved, loved and understood, and then uses these emotions to get the child away from

[17] Motaparthy, PRIYANKA, Human Rights Watch, "Maybe we live and maybe we die" 2014.

their parents and loved ones. Schoolchildren from countries such as Germany and the United Kingdom have left the Western countries with the aim of joining the terrorist organization. In March 2015, 70 young women, including 9 schoolchildren, left Germany to join the EI. German intelligence believes that approximately 400 people went to Iraq and Syria, of which 24 are minors. Some of these children are under 13 years old and four of them were women.18 In addition, the United Kingdom believes that approximately 900 Britons have traveled to join the EI19. Most of them, young people and teenagers, but the exact number of children among the 900 is not clear. Indonesia is also a vulnerable target for the recruitment of children, as it is a predominantly Muslim nation. The Secretary General of the Indonesian Child Protection Commission noted that since August 2014, Islamic State extremists had infiltrated the extracurricular Islamic classes as "imams". Here, they propagate to the children that the brand of Islam that defends the IS is good, they encourage them to join the IS and advocate the fight against the infidels. To further consolidate this indoctrination, children read the same messages through social networks and the Internet. The group has militarized education, using schools where Islam is taught to reach children internationally and essentially brainwash them. Islamic countries are especially vulnerable to the militarization of ISIS education. As will be discussed later, education is a crucial tool not only to recruit children nationally and internationally, but also to reform them. In addition, as the IS gained influence and began to establish branches in the vicinity of Iraq and Syria, the recruitment of children will increase in North Africa and other areas of the Middle East. According to reports, ISIS has established camps through its Libya branch in order to train children. Many of the recruits are African children between 12 and 15 years old, brought from nations such as Nigeria, Mali, Ghana and Niger with the help of Boko Haram, who swore allegiance to Abu Bakr al-Baghdadi in March 2015. Other recruits they come from Libya and Egypt20. By recruiting children internationally, the organization can show its brutality and extend its influence, which ultimately causes a greater sense of panic in the Western world.

With respect to the general recruitment of IS, foreign fighters comprise half of its members, including almost 4,000 westerners. Since January 26, 2015, approximately 20,730 people from 90 countries have traveled to Syria to fight in the ranks of the IS, the majority of these people come from Arab nations.[21] In Europe, France (1,200), the United Kingdom (500-600) and Germany (500-600) have produced the largest number of foreign fighters. However, in relation to the size of the population, the majority of foreign fighters come from Belgium, Denmark and Sweden. It is estimated that 11,000 people come from the Middle East and 3,000 come from the countries of the former Soviet Union. Of course, it is not entirely clear how the recruitment of children fits into these figures, since children from Western countries are more likely to

---

18 Al Arabiya News, Chief of German espionage: 13-year-old children who join extremist groups September 22, 2014.

19 HALL. J, ISIS decapita a un soldado libio fuera de una mezquita, 4 de junio de 2015.

20 BBC Monitoring Middle East. "Islamic State reportedly trains children to fight in Libya secret camps." BBC Monitoring Worldwide. April, 2015

21 The International Center for the Study of Radicalization and Political Violence, "Foreign Fighter Total In Syria / Iraq Now Exceeds 20,000; Surpasses Afghanistan Conflict in 1980s. "January 2015.

travel with their families to Syria and Iraq, and in this way real motivation can not be measured. voluntariness of the child to join Daesh.

What is certain is that among other tools, the internet and online propaganda, has played a crucial role in directly incited recruitment and self-radicalization leading to violence in the international arena. Not in vain, the organization has invested a lot of their time and money in the elaboration of propaganda campaigns worthy of the best of Hollywood movies.

3.1 DESENSITIZATION TO VIOLENCE

Through each stage of the IS's strategy to indoctrinate and train the children as future jihadist warriors, the group sought to normalize exposure of minors to violence and death. While most audiences would be disturbed by images of child soldiers executioners, the organization promotes these roles with great "honor" and responsibility to which children should aspire and for which they must even compete.

Something certainly new, because to date the different violent extremist groups rather kept secret the recruitment of minors, or the child did not boast about it and did not exhibit it with pride. This normalization is achieved through constant exposure to violence and brutality, as in IS propaganda on the internet while witnessing (or even carrying out directly) acts of violence. The terrorist organization is present as we have previously commented on the state structures not only sanitary but also in educational ones, which allows them to control the most effective tool for the indoctrination of minors such as education.

