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Type of work	**References**	**In-text citation**
Book (a single author)	Goldstein, A., (1994). *The ecology of aggression*, Plenum Press, New York.	(Goldstein, 1994:80)
Book (a number of authors)	Konstantinovic-Vilic,S.,Nikolic-Ristanovic, V., Kostic, M., (2009). *Kriminologija (Criminology)*, Nis, Pelikan print.	First in-text citation: (Konstantinovic-Vilic, Nikolic-Ristanovic, Kostic, 2009: 35). A subsequent in-text citation: (Konstantinovic-Vilic, et all., 2009: 77)
Joint authorship (a group of authors)	*Oxford Essential World Atlas* (7th ed). (2012). Oxford, UK: Oxford University Press	(Oxford, 1996: 100)
An article or a chapter in a book with an editor	Kostic, M., Miric, F., (2009).Ustanove za izvršenje krivičnih sankcija-pozitivno zakonodavstvo i strana regulativa-stanje i perspektive,(Facilities for execution of criminal sanctions -positive legislation and international regulations, state and perspectives) / In Djukanovic, P. (ed), *Proceedings of penology* /. - Banja Luka, Penological organization of KPZ, 2009, Vol.1, No.1, pp. 10-32.	(Kostic, Miric, 2009: 295)
Journal article	Papageorgiou,V., Vostanis, P., (2000).Psychosocial characteristics of Greek young offenders, *The Journal of Forensic Psychiatry*, Vol.11., No.2., 2000, pp.390-400	(Papageorgiou et all, 2000: 397)
Encyclopedia	(2009). *The Oxford International Encyclopedia of Legal History*. Oxford, UK: Oxford University Press	(Oxford, 2009:33)
Institution (as an author)	Statistical Office of the Republic of Serbia, Monthly statistical bulletin, No. 12 (2013)	(Statistical Office RS, 2013)
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Court decisions	Case Ap.23037/04 *Matijasevic* v. Serbia	Footnote: Case Ap.23037/04 Matijasevic v. Serbia
Online sources	Ocobock, P., Beier, A.L., (2008). *History of Vagrancy and Homeless in Global Perspective*, Ohio University Press, Swallow Press, Retrieved 31 November, 2015, from http://www.ohioswallow.com/book/Cast+Out	In-text citation: (Ocobock, Beier, 2008)

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EDITORIAL

Dear Readers,

It is my great pleasure to briefly present the papers published in the first issue of the scientific journal ***Facta Universitatis: Law and Politics*** for the year 2022. This issue contains a number of articles on different legal science research topics in the field of criminal law, administrative law, international public law and international sale of goods.

Prof. Darko Dimovski, LL.D., Associate Professor, Faculty of Law, University of Niš; Judicial Research Center Niš, submitted the paper titled "*Forensic Interviews with Children".* Given the essential role of forensic interviews in preventing the secondary victimization of children in cases where they are victims or witnesses of crime, the article first focuses on the concept and stages of forensic interview with a child. The author considers the current normative framework on the testimony of minors and children in the Republic of Serbia, and analyzes the forensic interviews conducted by the Social Welfare Center "St. Sava" in Niš. These pioneering steps in forensic interviews with children clearly show the advantages of expert-assisted discovery of facts, but their proper implementation calls for allocating funds for additional training of interviewers throughout Serbia.

Sanja Đorđević Aleksovski, LL.M, PhD Student, Faculty of Law, University of Niš, submitted the paper titled "*The ILC Work on the Codification of General Legal Principles"*. The author discusses the issue of codification of sources of international law. In 2018, after many decades of codifying international treaty law and international customary law, the International Law Commission (ILC) finally decided to tackle the codification of General principles of law. It is a challenging issue due to the unclear or ambiguous practice of states and international justice, lack of unity of opinion in the doctrine, and terminological inconsistency. In the current debate within the International Law Commission, the most controversial issue is the idea of the "two-category" approach, reflecting their dual origin (national and international legal order). The paper provides an overview of the work of the International Law Commission accomplished thus far, with the aim to shed light on certain aspects of the proposed course of action.

Yunus Emre Ay, LLB, LLM(Prague), Attorney, Antalya Bar Association, Turkey, submitted the paper titled *"The Fundamental Breach of Contract of Sale under the CISG".* This article focuses on the concept of the fundamental breach of sale contracts as an aggravated form of contract breach recognized in Article 25 of 1980 UN Convention on Contracts for the International Sale of Goods (CISG). The applicable remedies in ordinary breaches of contract are ordinary legal remedies (damages, replacement of goods). The fundamental (substantial) breach commonly includes overdue delivery of goods, non-delivery, delivery of non-confirming goods, and it is assessed on two criteria: detriment and foreseeability. In case of a fundamental breach, the unilateral declaration of termination of the contract of sale is used as the last resort to void the contract.

Ana Katić, LL.M., PhD Student, Faculty of Law, University of Niš, submitted the paper titled "*Parties in Administrative Disputes".* The paper explores the issue of active legitimacy to be a party in administrative dispute proceedings and the representation and protection of parties'

rights before the Administrative Court, established as a court of special jurisdiction by the Act on Seats and Areas of Courts and Public Prosecutor's Offices. The author first examines the legal standing of the plaintiff, the defendant and the interested person under the Administrative Disputes Act. The author further discusses the rules on party representation before the Administrative Court, and the current case law of this specialized court. The parties' roles and participation in administrative dispute proceedings will not only ensure the their right to a fair trial and the judicial control of the administrative power but also contribute to promoting citizens' trust in administrative judiciary and the rule of law.

Milena Golubović, LL.M., PhD Student, Faculty of Law, University of Niš, submitted the paper titled "*Special Administrative Organizations".* The paper explores the normative framework on special organizations in the Republic of Serbia. Special organizations are primarily instituted to perform professional and related administrative activities whose nature requires a higher degree of independence when compared to the independence required in the work of administrative authorities within the organizational structure of ministries. Being an integral part of state administration, they have features that are common to all organizations but also some specific and highly distinctive features. In this paper, the author discusses the concept, characteristics, significance, and specific position of special organizations, as well as their activities and organizational structure.

Tope Shola Akinyetun, Department of Political Science, Adeniran Ogunsanya College of Education, Oto/Ijanikin, Lagos State; and **Kola Bakare,** Department of Political Science & Public Administration, Babcock University, Ilishan-Remo, Ogun State, Nigeria, submitted the paper titled *"A Web of Crimes, Routine Activities Theory and the Deepening Scourge of Armed Banditry in Nigeria".* The authors elaborate on the incidence of banditry in Nigeria, which has generated a multi-pronged security challenge and amplified the destruction of life, property and displacement. The analysis of secondary sources of data reveals that banditry is prevalent in Northwest Nigeria, including armed robbery, cattle rustling, arson, sexual violence, kidnapping, raiding villages and schools, looting, livestock theft and gruesome killing. The incidence is attributable to the conflicts between farmers and herders for scarce resources, the influx of Small Arms and Light Weapons into Nigeria, an overwhelmed, weak and understaffed security apparatus, illegal mining, slow response of the Nigerian government, and a vast ungoverned forest territory. The issue is assessed from the standpoint of Routine Activity Theory, which identifies three major areas in developing a prevention strategy: the motivated offender, the suitable target, and the absence of guardianship.

We would like to extend our sincere appreciation and gratitude to our distinguished reviewers whose professional attitude to double-blind peer review has significantly contributed to the quality of this scientific journal.

Considering that our scientific journal ***Facta Universitatis: Law and Politics*** committed to publishing scientific articles on different law-related issues across a wide range of social sciences and humanities, we invite you to submit research articles on topics of your professional interest.

Editor-in-Chief
Prof. Dejan Vučetić, LL.D.

Niš, 20th June 2022

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Original Scientific Paper

FORENSIC INTERVIEWS WITH CHILDREN *

UDC 343.98-051.2(497.11)

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Judicial Research Center, Niš, Serbia

Abstract. *A forensic interview is a step forward in preventing the secondary victimization of children in situations where they are witnesses to a criminal event. However, its implementation requires not only appropriate training of interviewers but also appropriate preparation for each individual case. The author first defines the concept of forensic interview with a child and explain its stages. In the second part of the paper, the author considers the normative bases for its introduction in the Republic of Serbia, and analyzes the forensic interviews conducted so far by the Social Welfare Center "St. Sava" in Niš.*

Key words: *forensic interview, child, criminal procedure, Republic of Serbia*

1. INTRODUCTION

The decision of the Supreme Court of the United States (*Wheeler United States*, 159 U.S. 523, 1895**)** established a legal basis for the child to appear before the court as a witness. At the beginning of the 1980s, there was a sharp increase in the testimony of children in proceedings before the competent authorities. It has been estimated that up to 100,000 children appear as witnesses in court proceedings each year. However, the appearance of children in court as witnesses carries certain risks, especially if the child has previously been a victim of a crime, and if there is a risk of secondary victimization. Some of the ways to reduce the risk of secondary victimization are reflected in the fact that children can take their objects with them or testify in the presence of another person. Some suggestions for the testimony of a child victim included the existence of a screen between the witness and the defendant (Pantell, 2017: 1). However, this motion was challenged in the Supreme Court decision in *Coy v. Iowa* (1988),[1] while some other motions, such as

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* The paper is the result of research conducted within the project "Responsibility in the Legal and Social Context" funded by the Faculty of Law, University of Nis.
[1] *Coy v. Iowa*, 487 U.S. 1012 - 1988

testifying via television, were acceptable in particularly sensitive cases, as highlighted in *Maryland v. Craig* (1990).[2]

Some countries, such as the United States, have adopted an appropriate normative framework aimed at reducing the risk of a child appearing in court as a witness. In this regard, it suffices to mention the US Victims of Child Abuse Act of 1990, aimed at improving the response of criminal justice and related agencies to the phenomenon of child abuse. We should also mention the US Attorney-General Investigative Guidelines for Victim and Witness Assistance (2005), which stated that the goal of the acting officials is to reduce the trauma for child victims and witnesses caused by their contact with the criminal justice system. Yet, regardless of the stated normative framework at the federal level, it should be emphasized that children's testimony takes place through the application of normative solutions at the state level (Pantell, 2017: 2).

We have mentioned some of the ways in which children testify but it should be noted that all these ways of obtaining a statement from a child about a criminal event are performed with the prior help of experts. Generally speaking, children, especially young people or those with certain disabilities, will not even be able to comprehensively describe the way they were victimized or the critical event they witnessed. Therefore, in order to obtain quality testimony, the role of an expert with relevant competencies is important because he/she has to prepare the child for the upcoming appearance in court. This preparation, known as a forensic interview with a child, sets out a complex conceptual-methodological framework for interviewing children who have experienced some form of abuse.

Conducting a forensic interview with a child entails certain problems. Namely, considering the distrust that a child shows towards adults, and especially towards close family members, the forensic interview needs to be approached very carefully, with good preparation in advance. At the same time, children inevitably experience fear as well as the need to keep secrets because they are threatened by the perpetrator of the crime. The biggest problem in conducting a forensic interview with a child is short memory. Therefore, it is necessary to conduct a forensic interview as soon as possible in order to have the greatest possible temporal closeness to the critical event (Ćirić, 2002: 143-144). In this paper, after presenting the historical development and the concept of a forensic interview with a child, the author focuses on the stages of this model of examining a child. In the second part of the paper, the author analyzes the current situation in Serbian legislation and discusses the issue of introducing a forensic interview with a child into the legislation of the Republic of Serbia.

2. THE CONCEPT OF A FORENSIC INTERVIEW WITH A CHILD

Historically speaking, the development of a forensic interview with a child took place in the 1980s. In that period, several cases of child abuse by the persons in charge of their care surfaced in the public, which triggered the experts' interest to examine how child victims testify about their victimization. Obtaining quality data depended on the ability of mental health professionals to establish an appropriate relationship with the child, because in many cases the only evidence of what happened was the testimony of the child victim. However, despite the good will of the experts, the use of therapeutic techniques for data collection was inappropriate because there was a risk of suggestibility in the interviewing

[2] *Maryland v. Craig*, 497 U.S. 836 - 1990

process. In this regard, the courts did not accept such testimonies. At the same time, the interest of the professional and general public about the necessity to provide children with adequate protection increased in that period. The existence of a child victim who would testify was crucial to the conviction. The first expert to address this issue was Suzanne Sgroi (1982).[3] The American Professional Society on Abuse of Children (APSAC) developed guidelines called Psychosocial Evaluation of Suspected Sexual Abuse in Young Children (1990). Initially, the focus was on children's mental health but, after some time, it was changed so that the focus is now on the forensic perspective (Newlin, Cordisco Steele, Chamberlin, Anderson, Kenniston, Russell, Stewart, Vaughan-Eden, 2015: 3).

After presenting the historical context of the forensic interview, it is necessary to determine its concept. It is a unique type of interview that must meet certain legal and ethical requirements. which are ultimately aimed at adequately preparing the child for appearance in court. Only in that way can the child be assisted to make the most of his/her developmental capacities, while minimizing limitations and weaknesses. At the same time, a forensic interview with a child can be defined as an integral part of the criminal-law protection of child victims or witnesses of violence, which aims to examine the child and collect data but also to enable the child to describe the critical event as fully as possible (Stakić, 2019: 9-20). In other words, a forensic interview is used by previously "trained professionals to gather information about incidents of alleged child abuse in a manner that will yield factual information from the child and stand up to scrutiny in court. Forensic interviewing techniques are designed to remove or minimize the potential for the interviewer to use suggestive or leading questions that may call the child's statements into question. Forensic interviews can also help shape the investigation by highlighting areas for further investigation or evidence collection" (Child Welfare Information Gateway, 2017: 2).

3. Stages in a Forensic Interview with a Child

A forensic interview with the child includes the following stages: 1) the preparatory or rapport-building phase; 2) the central (substantive) phase; and 3) the closing (closure) phase

The preparatory phase includes measures and activities that precede the process of obtaining the child's statement; it includes introductory activities aimed at building rapport, developing trust relationship, explaining the basic rules of the interviewing process, encouraging the child's self-expression by asking questions about the child's personal interests (Magnusson, Ernberg, Landström Akehurst, 2020: 967) in order to understand the child's developmental level, linguistic competencies and legal capacity (Child Welfare Information Gateway, 2017: 3). The importance of the preparation phase is evidenced by the fact that inadequate preparation (without building rapport and trust relationship with the child) and the use of suggestive questions, unreliable techniques and disrespect of the code of ethics may result in the development of excessive stress, memory distortion and, most importantly, reduced credibility and testimony, all of which may be relevant for conviction (Themeli, Panagiotaki, 2014: 2).

At the same time, the preparatory phase aims to assess the degree of risk of victimization and determine measures to protect the child. This prevents any possibility of re-victimization. It is also necessary to determine the need to take measures of a medical

[3] Sgroi, Suzanne (1982). Handbook of Clinical Intervention in Child Sexual Abuse, The Free Press, NY , USA

nature in order to provide appropriate assistance to the endangered child. During the preparatory phase, it is also necessary to make a preliminary assessment of the legal grounds for suspicion of a committed crime, and to collect the basic relevant data on the critical event in order to adequately plan the conduct in the central phase. In order to meet the stated goals, the preparatory phase should be neither too broad nor too detailed. Thus, if the child demonstrates the need to fully trust the official in charge of conducting this phase, the interviewer should not interrupt the child nor encourage him/her to give a specific statement (Stakić, 2019: 154-155).

The central phase, known as the forensic interview in the narrower (substantive) sense, is a structurally complex process which includes several related parts. The first part refers to a gradual transition from the preparatory phase to the central phase. During this part, the interviewer tactfully facilitates and encourages the child's narrative response to open-ended questions on the critical event. Special care must be taken not to upset the child, to enable the child's free recall of the experience, and free self-expression (without intervention of the interviewer). At this stage, the child or the interviewer may raise the issue of child's victimization or presence as a witness in the act where another person was a victim of crime. In a neutral, non-suggestive and open way, the interviewer has to encourage the child to describe what happened or share his/her immediate experience. This phase usually begins with the interviewer's open-ended prompt to the child to describe at length everything that happened to him/her on the critical day. This method of interrogation is known as *a narrative invitation*. It is considered to be the best way of obtaining the most complete testimonies about a critical event because the child can freely describe his/her own experience and events in his/her own words (National Children's Advocacy Center, 2019: 4-5).

After obtaining the child's free statement, it is often necessary to find out additional or specific information about the event. It means that the child has to be prompted to elaborate on and supplement the response provided in the free statement. It brings us to the next part of the central (substantive) phase of the forensic interview, which is designated as a *focused narrative request*. The essence of this part is to improve the quality of narratives in order to obtain as accurate information as possible, while taking care not to change the factual basis of the child's statement. It is achieved by using open-ended and focused prompts on a specific topic, or questions prompting the child to elaborate, clarify certain details or provide missing information.

The next part of the central phase is the so-called *consultation break,* during which the interviewer has an opportunity to review the data collection and to consult other experts who monitored the interview from the observation room (via a two-way mirror or an electronic monitor). Before the break, the interviewer will first summarize the conversation with the child, and then explain to him/her the reason for the need to make a temporary break. After the break, the interviewer will continue prompting the child to clarify some details or additionally elaborate on missing data by using multiple choice questions and carefully introducing data obtained from other sources. It is important to emphasize that the interviewer's conduct shall not be governed by prejudice, which can lead him to wrong conclusions. In order to avoid this danger, the interviewer must remain calm even if there is evidence of a committed crime, and be aware of the possibility that the crime has not even been committed. In other words, the interviewer must search for an acceptable alternative explanation of what exactly happened, which is known as *an alternative hypothesis test* (Stakić, 2019: 198).

In the course of a forensic interview, the interviewer may use a number of interviewing techniques. In addition to the technique of narrative invitation, the interviewer may use a

focused narrative request. The goal of this technique is to gather as much information as possible from the child in their own words, while providing structure and guidance to the conversation. The child is prompted to provide clarifications or to elaborate on formerly mentioned details through open-ended prompts and questions (*Tell me more about it. Describe what happened. What happened next?*). This technique is good not only for learning additional information but also for starting a new topic (Stakić, 2019: 198).

In spite of all preparation, children may be reluctant to reveal some data. In that case, the interviewers may use Wh-questions (who, what, where, when and how) to address the phenomenology of crime. This type of questions may help in obtaining specific information that was not included in the child's original statement. In foreign literature, this technique is known as *detail questions*. When using this technique, it is important that the interviewer does not ask a number of questions of this type at the same time, as this can be confusing to the child. Notably, these questions should be resorted to only after using the narrative invitation technique (National Children's Advocacy Center, 2019: 5-6).

In case the interviewee is shy, embarrassed or confused by the request to freely elaborate on the event, the interviewer may use two other techniques: multiple-choice questions and yes/no questions. The use of multiple-choice questions occurs only when all previous techniques have not yielded adequate results. These questions aim to clarify some data in the already asked detail questions. In that case, the child is offered several specific choices and prompted to select the most appropriate one and elaborate on it. This technique should be used with caution, especially when it comes to small children. The interviewer may also use yes/no questions, which are used for collecting specific information that the child failed to say or was reluctant to say, in a manner that fully acknowledges that the child may or may not have requested information. For example, instead of asking a direct question (*What did he tell you?),* it is better to ask a yes/no question (*Did he say something to you*?) This technique should be used in conjunction with a prompt to provide a more detailed description or clarification. It should also be used with caution, especially in case of determining the essential elements of crime, such as specific acts or individuals (National Children's Advocacy Center, 2019: 6).

The last type of questions which may be used when conducting a forensic interview with a child are leading questions. They should be used with caution, especially when it comes to the essential elements of a crime. However, in some cases, the interviewer may resort to these suggestive questions in order to ensure full understanding of all relevant facts, to verify the information implicitly provided by the child, or to verify the information obtained from another person during the investigation (for example, *He kissed you, right?* or *He touched you, didn't he?)* If the child proves capable of giving a narrative description of what happened, and is not inclined to suggestions, the interviewer should ask the question with as little information as possible and follow the child's answer with a request a more detailed description (National Children's Advocacy Center, 2019: 7).

These forensic interview techniques should allow the professional to fully understand all relevant information. The choice of a specific technique depends on the merits of each individual case. In some cases, interviewers may combine them; in others, they can use only some of them. After going through all these steps and using the above techniques to find out all the relevant data, the interviewer will announce the completion of the main phase of the forensic interview with the child. Although it seems to be a formality, the interviewer should take into account the child's reaction to this announcement (in terms of whether the showed relief, nervousness, anxiety or ambivalence); depending on the emotion

expressed, the interviewer has to take appropriate steps in the closing phase of the interview. At the same time, it often happens that a child initiates another issue on his own initiative, which has not been considered until then, and there is a need to look into it an adequate way (Stakić, 2019: 214).