The Syrian Observatory for Human Rights, published in October 2016[22] a report that echoed the long-term strategy that ISIS intended to recruit minors, in the same way noted the creation by the terrorist organization of Sharia courses under the name of "invasion of territory" in the area of Deir Ezzor, in which children aged 12 and over participated for 40 days. The report indicated how public schools had been closed under the pretext of being military targets, thus pressuring the remaining students to join in these courses.

In the same way they had created at least five training camps and training for minors in the region of Deir Ezzor, in which they prepared the children both militarily and ideologically. The observatory also explained the creation of "secret mobile camps", created after the international coalition attacked the fields of Manjam to Melh, Palm Farm, al-Tebni and Husseiniya, attacks in which ten members of the organization died.

This direct and indirect exposure to violence serves to numb and desensitize the natural feelings of fear, disgust or guilt of children, and instead reinforces the group's message that violence is a necessary and "normal" way of life.

This situation makes the mere fact of being in the territory of the IS the exposure to its message and violence almost inevitable. As we have already seen, the terrorist organization occupies both public and private spaces, making the constant exposure to its message provoke in the minor a change of ethical and moral values and normalize the violent behaviors that naturalize when exposed to them in their day a day. Fundamentally, the active participation of children in violence is a tool that the IS uses as an instrument of coercion, since it prevents the desertion,

---

[22] Syrian Observatory for Human Rights, "Syrian children from school seating to" Caliphate Cubs ", available at http://www.syriahr.com/en/?p=53635 (last consulted on 06.25.2018)

the minor would face the loss of prestige of the families in disapproval on the one hand and on the other the punishment in virtue of national and international law.

3.2 PSEUDO- STATE AND "GOVERNANCE"

It is important to recognize that, in the context of Syria's civil war and the consequent suffering of local populations, ISI was considerably strengthened due to its practices of incipient "state" or pseudo-state government. Interviews with former IS militants and ex-civilians praise the reduction in crime, and the lack of "decorum" that the IS brought with it, stating that "when they arrived, things were going well, very well. Islam". As noted by Speckhard Yayla, in his book ISIS Defectors: Inside Stories of the Terorist Caliphate of 2016. This same initial approach is confirmed by Hector Caballero, the Doctor Without Border worker interviewed, in his own words: "Among the locals you could hear they were coming to throw a cable against the enemy." At the level of "Governance", when the IS seizes a city, it maintains selected services while using brute force to impose its vision of a fundamentalist i[23]slamic State. The religious police make sure that shops close during Muslim prayers and that women cover their hair and faces in public. The public spaces are walled with heavy metal fences and the black flags of the IS are flying. People accused of disobeying the law are punished with public executions or amputations. At the same time, the EI keeps markets, bakeries and service stations in operation. In this way, it maintains a situation of false normality and control in the face of the chaos of war, which inevitably leads many of the local people to consider them as "saviors" and to interpret this situation as desirable if they compare it with the situations of begging and destabilization of Syria's conflict zones.

The ideological mission of the group, therefore, to create its own model of the Islamic caliphate has resulted in practically the provision of goods and services, ranging from food and drinking water to health care and education for its "citizens", and even the provision of traffic agents. The EI recognizes and exploits the propagandistic value of its welfare services, with 31% of its images and videos published dedicated to showing schools, health services, aiming to highlight the service they offer and the scope of their domain in the areas that occupy.

3.3. SOCIAL FACTOR

The EI has focused its strategy with the minors in its concentration in groups, in this way it limits the usual social dynamics and uses classic social tools such as peer pressure, competition and "group thinking", to create an environment in the echo of the ISIS ideology resounds everywhere and there is a worldview among equals of trust. As children build their own collective confirmation bias, individuals are indoctrinated into the group through informal socialization, thus normalizing the process of radicalization and finding authoritarian voices among their own trusted peers. IS established institutions such as the Central Cub Scouts of the Caliphate to somehow "ensure that military training and religious training are combined with a generalized sense of community, identity and belonging, and thus strengthen the control of IS in the minds of their young recruits. "David J. Wasserstein on page 144 of his book Black Banner of ISIS: The Roofs of

---

[23] The New York Times, How ISIS works, September, 2014. Available at: https://www.nytimes.com/interactive/2014/09/16/world/middleeast/how-isis-works.html. (Last checked: 07.07.2018)

the New Caliphatese echoed the creation of this institution, explaining that in May 2015 a circular announced the celebration of the Second session of the Central Cub Scouts of the Caliphate in the province of Raqqa, aimed at children from ten to fifteen years of age who had some ability for reading and writing, and offered classes Sharia, the art of struggle and science military. In this way the children's roles are promoted as an immersion experience, providing satisfaction through social bonds, physical adventures and ideological purification, demonstrating finally that although only in appearance the IS values Syria and its minors both in life and in death. In spite of this message that the group transmits, in practice, the children are exploited solely for the tactical and ideological benefit of the group.