The last phase of a forensic interview with a child is *closure.* It aims to end the conversation with the child, which was emotionally exhausting for the child. Thus, several questions are an indispensable part of the closing phase, such as: whether the child has something else to say to the interviewer or whether the child wants to ask something. It is also necessary to thank the child for the time and effort invested in the interview, and ensure that the child leaves the room with a positive attitude. The interviewer should pay special attention to safety plans, in order to ensure the maximum level of child safety, and address the child's socio-emotional, educational and other immediate needs. It is also necessary to state the contact phone number which can be used by the child and his/her guardian for obtaining all additional information and, more importantly, for any assistance (Newlin, *et al*, 2015: 10-11). The interviewer must also state the next steps which have to be taken in order to prove the committed crime. In the end, the interviewer is expected to end the conversation with the child by engaging the child in conversation on some neutral topics, unrelated to the incident (e.g. what the child intends to do after the interview, who he will go home with, whether he will play with his peers, etc.), in order to divert the child's attention from the conversation on negative experiences to positive topics (National Children's Advocacy Center, 2019: 14). Finally, the child is taken out of the room where the forensic interview was conducted and handed over to the parent or guardian. A meeting of the interviewer(s) and other experts who observed the conversation is organized as soon as possible, in order to discuss the collected material and decide whether there is a need to conduct an additional interview with the child for the purpose of supplementing the material. In that way, experts may obtain more valid material about the disputed event (Stakić, 2019: 226).

4. The Normative Framework on the Testimony of Minors and Children in Serbia

Before we look at the need to introduce a forensic interview with a child in the Republic of Serbia, we will consider the existing normative framework on the testimony of minors and children. In Serbia, the general rules on testimony are regulated by the Criminal Procedure Code[4] (Articles 90 - 112 CPC). The Juvenile Justice Act (2005)[5] contains some special rules regarding the testimony of minors who have been harmed by the commission of a criminal offense.

Article 94 of the Criminal Procedure Code (CPC) prescribes exemption from the duty to testify. It stipulates that defendant's blood relative in the direct line, in the collateral line up to the third degree, as well as a relative by affinity up to the second degree, and the adoptee and the defendant's adoptive parent are released from the duty to testify. A minor who, given his age and mental development, is unable to understand the significance of the right to be exempt from the duty to testify, cannot be examined as a witness, unless the defendant himself so requests. Article 96 of the CPC envisages the duty of the witness to

[4] Criminal Procedure Code, *Official Gazette RS,* no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021– CC decision, and 62/2021–CC decision.

[5] Act on Juvenile Delinquents and Criminal-law Protection of Juveniles (hereinafter: Juvenile Justice Act), *Official Gazette RS,* no. 85/2005.

take an oath but, in Article 97 CPC, the legislator introduces the rule that a person who is not of legal age at the time of the hearing should not take an oath.

In Article 103 CPC, the legislator provides that, at the request of the parties or the witness himself, the authority conducting the proceedings may give the status of an especially vulnerable witness to a person who is particularly sensitive, due to his/her age, life experience, lifestyle, gender, health condition, nature, manner or consequences of the crime, or other circumstances of the case. If we were to analyze this article, we may conclude that a minor (given his age) can obtain the status of a particularly sensitive witness (Atanasov, 2016: 50). The status of a particularly vulnerable witness is determined by the court *ex officio*, or at the request of the parties or the witness (Article 103 para. 2 CPC). In contrast to common procedural actions, the legislator envisages several deviations in the testimony of a particularly sensitive witness.

The examination of a particularly vulnerable witness may be conducted with the assistance of a psychologist, a social worker or another professional, as decided by the authority conducting the proceedings (Article 104 para.4 CPC). In contrast to the common method of examining witnesses, the examination of a particularly vulnerable witness can be performed by using technical devices for the transmission of images and sound. The examination of a particularly vulnerable witness is conducted without the presence of the parties and other participants in the proceedings in the same room where the witness is located (Article 104 para.2 CPC). The legislator also provides for the possibility that a particularly vulnerable witness may be examined in his/her apartment or some other premises, or in an authorized institution that is professionally trained to examine particularly sensitive persons (Article 104 para.3 CPC). In that case, the authority conducting the proceedings may order the application of technical devices for the transmission of the image and sound referred to the previous paragraph. Given the fact that criminal proceedings often involve contradictory statements, it brings us to a specific situation when it comes to the testimony of a witness and a defendant. Thus, Article 104 para.4 CPC prescribes that a particularly vulnerable witness may not be confronted with the defendant, unless the defendant himself/herself so requests and unless the procedural authority allows it, taking into account the sensitivity of the witness and the rights of the defense. Thus, the confrontation of the accused and a particularly sensitive witness is limited. However, if there is a contradiction in the testimonies of two witnesses, there are no restrictions but they are confronted in the usual way – in a face-to-face encounter, where they are asked to repeat their statements on decisive facts (Ilić, 2017: 247-248).

Although there is a legal possibility to grant the status of a particularly vulnerable witness to juvenile victims of various crimes, it should be noted that in practice this status is very rarely granted to victims in general, and to juvenile victims in particular. One reason for not granting this status lies in the fact that many courts do not have adequate premises, nor technical equipment, which would enable the use of this legal possibility (Burnsajd, 2018: 35).

In addition to the CPC, the Juvenile Justice Act (2005) also provides for the protection of minors, victims and witnesses. Part 3 of the JJ Act, titled “Special Provisions on the Protection of Minors as Victims in Criminal Proceedings”, prescribes a range of measures for the protection of juvenile victims and witnesses from secondary victimization. Thus, Articles 150 and 151 of the JJA provide that all bodies involved in criminal proceedings related to minors need to acquire special knowledge and skills in the field of children's rights and criminal protection of minors. Under Article 152 JJA, when criminal proceedings are

conducted for criminal offenses where a minor is the victim, the acting authorities must treat the injured party by taking into account his/her age, personality, education and circumstances in which he lives; they must also try to avoid the harmful consequences of the procedure for his personality and development. The questioning of a child or juvenile has to be conducted with the assistance of a psychologist, a pedagogue or another qualified person (Art. 152 para.1 JJA). In order to prevent secondary victimization, the legislator prescribes that a minor, who has been a victim of a criminal offense, may be examined as a witness no more than twice. Exceptionally, the questioning may be conducted several times only if it is necessary for the purpose of criminal proceedings. If the juvenile is heard more than twice, the judge is obliged to ensure safeguards for the protection of the juvenile's personality and development (Art. 152 para.2 JJA).

Starting from the peculiarities of the criminal procedure and the personality of the juvenile, the judge may order, if he considers it necessary, that the juvenile be interrogated by using technical devices for the transmission of images and sound. The questioning will be conducted without the presence of parties and other participants in the same room where the juvenile is located. The parties and persons who are entitled to ask questions may do so through the judge, psychologist, pedagogue, social worker or other qualified professionals. (Art. 152 para.3 JJA). In addition, a juvenile may be heard in his/her apartment or other premises, or in an institution that is professionally qualified for the examination of minors; the competent authority may order the application of technical devices for the transmission of images and sound (Art. 152 para.4 JJA). Notably, in all these cases, the record of minor's testimony has to be read or a recording of the hearing has to be played at the main trial hearing (Art. 152 para.5 JJA).

If a juvenile is examined as a witness, Article 153 of the Juvenile Justice Act prohibits the confrontation between a juvenile and the defendant if the juvenile is deemed to be a particularly vulnerable witness, due to the nature of the crime, consequences or other circumstances, or if he/she is in a particularly difficult mental state. Article 154 of the Juvenile Justice Act also prescribes that a juvenile victim of crime must have a legal representative from the first hearing of the defendant. It has to be an attorney specializing in the rights of the child and criminal-law protection of juveniles. If a juvenile does not have a legal representative, an attorney shall be appointed by the presidents of the court, while the costs of representation will be borne from the court budget. According to Article 155 of the Juvenile Justice Act, in case a juvenile victim of a crime has identified the defendant as the perpetrator, the court shall proceed with special caution; in all phases of the proceedings, the identification has to be performed in a manner that completely prevents the defendant from seeing the juvenile.

The presented normative framework which refers to the testimony of juveniles in criminal proceedings is good because it introduced measures to prevent secondary victimization, as well as re-victimization. It should also be noted that the existing legal provisions fully recognize the participation of a psychologist, pedagogue, social worker or other professionals during the interrogation of a minor, which creates a basis for conducting a forensic interview.

5. Forensic Interview with a Child in the Republic of Serbia

Article 1 of the Convention on the Rights of the Child (1989)[6] envisages that a child is any human being under the age of 18, unless adulthood is attained earlier under the applicable law.

[6] The Convention on the Rights of the Child of 20 November 1989, the General Assembly of the United Nations.

Some social welfare centers in the Republic of Serbia, including the Social Welfare Center 'St. Sava' in Niš have taken pioneering steps in introducing forensic interviews with children.

One forensic interview was conducted on the premises of the Social Welfare Center 'St. Sava' in Niš on 2nd March 2021, in a case marked KT 418/21. In this case, the father (M.S) of a minor is suspected of committing a criminal offense of domestic violence under Article 194 para. 3 in connection with para. 1 of the Criminal Code.[7] In this regard, the child witness (a boy who was presumed to be the victim of abuse by the father) was examined; the witness was interviewed by the interviewer (a vocation pedagogue who had completed the appropriate training) behind opaque glass. The interviewer was in constant wireless communication with the acting prosecutor and the defense attorney to hear what facts to focus on. It enabled the interviewer to formulate the questions in an appropriate way so that the child could give answers to the questions of interest to the prosecutor and the lawyer. Thus, the child was spared of giving statements several times. On the basis on Article 95 para. 2 of the CPC, the witness was warned about the obligation to tell the truth and not to keep anything silent, as well as the fact that giving a false statement is a criminal offense under Article 335 of the Criminal Code. Article 95 of the CPC also envisages that the witness has to be cautioned that he is not obliged to answer questions or testify if it is likely that he or the person with whom he/she lives in marriage, cohabitation or other permanent community of life is a blood relative in the direct line or in the collateral line up to the third degree, or a relative by affinity up to the second degree, as well as an adoptee and adoptive parent exposed to severe humiliation, significant material damage or criminal prosecution. At the same time, the witness was cautioned about the reasons for excluding the duty to testify under Article 93 of the CPC, as well as the exemption from the duty to testify under Article 94 of the CPC. The witness stated that he wanted to testify.

Before the interview was conducted, relevant experts examined the child's mental development level through the analysis of his language and communication development, attention and working memory, emotions and behavior, cognitive flexibility skills and social thinking skills. After that, the interviewer explained to the child his rights during the conversation, as well as the reason why it is necessary to hear his opinion. Communication with the child was easy to establish and was quickly directed in the appropriate direction; the child demonstrated the ability to understand and express himself in accordance with the age-appropriate criteria but he still had limited abilities to understand the concept of time and the sequences of events. At the same time, the child had the ability to distinguish reality from imagination, truth from lies, and a simple cause-and-effect relationship. In addition, the child showed a developed sense of respect for moral rules, including a willingness to protect the mother but also to identify with the father. During the entire interview, he talked about the imaginary uncle Valrico, who enters his head and forces the child to do bad things (which is not the characteristic feature of the child development at the age of seven), it should be noted that nothing unusual was found in this fact. During the conversation, the child repeatedly expressed positive opinions about his father, and he was able to authentically recollect a certain event (which was reflected in his sentence "*I had a wonderful, very wonderful time").* He showed no fear of his father, denying that his father had ever been aggressive towards him in any way. On that occasion, the interviewer assessed the authenticity and credibility of the statement, which lead to the conclusion that

[7] Criminal Code of the Republic of Serbia, *Official Gazette RS*, no. 85/2005, 88/2005-corr., 107/2005-corr.., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

the indicators of the child's fear of the father were not recognized. Based on the child's testimony and other presented evidence, the acting prosecutor concluded that there was insufficient evidence for prosecution; on 18 November, 2021, the prosecutor issued an order suspending the investigation.

CONCLUSION

The presented forensic interview case conducted at the Social Welfare Center 'St. Sava' shows all the advantages of establishing the facts through the testimony of a minor with the help of experts. Although the investigation was suspended in the specific case, it should be noted that all relevant facts for this case were established on the basis of the conducted forensic interview. In the forthcoming period, it should be expected that other public prosecutors will decide to use the provisions of the Criminal Procedure Code, which necessarily requires the training of employees of social welfare centers on the process of conducting forensic interviews. In this regard, the Social Welfare Center "St. Sava" in Niš should be engaged in training workers of other centers throughout the Republic of Serbia. It is the only way for creating an appropriate basis for the use of the provisions of the Criminal Procedure Code by acting public prosecutors.

The presented examples of good practices in other countries, such as the United States, can be also used in the training seminars for social welfare center workers. Therefore, it is necessary for the Republic of Serbia to allocate financial resources in order to bring in American experts who would hold appropriate trainings. Otherwise, it is impossible to expect that the pioneering step carried out by the Social Welfare Center "St. Sava" in Niš will represent anything but an individual effort of the management of that institution to improve the quality of its services.

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Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica (Act on Juvenile Delinquents and Criminal-law Protection of Juveniles; Juvenile Justice Act), *Sl. glasnik RS*, br. 85/2005

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US Supreme Court case: *Maryland v. Craig*, 497 U.S. 836 (1990)

FORENZIČKI INTERVJU SA DECOM

Forenzički intervju predstavlja iskorak u sprečavanju sekundardne vitkimizacije dece u situacijama kada su svedoci o nekom krivičnom događaju. Ipak, njegovo sprovođenje zahteva ne samo odgovarajući obuku intervjuera, već i odgovarajuću pripremu za svaki pojedinačni slučaj. Autor će stoga odrediti pojam forenzičkog intervjua sa detetom, ali i obrazložiti njegovo faze. Ujedno, u drugom delu rada razmotriće normativne osnove za njegovo uvođenje u Republiku Srbiju, pri čemu će analizirati do sada sproveden forenzički intervju od strane Centra za socijalni rad "Sveti Sava" u Nišu.

Ključne reči: *forenzički intervju, dete, krivični postupak, Republika Srbija*

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Original Scientific Paper

ILC WORK ON THE CODIFICATION OF GENERAL LEGAL PRINCIPLES

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Abstract. *The codification of sources of international law is a monolith and lengthy project. After many decades of codifying international treaty law and international customary law, the International Law Commission has finally decided to tackle the topic of General principles of law as late as 2018. The codification of general legal principles is challenging for many reasons: the unclear or ambiguous practice of states and international justice, lack of unity of opinion in the doctrine, and terminological inconsistency. However, in the current debate within the International Law Commission, the most controversial issue is the idea of the "two-category" approach which entails their dual origin. Namely, they can be derived not only from national legal systems but also from the international legal order itself. The paper provides an overview of the work of the International Law Commission accomplished so far, with the aim to shed light on certain aspects of the proposed course of action.*

Key words: *general principles of law, codification, International Law Commission*

1. INTRODUCTION

According to Article 38 (1) (c) of the Statute of the International Court of Justice, "*general principles of law recognized by civilized nations*" are explicitly listed as a *separate* and *independent* formal source of international public law.[1] Despite the fact that it is a source

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[1] It should be noted that this definition dates back to 1920, i.e. the identical wording of Art. 38(1)(c) of the Statute of the Permanent Court of International Justice. However, today it is considered to be pejorative and both politically and essentially incorrect to refer to "*civilized nations*". Therefore, there is a consensus that this definition (i.e. the syntagm) should no longer be used, not only by the ILC (First Report, para. 19, para. 243) but also in academic literature (Pellet, Müller, 2019: 927; Yee, 2014: 21-35; Yusuf, 2019: 449-450; Bogdan, 1977: 45; Cheng, 1953: 25). Hence, it was suggested that the term "*civilized nations*" should be replaced with one of the following terms: 1) "*international community of States*", Statement by Mr. Hmoud (A/CN.4/SR.3489, p. 15); 2) "*international community*", Statements by Ms. Galvao Teles (A/CN.4/SR.3489, p. 21); Mr. Hassouna (A/ CN.4/SR.3490, p. 24); Mr. Nguyen (A/CN.4/SR,3491, p. 14); see also statement by Belarus (A/C.6/74/SR.31, p. 14, para. 95); 3) "*international community as a whole",* Statement by Mr. Gomez-Robledo (A/CN.4/SR.3492, p. 10); 4) "*community of nations*", Statements by Mr. Nolte (A/CN.4/SR.3492, p. 18); Mr. Ruda Santolaria (A/CN.4/ SR.3492, p. 13); Mr. Sturma (A/CN.4/SR.3493, p. 15);

noted over a century ago, its origin and scope still represents a controversial issue.[2] Having in mind that general legal principles exist in most legal systems, regardless of their geographical or historical background,[3] it can only be said with certainty that they are unwritten legal principles common to a majority of national legal systems that represent the common thread of the legal *acquis* of civilization.[4] They represent basic rules which are of an abstract and general nature, They are undoubtedly a significant formal source, constructively serving as gap-fillers in the ever-evolving international public law with numerous legal lacunas. General legal principles, as the main but *subsidiary* source, have played a substantive role in resolving *non-liquet* situations throughout history and contemporary international law (Andenas, Chiussi, 2019: 10, 14; Anzilotti, 1999: 117; Blondel, 1968: 202, 204; Bogdan, 1977: 37; Lammers, 1980: 64; Pellet, Müller, 2019: 923; Raimondo, 2008: 7; Redgwell, 2017: 7; Thirlway, 2019: 125-130). Being a *residual* source of international public law, general principles of law play a crucial complementary role and constitute an interpretative aid to international treaty and/or customary law. Although Article 38 of the ICJ Statute represents a starting point in the understanding of general principles of law, their existence is found in State practice, in international instruments, in the jurisprudence of international courts and tribunals, as well as in the previous work of the ILC.

It is believed that the significance of general principles of law will naturally fade away as legal lacunas will be filled. Due to the increased regulation of relations between subjects of international public law, the importance of general principles is undoubtedly diminishing. The fact is that international customary law and general legal principles have historically "lost the battle" with international treaties, as the most numerous, represented and important formal source of contemporary international public law. However, due to the fragmentation and expansion of international law, and considering their flexibility due to their unwritten nature, there are doubts whether general principles of law will ever be marginalized as a formal source.

Ever since the adoption of the Statute of the Permanent Court of International Justice in 1920, there have been numerous theoretical and practical dilemmas regarding the general principles of law. In former doctrine, it was disputed whether general legal principles are an independent formal source, what their legal nature is, and what their role is in the system of formal legal sources of international law (Janković, Radivojević, 2019: 31-33). However, despite their subsidiary character, today there is no doubt that they represent an *independent* source of international law. This claim is supported by the fact that not only is it singled out as a independent formal source in the statutes of the Permanent Court of

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Statement of Germany (A/C.6/74/SR.28, p. 18, para. 105); Statement of Sierra Leone (A/C.6/74/SR.31, p. 16, para. 110), 5) "*international community of States as a whole*", Statement by Mr. Nolte (A/CN.4/SR.3492, p. 18). The Special Rapporteur's proposed to use the phrase *"community of nations"* instead; Second report of the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, 72nd session of the ILC (2021), A/CN.4/741, para. 13.

[2] "*The rubric 'general principles of international law' may alternately refer to rules of customary international, to general principles of law... or to certain logical propositions underlying judicial reasoning on the basis of existing international law. This shows that a rigid categorization of sources is inappropriate",* (Crawford, 2012: 37).

[3] Schachter, O., International law in theory and practice: General course in Public International Law, Collected Courses, The Hague Academy of International Law, 178, 1982-V, pp. 74-75.

[4] We find a kind of counterpart in the literature marked as the so-called wandering topics, i.e. universal topics on which there are works from all cultures, religions and civilizational epochs.

International Justice and the International Court of Justice but also by the fact that this is also the position of the ILC Special Rapporteur currently in charge of its codification.[5]

Unfortunately, the codification of general legal principles is challenging predominantly for two reasons: the unclear or ambiguous practice of states and international justice,[6] and the lack of unity of opinion in the doctrine.

Another significant challenge is terminological inconsistency, employed both in academic literature and in practice.[7] The lack of uniformity regarding used terms contributes to the confusion, considering the plurality of terms and phrases used to denominate this source: "*principles*", "*rules*", "*general principles*", "*general legal principles*", "*general principles of law*", "*general principles of international law*", "*principles of international law*" and even "*generally accepted legal principles*". Unfortunately, different terms are not always used in order to denote the same notion.[8] As a member of the ILC fairly noted, "*every general principle of law was a rule, but not every rule was a principle*".[9] Also, there is frequent confusion as to whether international customary law and general principles of law are *jointly* understood under the syntagm *general international law*. On the other hand, general international law sometimes means international treaties and international customary; but, in other situations, it can mean international customary law and general principles of law.[10]

The mere fact that the codification of general principles of international public law started as late as 2018 illustrates the insufficient knowledge about this formal source. It is interesting to note that codification started the same year before a double expert forum. First, the International Law Association (ILA) adopted a report titled "*The Use of Domestic Law Principles in the Development of International Law*".[11] As the name clearly states, a tried-out and tested, indisputable but at the same time *narrow* approach was adopted, which focused only on invoking general principles of law derived from domestic legal systems. The Study group explicitly focused on general principles derived from national law,[12] without entering into an analysis of whether they could possibly derive from other origins, although not ruling out such a possibility. *"The Study Group has concluded its work but, considering the complexity and continuing relevance of the topic, it would recommend that the Association considers establishing a Committee with broader representation to contribute to the work of the UN International Law Commission on the broader topic of general principles of law (including other potential sources from which general principles could be derived)."*[13]

The second forum which tackled the codification of general legal principles in 2018 is the International Law Commission (ILC), whose work is still in progress. After decades of work on codifying international treaty and customary law, the ILC had finally turned its

[5] First Report of the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, A/CN.4/732, 71st session of the ILC, 2019, para. 14.
[6] First Report, 2019, p. 5.
[7] As noted and analyzed in paras. 150-152 of the First Report, both the ICJ and the ILC usually use "rules" and "principles" interchangeably.
[8] First Report, para. 161.
[9] Statement by Ms. Galvao Teles (A/CN.4/SR.3489, p. 20).
[10] This view was expressed by the Special Rapporteur in the First Report on the Formation and Evidence of Customary International Law, A/CN.4/663, paras 36, 42. A more detailed explanation of the confusion created by inconsistent terminology can be found in the last part of the Special Rapporteur's First Report on General Legal Principles (A/CN.4/732, paras. 254-258).
[11] ILA Draft Report; https://www.ila-hq.org/images/ILA/DraftReports/DraftReportSG_DomesticLawPrinciples.pdf (20.11.2021).
[12] ILA Draft Report, paras 106-181.
[13] ILA Draft Report, p. 70.

attention to the third formal source of international law on its seventieth session.[14] Thus far, two reports of the Special Rapporteur have been adopted.[15] Due to the pandemic of the Covid-19 virus, further discussions have been postponed. Three key and somewhat problematic issues of the discussions regard the legal nature of general principles of law as a source of international law, the identification of two origins of general principles of law, and the relationship of general principles of law to other main sources of international law (international treaty and customary law) (Vázquez-Bermúdez, Crosato, 2020: 158).