Bloom et al. observed that despite the extensive marketing and glorification of the IS of their puppies and pure children of the caliphate, the age of the child combatants and martyrs is never reflected in the propaganda that the organization spreads.

Although children are granted the "glory" of fighting alongside adults, the loss of their lives and their childhoods is not recognized at any time in the propaganda seen to date. We could take this fact as a weak point in the organization's strategy, using it to undermine the "heroic" call that the IS makes to join its ranks, especially by highlighting the group's hypocrisy.

The short-term celebrity and wealth enjoyed by the IS families in the case of some of them have led to ostracism and even to the statelessness of the children of women who were born in the caliphate. Efforts to counteract the radicalization of minors and undermine the messages of jihadi recruiters should focus on the long-term positive outcomes of alternative lifestyles. Investing in education can equip children, at least the most vulnerable, with the knowledge and skills necessary to be able to protect themselves against extremist narratives and, instead, find a satisfactory and sustainable job to sustain themselves and others. Following the positive career paths of doctors, engineers, activists, lawyers and other community leaders and influential people will not only gain the respect of their communities in the short term, but also, most importantly, allow them to play a role active and influential in the reconstruction and revitalization of their communities in a post-conflict era.

LOST OF ADULT REFERENCE MODELS

Regarding the confidence of these children in adults, although many children voluntarily enlisted and initially interacted with the IS independently of their parents and guardians (as seen above), the family unit remains a key to influence children, introducing and reinforcing extreme ideas and worldviews. Radicalization through the private and domestic sphere, particularly through family ties or kinship, obscures efforts to detect and prevent the indoctrination of people, particularly children. Close ties and family radicalization are based on feelings of trust and respect in order to attract the possible recruit, while the process of radicalization is normalized through its integration in the upbringing and informal education of children in the home. Therefore, it is important to consider that the search for individual motivations may not always be useful to explain why people are involved with terrorism because the motivation may not reside in the individual actors themselves, but in the small extremist environment from which they come. . In the same way, once several influential members of the family unit have committed themselves to the cause, rejection and distancing of these shared ideas it becomes more difficult that is to say, the desertion of the group implies a double treason:

to betray the cause and betray the own family. Therefore, children born or raised in jihadist families, particularly within Syrian territory, are vulnerable to pressure to follow the example of relatives, people of trust and not to stray or betray the worldview of the family unit. The normalization of the upbringing of children within jihadist it has been formally institutionalized under the education of the IS system. The climate of fear under the control of ISIS has repressed the ability and willingness of citizens to speak out against the actions and ideology of the group, particularly in the case of school teachers.

Briefly

We find suitable two models to define the recruitment

- SINGER, 2005 (*Children at War*)

Three key phases of children's involvement in armed conflict:

1. Selection
2. mental preparation (indoctrination)
3. and action

- HORGAN et. al, 2016 (*From Cubs to Lions: A Six Stage Model of Child Socialization into the Islamic State*)

Emphasising a gradual process of both formal and informal learning and engagement with the organisation.

Six stages of child recruitment:

1. Seduction (initial exposure to ideas and personnel);
2. Schooling (routine, direct exposure and intensive indoctrination);
3. Selection (institutionalised grooming for military and other roles);
4. Subjugation (physical and psychological training and brutalisation to deepen commitment and loyalty);
5. Specialisation (fostering expertise in specialised training);
6. Stationing (role assignment, recruitment of new members)

But the true is that IS combines:

- formal and informal recruitment
- direct and indirect recruitment
- cooperative and coercive recruitment
- Individual and systematic methods of outreach to create a holistic and immersive strategy to radicalize minors.

PROPOSED STAGES MODEL

1. Kidnapping and forced enlistment; from schools, mosques…
2. desensitization to violence; continue exposure to it.

3. 'positive' governance;
4. social factors;
5. lost/replacement of positive role model(s);
6. and trusted adult influencers.

1. KIDNAPPING AND FORCED ENLISTMENT

The most prominent and devastating example of this tactic: IS' genocide of Yazidis on Mount Sinjar in August 2014. The United Nations and Kurdish officials have estimated that a total of 400,000 Yazidis were living in Sinjar at the time of the attack. An extensive retrospective survey of those killed and kidnapped has calculated an approximate 9,900 deceased and 6,800 abducted, with children under 14 constituting 33.7% of those kidnapped.