Unlike the International Law Association, the ILC has stated that there is a dual origin of general principles of law, and that there should be a distinction between the ones that derive from national legal orders and the ones rooted in international law itself. Thus, they are not limited to those originating only from national legal systems (Lammers, 1980: 67), which has been a tacit position of doctrine and even professional associations so far. Having in mind such a dual origin, it is pointed out that that general legal principles are a "*heterogeneous concept*", (Lammers, 1980: 74-75), meaning that their nature and manner of identification may differ depending on the category in question. This idea, taken from the doctrine, represents a significant step forward into the realm of progressive development of the law rather than staying in the circle of "pure" codification.

The ILC work on general legal principles has come to a common understanding that codification should not go into their substance,[16] nor try to draw up a *numerus clausus* list. It should only give references in the function of *exempli causa*.

[14] Report of the International Law Commission, Seventieth session (A/73/10), para. 363.

[15] First Report of the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, A/CN.4/732, 71st session of the ILC (2019); Second Report of the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, A/CN.4/741, 72nd session of the ILC (2020).

[16] It should be noted that there are a number of general legal principles in international public law, which are generally divided into substantive and procedural principles. Many of them originate from Roman law, while others are taken from national legal orders. Substantive general legal principles include: *pacta sunt servanda, bona fides, nemo plus juris ad allium transferre potest quam ipse habet, pacta tertiis nec nocent nec prosunt, inadimplendi non est adimplendum, restitutio in integrum lost profits (damnum emergens and lucrum cesans*), principles relating to free consent and lack of will, principles relating to abuse of rights and obsolescence, *force majeure*, state of emergency, unjust enrichment (Janković, Radivojević, 2019: 32-33). Procedural general legal principles include: *jura novit curia, res iudicata, nemo judex in causa sua, ejus est interpretare legem cujus condere, audiatur et altera pars*, the principle of independence and impartiality of the court, the rule that notorious and negative facts are not proven, the principle of the exception of judges, or the principle that the judgment must be reasoned, the principle of *lis pendens*, the principle that the court itself decides on its jurisdiction, the principle of indirect proof (Janković, Radivojević, 2019: 32-33). For example, the International Court of Justice pointed out that the *bona fides* principle is one of the "basic principles that regulate the creation and execution of legal obligations"; ICJ, Nuclear Tests Cases (*Australia v France; New Zealand v France*), ICJ Reports 1974, p. 268. The principle of equity is also invoked relatively often; PCIJ, River Meuse Case (*Netherlands v Bel*gium) PCIJ Reports Series A/B No 70, p. 76; ICJ, Case Concerning the Frontier Dispute (*Burkina Faso v Republic of Mali*) (Judgment), ICJ Reports 1986, p. 567; ICJ, North Sea Continental Shelf cases, (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*), ICJ Reports 1969, p. 46-50. The concepts of estoppel and justice were also used in resolving international disputes. For example, if a State, by its conduct, encouraged another State to believe in the existence of a certain legal or factual situation and to rely on that belief, it cannot claim or act contrary to it; ICJ, North Sea Continental Shelf cases, (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*), ICJ Reports 1969, p. 26; ICJ, Case Concerning the Temple of Preah Vihear (*Cambodia v Thailand*) (Merits), ICJ Reports 1962, p. 32-33.

2. General Principles of Law Derived from National Legal Systems

The ILC reaffirmed that general principles of law derive from domestic laws, which is not problematic given the fact that they have always been defined by this origin. However, in order to demonstrate that such principles are *recognized* and that they are part of *international* and not only municipal law, a specific analysis must be carried out. As Sir Fitzmaurice rightly warned 50 years ago: "the concept of the general principles is so fluid that a quasi-legislative element would often be introduced into the Court's decisions by any 'bold' application of them, and... considerable harm might be done to the desideratum of increased resort to the Court unless a reasonable predictability as to the basis of its decisions can be maintained." (Fitzmaurice 1973: 325).

Therefore, the ILC proposed *method of identification* of the general principles of law derived from national legal systems is twofold. First, it is necessary to identify the principles of law common to most national legal systems,[17] subsequently moving on to the determination of whether the principle in question is *at all applicable in international law*.[18] Therefore, they must be "*derived from*", "*accepted in*", "*found in*", "*applied in*" or "*borrowed from*" national legal systems. However, one should bear in mind that the sheer existence of one general legal principle in national systems is insuficient. In other words, there is *no automatic transposition* of general principles from national to international public law, due to their numerous and essential differences.

As with international customary law, there is no impediment to the formation of regional or individual, or even local general legal principles. However, the attribute of "generality" implies a wider number of national legal systems sharing a common principle. The general principles of law are "*general*" in the sense that their content has a certain degree of abstraction and "*basic*" in the sense that they represent the basis of certain rules or embody important values. Therefore, the principles of national law should be viewed only as *sources of inspiration*, and not as a formal source of law directly applicable in international law.[19] In other words, *not all general principles of law* from national legal orders have the potential to be of importance for international law, but only the ones that meet the above requirements and, as such, represent a common thread that connects a large nuber of national legal systems.

In order for such principles to be *applied* in international law, it is necessary that: 1) they are harmonized with the basic principles of international law, and 2) the preconditions for their adequate application in the international legal order are met. In addition, it is necessary that there is *evidence* confirming the *transposition* of a general principle of law from the domain of national to international law, whereby international treaties most often serve as evidence.

[17] For more details, see the Second Report of the Special Rapporteur (A/CN.4/741, paras. 23-72).
[18] The question of the applicability of general legal principles is explained in detail in the Second Report (A/CN.4/741, para. 73).
[19] ICJ, International Status of South-West Africa (Advisory Opinion) [1950] ICJ Reports, p. 148.

3. General Principles of Law Formed within the International Legal Order

The most controversial issue in the work of the ILC relating to general legal principles is the proposed idea of including a second category according to their origin. It should be noted that this idea was not born by the Special Rapporteur himself but had already existed in academic literature (Cherif Bassiouni, 1990: 768, 771; Rosenne, 2006: 1549).

When it comes to general legal principles that have been formed within the framework of international law, it has to be noted that there are conflicting views, not only in literature but also within the ILC itself. Therefore, it remains to be seen whether such a proposal of the Special Rapporteur will find its place in the final draft.

Some authors support the idea of this particular separate source of general legal principles, while others believe that (even then) they are in essence still principles derived from national legal orders.[20] Hence, their separation is unnecessary since such an origin does not have the potential to constitute an independent legal source. Arguments against the extrication of this particular source of general principles of law are numerous: 1) insufficient and/or incoherent practice; 2) substantial difficulties or even inability to distinguish two main formal sources of international public law, i.e. international customary law from general principles of law; 3) the inherent risk that the criterion for identifying these general principles of law will not be too lenient, making the application threshold too lowered.[21] However, some argue that the danger of rendering this source an easier route to create obligations for States is overrated (Shao, 2021: 241-246). Hence, there is understandable concern that this specific category of general principle of law cannot be objectively identifiable.

Having in mind that the same legal rule is understood as a general principle of law that originates from national legal systems, but at the same time from international law as well, there is no encumbance for the so-called *parallel tracks* to exist. The best illustration in this regard is the principle of *pacta sunt servanda.*

The *identification* of general legal principles derived from the domain of international law logically does not imply a two-step identification process, which is the case with the ones found in *foro domestico*. The essential condition is that their "recognition"[22] exists, which can be achieved in three ways: 1) through wide recognition in international treaties and other international instruments; 2) deductively; given that general rules of international treaty or customary law can be based on general principles, the fact of recognition and acceptance of given international treaties and customary law will be considered to have recognized the general principles of law they contain; 3) if the general legal principle is inherent in the so-called *basic characteristics* and/or basic requirements of the international legal order, it will automatically be recognized. To put is simply, they are either "*deduced from international legal materials or the structure of the international legal system*" (Shao, 2021: 233). Since the forms of recognition are not mutually exclusive, they often coexist.

Therefore, it is noted that the identification of general legal principles in the field of international law is somewhat more complex (Vázquez-Bermúdez, Crosato, 2020: 168), and resembles the identification method of international customary law, where it is also necessary to carefully examine available evidence. As noted in the First Report, "*to identify a general principle of law, a careful examination of available evidence showing that it has*

[20] For more details, see footnotes 177 and 178 of the Second Report.
[21] Recognition as a term is dealt in paras 163-175 of the First Report.
[22] Recognition in terms of Art. 38 (1) (c) of the Statute of the International Court of Justice.

been recognized is required".[23] In order to establish the existence of general principles of law derived from international law, two conditions must be met: 1) to establish that the principle is generally recognized in treaties and other international instruments: and 2) to establish that the given principle lies: a) in the basis of the general rules of treaty or customary international law, or b) is inherent in the basic characteristics and basic requirements of the international legal order.

For a better understanding of the newly proposed category of general legal principles, examples are given in the Second Report. For instance, one example is the Nüremburg principle of *nullum crimen sine lege, nulla poena sine lege* found in the Charter of the International Military Tribunal which represented an "*expression of international law existing at the time of its creation*".[24] In the Right of Passage case, Portugal relied not only on the first and undisputed category of general principles of law but it also strengthened its case by referring to "principles inherent in the international legal order" with the aim of proving its right to access the enclaved territory.[25] Another example is the principle of *uti possidetis* as applied in Frontier Dispute between Burkina Faso and Mali,[26] as well as the famous Martens clause, to name just a few.