2. DESENSITIZATION TO VIOLENCE

Whereas most audiences would be perturbed by images of child soldiers and executioners, is promotes these roles as a great 'honour' and compete. To complement its structured indoctrination courses in its schools and military training camps, is ensures that violence becomes integrated into the everyday life of its 'citizens'. eliminating the need for internet access to view its propaganda.

3. 'POSITIVE' GOVERNANCE

The group's ideological mission to create their own model of the Islamic caliphate has translated practically into the provision of goods and services, ranging from food and safe water to healthcare and education for its 'citizens', and even provision of traffic officers.

4. SOCIAL FACTORS

By gathering and isolating groups of children, is has sought to build on normal social dynamics – such as peer pressure, competition and 'groupthink'.

5. LOST/REPLACEMENT OF POSITIVE ROLE MODEL(S)

With a civilian death toll of over half a million Syrians (with 4,166 civilian fatalities in 2018 alone), is responded to children's desire for vengeance, family income or simply a new role model to follow. For the 'cubs' (boys), trusted figures of fathers, businessmen and community leaders were replaced with hypermasculine fighters wealth, status and an outlet for adventure and aggression.

6. TRUSTED ADULT INFLUENCERS

Though many children reportedly enlisted 'voluntarily' and initially interacted with is independently from their parents and guardians, the family unit remains a key influencer for children, introducing and reinforcing extreme ideas and worldviews.

Radicalization through the private and domestic sphere, particularly through family or kinship bonds, obscures efforts to detect and prevent the indoctrination of individuals, particularly children.

CONCLUSIONS

After this study, some conclusions have been reached that undoubtedly should continue to be studied and analyzed based on the continuous changes that the IS makes in its strategy with the minors. However, we can highlight in the light of the data and situations studied that:

1. Radical ideologies cause the minor to occasionally join the ranks of the IS voluntarily, which hinders their integration into society once the armed conflict ends.
2. The nature of the minor, his vulnerability and the ability to feel admiration for his recruiters as role models, facilitates their recruitment and manipulation.
3. In the recruitment of minors in the territory of the IS, the family plays a great role as a recruiter, but at the same time it can be used as a rehabilitation instrument. In addition it seems necessary:
    - Provide a multidisciplinary approach to prevention programs both in Europe and in Syria, it is therefore necessary to understand the complexity of ISIS recruitment in minors, as well as the training of front-line professionals, police, workers social, psychologists but mainly in crucial training in the creators of these prevention policies, it is essential that the creators (mostly politicians) know the first processes and pursue viable, real and tangible results to avoid as commented by the Spanish National Police in the interview, with the National Strategic Plan to Combat Violent Radicalization, which does not end up being implemented, in fact in this sense, the latest figures show that in August 2017, only 13 of the 8,000 Spanish municipalities had implemented any of the plan's actions.
    - Insist on the need for a real political commitment, in Syria and Iraq, it is not admissible that tasks and actions that are competences of the institutions (national or international) in light of the situation of "ruin" and lack of basic structures that the country suffers, NGOs implement them, they have a limited operational capacity and they also can not develop long-term programs because of the instability and financing they experience. It is up to the international community with the help of the NGOs and other agents operating in the area to restore the basic structures and provide the area with stability in order to launch programs for the rehabilitation of children adapted to the training peculiarities of ISIS and its great religious and belonging component..
    - It is also necessary, a multi-agency approach, it is essential the join effort between the different agencies, state security bodies, border control and NGOs that intervene in the process of detention, prosecution and enforcement of the sentence of returned minors and minors recruited in Europe accused of terrorist acts.

BIBLIOGRAPHY

- Child Soldiers International.(2002). Louder Than Words: An Agenda for Action to End State Use of Child Soldiers. 12/12/2018, Child Soldiers International. Web: https://www.child-soldiers.org/Handlers/Download.ashx?IDMF=da92581e-7130-40e6-bf3a-a86b944f17dd
- Horgan, John G; Taylor, Max; Bloom, Mia; Charlie Winter. (2016). From Cubs to Lions: A Six Stage Model of Child Socialization into the Islamic State. Journal Studies in Conflict & Terrorism , 40, 2017, Issue 7. 07/07/2018, Online version: Journal Studies in Conflict & Terrorism
- Sasson, I. Shabila, N Gilbert Burnham. (2017). Mortality and kidnapping estimates for the Yazidi population in the area of Mount Sinjar, Iraq, in August 2014: A retrospective household survey. Journal PLOS, 05/07/2018. Web: https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1002297
- BENOTMAN, N and MALIK, N: *The Children of Islamic State*, Londres. Quilliam Foundation, 2016.
- SINGER, P *Children at War*. University of California Press, 2006