4. The Demarcation between General Principles of Law and International Customary Law

Having in mind that there is no obstacle to the existence of parallel tracks, i.e. that the same legal rule can be contained in several legal systems (national and international law) or in several main formal sources of the international public law, one of the key issues in the current debate refering to the codification of general principles of law is their differetiation from other sources of international public law. The major issue of controversy is the difficulty in disentagling international customary law from general legal principles. It is argued that the need for international public law to achieve the level of a coherent legal system is intrinsic to the different understanding of general principles of law as compaired to international treaty and customary law (Shao, 2021: 224, 229). Not having a clear distinction could have a potential to reflect negatively on both said unwritten formal sources of international law.[27] However, some emphasize that a clear-cut distinction between the two is unnecessary (Gaja, 2019: 43).

It is interesting to point out that the existance of parallel tracks between international treaties and international customary law is not seen as a problem. On the contrary, the codification of customary law is percieved in a positive light. Since an international rule can coexist in an international treaty and international customary law, it is considered by analogy that there would also be no obstacle to its parallel existence in an international treaty as a general principle of law, or in international customary law as well as a general

[23] First Report, para. 165.
[24] Judgment of the International Military Tribunal, Official Documents of Trial of the Major War Crimes before the International Military Tribunal (Nuremberg, 14 November 1945 – 1 October 1946), vol. 1, 218.
[25] ICJ, Right of Passage over Indian Territory (*Portugal v. India*), Reply of the Government of the Portuguese Republic (VII 58), paras. 335-348.
[26] ICJ, Frontier Dispute (*Burkina Faso/Republic of Mali*), Judgment of 22 December 1986, ICJ Reports 1986, 554, 565, paras 20-21.
[27] Statement by Mr. Wood (A/CN.4/SR.3490, p. 5); Statement by Mr. Rajput (A/CN.4/SR.3490, p. 20).

principle of law.[28] The *fluid* relationship between international customary law and general legal principles *derived from international law* is particularly emphasized.[29] It is considered that their relationship may be chronologically determined, in the sence that the first formed and recognized general principle of law born within the framework of international law can "pave the way" for the same rule that can be transformed[30] into an international customary rule (Simma, Alston, 1989: 104). Hence, it is believed that general principles of law may in fact "harden" into treaty or customary rules (Shou, 2021: 253). In this regard, an example is the evolution of the principle of notification of posible dangers in territorial water from the PCIJ Corfu Channel case, which was later incorporated in 1958 Geneva Convention[31] and further on in the United Nations Convention on the Law of the Sea;[32] today, it constitutes a rule of international customary law (Palchetti, 2019: 51).

Reflecting on such a situation, an ILC member queried whether general principles of law could be described by the formula "*customary international law minus opinio juris, or customary international law based purely on practice*".[33]

Certainly, it should be quite clear that this is only a *potential* that can but *does not have* to be realized, which ultimately depends on the will and behavior of the subjects of international public law, primarily States. In this sense, we may refer to the EC-Hormones dispute conducted before the WTO Appellate Body between the USA and the then EC, today EU.[34] Namely, the then EC invoked the *precautionary principle* in its defense, emphasizing that in case the Appellate Body does not determine that it is an international custom, it should at least be considered a general legal principle, recognized in both domestic and international law. According to their logic, general principles of law express principles articulated in domestic and international law, which do not necessarily meet the stricter conditions set for the existence and maintenance of international customary law (practice and *opinio iuris*).[35] In its oral submission on appeal, the EC also pointed out that the precautionary principle in any case constitutes a general principle of law, within the meaning of Article 38 (1) (c) of the Statute of the ICJ. "*These are principles which often emerge as an interaction between international law, national law and the dictates of reason, common sense or moral considerations.*"[36]

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[28] An example is *res iudicata*, which is claimed to be a general legal principle but which is also contained in Articles 59, 60 and 61 of the ICJ Statute. In that sense, *Scelle* pointed out that "any principle of international law had its origin in custom... Before becoming a principle of international law, therefore, any principle was first a general principle of municipal law and at both stages of its development it could be applied by the Court in international matters." UN Yearbook of the International Law Commission, 1949, United Nations, New York, 1956, p. 206, para. 81, available at: https://legal.un.org/ilc/publications/yearbooks/english/ilc_1949_v1.pdf (20.11.2021)

[29] Para. 233 of the First Report.

[30] It is observed that an analogous relationship exists or may exist between *ius cogens* norms of international law and general principles of law, emphasizing that general principles of law can also be the basis for the formation of peremptory norms; Second report on jus cogens, A/CN.4/706, paras 48-52.

[31] Convention on the Territorial Sea and the Contiguous Zone (29 April 1958), 516 UNTS 205, Article 15 (2).

[32] United Nations Convention on the Law of the Sea (10 December 1982), 1833 UNTS 3, Article 24(2).

[33] Statement by Mr. Tladi (A/CN.4/SR.3489, p. 4).

[34] It is also interesting to consider the position externally represented by the EU on relations between general legal principles and international customs.

[35] EC-Measures concerning meat and meat products (Hormones) (AB-1997-4), Appeal of the European Communities, 6 October 1997, para. 91.

[36] There is a similarity in the formulation of the second part of this kind of definition with the *Martens clause*. EC-Measures concerning meat and meat products (Hormones) (AB-1997-4), Oral Submissions of the European Communities, 4 November 1997, para. 18.

Other authors, however, believe that it is virtualy *impossible* to distinguish between general principles of law that derive from international law from international customary law[37] (Yee, 2016: 490; Raimondo, 2008: 42; Degan, 1997: 83; Bogdan, 1977: 42; Lammers, 1980: 67-69).

The ILC stated that the parallel existence of a legal rule in an international treaty, and in the form of a general legal principle, represents a more favorable situation due to the written form of international treaties, which significantly facilitates proving the existence and content of general principles of law. In contrast, in the second case, when there is a parallel between international customary law and general legal principles, the lack of written form of both sources contitues a significant aggravating factor. Even if there is an identical rule of international law in the spirit of both international customary norm and general principle of law, in both cases it is very difficult to prove their existence, and even more so their precise content. The consequences of the said *parallel tracks* are the invisibility and excessive absorption of general principles of law in other formal sources of international public law.

Despite the existing fluidity between international customary law and general legal principles, they still represent separate and independent formal sources.[38] Although general principles of law can influence the formation of international customary law,[39] the specific issue of their mutual relationship has not yet been clarified in the work of the ILC, nor in academic literature. While working on the codification of international customary law, the ILC focused only on the issue of their *identification*, and not on the process of formation and evidence as initially planned.[40] On the other hand, thus far, the ILC has not addressed the issue in the two mentioned reports related to general principles of law. What has been processed and what represents an important basis for differentiation is the *method* of identifying international customs and general legal principles.[41]

5. Concluding Remarks

It is positive that the most misterious and controversial main formal source of international law has finally become the subject of codification. This process in itself will undoubtedly bring clarity to many questions surrounding general principles of law, hence providing necessary guidance among subjects of international law, as well as international adjudicators.

The subsidiary nature of general principles of law is the central thread connecting its two categories. By introducing a new category of general prinicples of law, found within the realm of international law itself, the ILC stepped into the field of progressive development with a noble aim of significantly enhancing the gap-filling function of general legal principles.

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[37] Statement of the Czech Republic, 74th Session of the General Assembly, Report of the International Law Commission, Cluster III, 5; Statement of Iran, 74th Session of the General Assembly, Report of the International Law Commission, Cluster III, 2; Statement of Mr. Rajput, A/CN.4/ SR.3490; Statement of Mr. Murase, A/CN.4/ SR.3490.

[38] First report, Report, p. 8, para. 28: "*The relationship between general principles of law and customary international law, sometimes described as unclear, deserves particular attention. Nevertheless, the fact that a rule of customary international law requires there to be a "general practice accepted as law" (accompanied by opinio juris), while a general principle of law needs to be "recognized by civilized nations", should not be overlooked. This suggests that these two sources are distinct and should not be confused."* UN Yearbook of the International Law Commission, 2013, vol. I, 3183rd meeting, United Nations, New York, Geneva, 2018, p. 92, para. 14.

[39] Para. 71 of the First Report.

[40] Initially the topic of the codification work was called "Formation and evidence of customary international law". However, at its sixty-fifth session in 2013, the ILC decided to change the title to "Identification of Customary International Law", which automatically narrowed down the scope of codification.

[41] For more details: Second Special Rapporteur's Report, para. 107-111.

However, it remains to be seen wheather such an approach will be widely accepted, due to concerns that recognizing the latter category of general principles of law may lead to a "slippery slope" for the establishment of binding international law norms.

Hence, the following arguments against the extrication of general principles of law formed within international law are put forward: 1) insufficient and/or incoherent practice; 2) substantial difficulties or even inability to distinguish two main formal sources of international public law, that is international customary law from general principles of law; and 3) the inherent risk that the criterion for identifying these general principles of law will not be too lenient, making the application threshold too lowered. There is understandable concern that this specific category of general principle of law cannot be objectively identifiable.

The major issue of controversy is the difficulty in disentagling international customary law from general legal principles derived from international law. The fluidity of this relationship makes it hard to delineate between them and, therefore, separate them as independent formal sources of international law.

Finally, despite the obstacles and difficulties linked to the task of codification of such an unwritten source, one must also acknowledge the interconnectedness between this and other works of the ILC which bring a systematic quality not only to the process itself but also to international law as a whole, thus contributing to its much needed coherence.

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RAD KOMISIJE ZA MEĐUNARODNO PRAVO NA KODIFIKACIJI OPŠTIH NAČELA PRAVA

Kodifikacija formalnih izvora međunarodnog prava predstavlja monolitan i dugotrajan projekat. Nakon više decenija posvećenih kodifikaciji međunarodnog ugovornog i običajnog prava, Komisija za međunarodno pravo je najzad pristupila obradi teme Opštih principa prava tek 2018. godine. Kodifikacija opštih pravnih principa je izazovan zadatak iz višestrukih razloga: usled nejasnoće ili dvosmislene praksa država i međunarodnog pravosuđa, nedostatka jedinstvenog stava u doktrini, ali i zbog terminološke nedoslednosti. Međutim, u aktuelnoj debati u okviru Komisije za međunarodno pravo, najkontroverznije pitanje predstavlja ideja o postojanju „dve kategorije" opštih principa prava usled njihovog koji dvostrukog porekla. Naime, oni mogu biti izvedeni ne samo iz nacionalnih pravnih sistema, već i iz samog međunarodnog pravnog poretka. U radu je dat pregled dosadašnjeg rada Komisije za međunarodno pravo, sa ciljem da se rasvetle pojedini aspekti predloženog pravca delovanja.

Ključne reči: *opšta načela prava, kodifikacija, Komisija za međunarodno pravo*

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THE FUNDAMENTAL BREACH OF CONTRACT OF SALE UNDER THE CISG

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Abstract. *While a breach of contract implies the failure of one party to fulfil the obligations arising from the contract, the fundamental breach of contract is an aggravated form of breach of contract. The concept of the fundamental breach of contract of sale is recognized in Article 25 of the CISG (UN Convention on Contracts for the International Sale of Goods, 1980). In an ordinary breach of contract of sales, the applicable legal remedies are ordinary legal remedies (such as substitution of goods, damages). In case of a fundamental (substantial) breach, the unilateral declaration of termination of the contract of sale is used as the last resort (to void the contract). Given that it is perceived as a special aggravated type of breach of contract of sale, the fundamental breach has to be carefully analysed in more detail.*

Key words: *Contract of sale, breach of contract, CISG*

1. INTRODUCTION

In post-World War II era, the international trade increased and triggered globalization. Since the law of the place of destination of goods is the applicable law in disputes including a foreign element in international trade, there is unspecified applicable law for the seller. Naturally, national contract law provisions are insufficient to regulate the international sales transactions. The globalization of trade entails the regional and global unification of sales law (Ruangvichathorn, 2020:133).[1] Therefore, the UNCITRAL (the UN Commission on International Trade Law) drafted the text of the CISG (UN Convention on Contracts for the International Sale of Goods) in 1980 to create uniform sales law at the global level and to reduce

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[1] Ruangvichathorn Jumpita, The Harmonization of ASEAN Sales Law: A Comparative Study with Thai Sales Law and CISG, *Thammasat Law Journal*, Vol.49, No.1, 2020, page 133.

legal uncertainty. The CISG has 93 signatory states. It is clear that it removes legal barriers to a certain degree (Ay, 2021:138).[2]

Breach of contract is not defined in the CISG. In legal doctrine, it may be defined as the unjustifiable failure of any provision or condition of the contract by one of the parties. Differently from the ordinary breach of contract of sale, the CISG recognizes the concept of fundamental breach of contract of sale. Under Article 25 CISG, a breach of contract of sale is considered fundamental "*if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result*." (Jovicic, 2018: 41).[3] This provision sets up two criteria to assess breach as the fundamental breach: detriment and foreseeability (Huber, Mullis, 2007: 213).[4] As a result of the fundamental breach, it is possible to resort to the avoidance of contract, which is a unilateral termination of contract as the last resort. Given that it is perceived as a special type of breach of contract of sale, the fundamental breach has to be carefully analysed.

2. The Definition of the Fundamental Breach of Contract

2.1. Detriment

Under Article 25 of the CIGS, In order to be deemed fundamental, a breach of contract of sale must result in a detriment that "substantially deprives" the aggrieved party of what he is "entitled to expect under the contract". The reference to "under the contract" is certain proof that the yardstick for breach of contract of sale is first in the express and implied provisions of the contract of sale itself (Koch, 1998: 71).[5] This reference is a decisive factor. For instance, according to the principle of freedom of contract, the parties have free will to specify their contract whose breach is considered to be fundamental or substantive (Ahmed, Hussein, 2017: 128).[6] However, if there is no choice of law clause specifying the fundamental breach, this reference causes open questions regarding other circumstances which should be taken into account, such as: negotiations, trade practices between parties, usages, and any subsequent conduct of the parties (Koch, 1998: 71). Article 9 of the CISG fills the gap in this situation. Pursuant to Article 9 of the CISG, the parties are bound by any trade usages or business practices to which they have agreed or established between them. For instance, the China Arbitration Commission found that the parties had established a business practice regarding the issue of quality (specifically, of confirming the cloth sample) in the stage of performing the "general" contract (Pamboukis, 2005:

[2] Ay, Yunus Emre, The Scope of the Convention on International Sale of Goods, *Uluslararası Ticaret ve Tahkim Hukuku Dergisi (Journal of International Trade and Arbitration Law*), Vol.10, Issue:1, 2021, p. 138.
[3] Jovicic Katarina, The Concept of the Fundamental Breach of Contract in the CISG, *Strani pravni zivot/ Foreign Legal Life*, Issue:4, Belgrade, 2018, page 41.
[4] Huber, Peter, MULLİS Alastair, The CISG A New Textbook for Students and Practitioners, *European Law Publishers*, 2007, page 213.
[5] Koch Robert, The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods, LLM Dissertation, Supervisor: David Stevens, *McGill University Faculty of Law*, 1998, p. 71
[6] Ahmed Bzhar Abdullah, HUSSEIN Hassan Mustafa, Avoidance of Contract as a Remedy under CISG and SGA: Comparative Analysis, *Journal of Law, Policy and Globalization*, Vol.61, 2017, page 128.

113).[7] Therefore, it is seen that determination of detriment criterion depends on the merits of each specific case. The CISG Secretariat Commentary explains the determination of detriment as follows:

> "*The determination whether the injury is substantial must be made in light of the circumstances of each case, e.g. the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party*." (Agapiou, 2016: 153) [8]

2.2. Foreseeability

Foreseeability is the other criterion of fundamental breach but it does not shed much light on the concept of fundamental breach. First of all, the criterion of foreseeability is vague. Even if a breach of contract of sale causes substantial deprivation of what the buyer was entitled to expect under the contract between parties, there is no fundamental breach if the breaching party (seller) "*did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result*" (Article 25 CISG). It is explained that "*one must not only take into account the actual subjective knowledge of the defaulting party but also inquire into whether an average party to the same kind of contract and in the same circumstances would have foreseen the result*" (Agapiou, 2016: 154). Therefore, many scholars are of the opinion that foreseeability is a burden of proof rule and requires taking into account the defaulting party's knowledge of the harsh consequences of the breach of contract of sale. On the other hand, the foreseeability criterion under Article 25 of the CISG has a similar effect as the same criterion under the general rule for calculation of damages in Article 74 CISG. There is a limitation imposed on the aggrieved party in case the other party could not foresee the far-reaching consequences (Koch, 1998: 72).

Another point that should be examined refers to the term "*a reasonable person of the same kind in the same circumstances*", which includes another ambiguity. Some authors suggest that the concept of "foreseeability" entails not only the subjective perspective of the defaulting (breaching) party but also the objective perspective of the reasonable merchant on the position of the defaulting party (Koch, 1998: 72). Yet, it is still insufficient to understand the concept of a reasonable person. Other authors suggest that the qualification of a reasonable person and the defaulting party have the same socio-economic background. Prior dealings, negotiations, political climate, legislation, global and regional market conditions are taken into account to assess 'the same circumstance' (Ahmed, Hussein, 2017: 129).

In addition, the most debated issue under Article 25 of the CISG is the time of foreseeability because there is no provision which regulates determination of the foreseeability time in Article 25 CISG. It is unclear whether the time of forming or breaching a contract must be considered to determine the time of foreseeability (Ahmed, Hussein, 2017: 129). In the doctrine, some scholars are of the opinion that the time of the conclusion of contract should be accepted because rights and obligations of parties are determined when

[7] Pamboukis Ch., The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods, *Journal of Law and Commerce*, Vol:25, Issue:1, 2005, p. 113.
[8] Agapiou Nevi, Buyer's Remedies under the CISG and English Sales Law: A Comparative Analysis, *University of Leicester School of Law*, PhD Thesis, 2016, p.153.

the contract is concluded (Sayın, 2019: 94-95).[9] In this view, foreseeability is a substitute for provisions or a part of the contract of sale (Ishida, 2020: 75).[10] Professor Schlechtriem (1998) explains this view as a substitute for certain contractual terms as follows:

> "*In the author's opinion, the role which foreseeability plays ……. makes it clear that it is the time when the contract was concluded that is decisive. The promisor's knowledge or the foreseeability of the promisee's interest in individual contractual obligations and methods of performance can be a 'substitute' for the need to reach clear agreement in the contract on the importance for those matters, i.e. it can make an appropriate interpretation of the contract possible. However, the importance attached by a promise to a particular obligation, which has been shown otherwise than by express agreement, must nevertheless be fixed by the time the contract is concluded. If knowledge or foreseeability is to be equivalent to express agreement, it must in any event exist at the time when the contract was concluded*." (Ishida, 2020:75).

3. Specific Case Scenarios

3.1. Delay in Delivery

As a general principle, late delivery does not constitute a fundamental breach of contract of sale. The buyer may claim damages when the delay causes any damage. For this reason, generally, he is not entitled to terminate the contract of sale. Further circumstances must be presented to consider the delay as a fundamental breach. Where the buyer and the seller have agreed that the delivery time of goods is of the essence for the performance of the contract (e.g. in case of just-in-time delivery), late delivery may constitute a fundamental breach of contract of sale (Magnus, 2005: 434).[11] The punctual delivery may be sensitive in some cases. The nature of goods is important. In particular, perishable goods should be delivered on time. Seasonal articles should also be delivered on time. Late delivery of seasonal goods may prevent the marketing of such goods on time. The most interesting example is that delay will also be considered fundamental where it was clear that the buyer had already resold the goods (Huber, Mullis, 2007: 226). In accordance with these examples, the Oldenburg District Court refused fundamental breach in a conflict between an Italian seller and a German buyer, where the seller had delivered summer clothes one day later than the agreed time. Relying on the fact that the buyer accepted delivery of the goods instead of refusing them, the German Court concluded that punctual delivery was not essential for the relationship (Koch, 1998: 45-46).

If both parties fail to perform their obligations on time, one party may fix additional time to the other party to carry out the obligations, regardless of whether the obligation is ancillary or basic. The seller may fix additional period for the buyer to take over the goods, pay the price, or to enable the seller to complete delivery process. The buyer may fix additional

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[9] Sayın Ceren, Viyana Satım Sözleşmesinde Satıcının Ayıptan Doğan Sorumluluğu (Liability of the Seller for Default in the Convention on International Sale of Goods), LLM Thesis, *Ankara University Faculty of Law*, Supervisor: Prof. Hasan Ayrancı, Ankara, 2019, pp. 94-95.

[10] Ishida Yasutoshi, Identifying Fundamental Breach of Article 25 and 49 of the CISG: The Good Faith Duty of Collaborative Efforts to Cure Defects – Make the Parties Draw a Line in the Sand of Substantiality, *Michigan Journal of International Law*, Volume:41, Issue:1, 2020, page 75.

[11] Magnus Ulrich, The Remedy of Avoidance of Contract under CISG – General Remarks and Special Cases, *Journal of Law and Commerce,* Vol:25, 2005, p. 434.

period for the seller to deliver goods, supply substitute goods in case of nonconformity of goods, and repair non-confirming goods (Duncan, 2000: 1383).[12] This additional time for performance must be a reasonable time. According to Peter Schlechtriem, the reasonable time depends largely on the circumstances as follows (Duncan, 2000: 1384):

"*1 Length of time of the contractual delivery period (transactions with short delivery dates justify a shorter additional period, long delivery dates require a longer additional period);*

2. The buyer's recognizable interest in rapid delivery, if the seller should have been aware of that interest upon conclusion of contract;

3. The nature of the seller's obligation (a longer period is reasonable for delivery of complicated apparatus and machinery of the seller's own manufacture than for delivery of fungible goods by a wholesaler);

4. The nature of the impediment to delivery (if the seller is affected by a fire or strike, the buyer can be expected to wait for a certain time if the delivery is not particularly urgent)."

3.2. Definite Non-Delivery

Where the seller refuses the delivery of goods or does not deliver the goods, such non-performance constitutes fundamental breach. If the performance of the contract is significantly carried out, there is no fundamental breach (Magnus, 2005: 433). If the seller declares that he will not definitely perform his obligations, it will usually be considered as a fundamental breach (Huber, Mullis, 2007: 227). In *Ste Calzados Magnanni v SARL Shoes General International* case, the buyer (a French company) ordered 8651 pairs of shoes from the seller (a Spanish company). However, the seller denied order made by the buyer and refused delivery. As a result of this situation, the buyer resorted to the avoidance of the contract and got shoes from other manufactures. The court ruled that "*refusal, without any legitimate reason, to fulfil an order received by falsely maintaining that the order had not been placed constitutes a fundamental breach by the seller within the meaning of Article25 of the CISG*." (Ahmed, Hussein, 2017: 131).

3.3. Delivery of non-Confirming Goods

Delivery of non-confirming goods is one of the most debated issues within the context of the fundamental breach of contract of sale. Pursuant to Article 35 of the CISG, the seller must deliver the goods in the manner required by the contract. The goods must be of the quantity, quality and description required by the contract. Unless otherwise agreed by the parties in the contract of sale, the confirming goods shall meet the following conditions:

a) they are fit for the purposes for which goods of the same description would ordinarily be used,
b) they are fit for any particular purpose which is clearly (expressly)or tacitly (impliedly) made known to the seller at the time of formation of the contract of sale,
c) they have the same quality as the sample goods sent from the seller to the buyer,
d) they are packaged or contained in the ordinary manner for such goods or, if there is no such manner, in a manner adequate to preserve and protect goods.

[12] Duncan JR John C., Nachfrist Was Ist? Thinking Globally and Acting Locally: Considering Time Extension Principles of the UN Convention on Contracts for the International Sale of Goods in Revising the Uniform Commercial Code, *BYU Law Review*, Vol:2000, Issue:4, 2000, p. 1383.

This article became the subject matter of many cases. On 28 December 2008, the Shangai First Instance Court ruled that there is the fundamental breach in case the seller had delivered only minor parts of the liquors ordered by the buyer and none of the brands listed in the contract of sale. Other courts rendered similar decisions in cases where the major part of the goods were either non-confirming or significantly affected by the non-confirming goods. An American court ruled that it is a fundamental breach of the contract of sale that 93% of delivered goods perform below the standard cooling capacity for air conditions. In a French case, it was ruled that 380 of 445 non-confirming motherboards constitute the fundamental breach. A German court held that 420 kg out of 22 tons non-confirming goods amounts to a fundamental breach. In an Italian case, the value of more than 90% of the non-confirming goods amounts to a fundamental breach. However, it should be noted that excess delivery of goods does not constitute fundamental breach (Chen, Pair, 2011: 669). [13]

One of the most important cases related to Article 35 of the CISG is the "*New Zealand Mussels case*", which was heard by the German Court in 1995.[14] The German buyer ordered 1750 kg of New Zealand Mussels from the Swiss seller, and the seller delivered the goods on time to the place agreed by the parties. Upon the seller's payment request, the buyer notified that the level of cadmium concentration is higher than the rate determined by the German authorities. The German court ruled that the foreign seller cannot know the public law provisions and administrative criteria; therefore, the buyer cannot rely upon the knowledge of the foreign seller; the buyer can be expected to have such information in the place of destination or in his own country. The buyer must give relevant information to the seller. Therefore, the German court accepted the seller' request for payment from the buyer (Atamer, 2005: 202).[15] For this situation, the German court determined three exceptions as follows:

1) The country of the seller has the same standards as the country of the buyer.
3) The seller was informed about the standards of goods by the buyer.
3) Relevant factors (such as: the relationship between the buyer and the seller in pre-shipment of goods, the existence of the headquarter or a branch of the seller in the country of the buyer, the fact that the seller sells the goods to the country of the buyer for a long time, or other reasonable conditions) demonstrating that the seller knows the criteria in the country of the buyer (Can, Tuna, 2019: 2186).[16]

In a different case, the Spanish seller had been selling spice to the German buyer regularly. In the last order, the Spanish seller sold a bulk of spice containing a high level of ethylenoxid. The German buyer wanted to substitute spices due to the high ethylenoxid level. The German courts justified the request of the German buyer by the fact that both parties had a long-term spice trade relationship (Atamer, 2005: 202). In particular, a

[13] Chen Markus Müller, Pair Lara M., Chapter 35: Avoidance for non-Conformity of Goods under Art. 49(1)(A) CISG, in: Liber Amicorum Eric Bergsten International Arbitration and Commercial Law: Synergy, Convergence and Evolution, Edited by Stefan Kröll, L.A. Mistelis, P. Perales Viscasillas & V. Rogers, *Kluwer Law International*, 2011, p. 669.

[14] Article 35(2)(a) CISG "fit for the purpose for which they would ordinarily be used".

[15] Atamer Yeşim Müride, Uluslararası Satım Sözleşmelerine İlişkin Birleşmiş Milletler Antlaşması (CISG) Uyarınca Satıcının Yükümlülükleri ve Sözleşmeye Aykırılığın Sonuçları (The Seller's Obligations and the Consequences of Breaching the Contract of Sale under the CISG), Beta Yayınları, İstanbul, 2005, p. 202

[16] Can Hacı, Tuna Ekin, Sınıraşan Sözleşmelere İlişkin Meseleler Gümrükten Geçmeyen Mallardan Kaynaklanan Hukuki Sorumluluğa İlişkin Bir Vaka İncelemesi (Issues Related to International Contracts: A Case Study of Legal Liability Arising from Non-customs Goods), *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi*, Volume:19, Issue:2, 2019, p. 2186.

revolving letter of credit may create a presumption as it proves long-term trade between the buyer and the seller.

3.4. Breach of other Obligations

A breach of obligations other than those presented in the aforesaid situations may also amount to a fundamental breach. A Letter of Credit (L/C) fraud may be considered a fundamental breach. Additional obligations are provided in the CISG. For instance, pursuant to Article 32 of the CISG, the seller must provide the identification of the goods to arrange for the carriage of the goods or give notice of the consignment specifying goods if there is no identification. Such a violation of obligations may amount to a fundamental breach. Furthermore, additional obligations may be specifically agreed by the parties (Magnus, 2005:435). For example, if both parties have agreed the documentary letter of credit as the payment method and the buyer will not open the letter of credit, this amounts to a fundamental breach of contract of sale (Taştan, 2019: 387-388).[17]

4. CONCLUSION

The fundamental breach of contract of sale is a special form of breach of contract in the CISG (UN Convention on Contracts for the International Sale of Goods, 1980). Thus, it is important to determine whether the breach of contract of sale is an ordinary breach or a fundamental breach in order to enjoy avoidance of contract or not. Since the purpose of the CISG provisions is to keep the contract of sale in effect, the fundamental breach which causes the termination of contract is considered the last resort (Toker, 2016: 241).[18]

Secondly, the fundamental breach has two elements: the detriment (substantial deprivation of the aggrieved party of what he is "entitled to expect under the contract") and foreseeability. The determination of these basic two elements depends on the merits of each specific case. Both elements are determined in accordance with the provisions of the contract of sale. Therefore, the fundamental breach of contract of sale should be assessed on the case- by-case basis. In the sale of goods, the common types of fundamental breach are overdue delivery of goods, definite non-delivery of goods, and delivery of non-confirming goods. However, some other violations (e.g. L/C fraud or a failure open an L/C, failure to identify the goods, provide specification or give notice) may also amount to a fundamental breach.

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[17] Taştan Furkan Güven, Viyana Satım Antlaşmasına (CISG) Göre Alıcının Sözleşmeyi İhlali Halinde Satıcının Hakları (The Seller's Rights in Case of Buyer's Breach of Contract under the CISG, *Yıldırım Beyazıt Hukuk Dergisi*, Year:3, Issue:1, 2019, pp. 387-388.

[18] Toker Ali Gümrah, Viyana Satım Sözleşmesi (CISG) Uyarınca Sözleşmenin Esaslı İhlali (Fundamental Breach of Contract pursuant to the CISG), *Public and Private International Law Bulletin*, Volume:33, Issue:1, 2016, p. 241.

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BITNA POVREDA UGOVORA O PRODAJI PREMA KONVENCIJI UN O UGOVORIMA O MEĐUNARODNOJ PRODAJI ROBE (CISG)

Dok obična povreda ugovora predstavlja neizvršenje ugovorne obaveze jedne od ugovornih strana, bitna povreda ugovora predstavlja teži oblik povrede ugovora. Koncept bitne povrede ugovora o prodaji prepoznat je u članu 25 Konvencije UN o ugovorima o međunarodnoj prodaji robe (CISG, 1980). Prilikom obične povrede ugovora o prodaji, primenjuju se redovna pravna sredstva kao što su zamena robe, naknada štete, itd. Prema članu 25 Konvencije UN o ugovorima o međunarodnoj prodaji robe (CISG), kod bitne povrede ugovora o prodaji, jednostrana izjava o raskidu ugovora o prodaji primenjuje se kao poslednje sredstvo. S obzirom da se radi se o posebnom i teškom obliku povrede ugovora, bitna povreda ugovora o prodaji zaslužuje pažljivu analizu.

Ključne reči: *ugovor o prodaji, bitna povreda ugovora, Konvencija UN o ugovorima o međunarodnoj prodaji robe (CISG)*

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Review Paper

PARTIES IN ADMINISTRATIVE DISPUTES

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Abstract. *The paper explores the issues of active legitimacy to be a party in administrative dispute proceedings and the representation and protection of parties' rights before the Administrative Court, established as a court of special jurisdiction by the Act on Seats and Areas of Courts and Public Prosecutor's Offices which entered into force in January 2010. The author first examines who can be the plaintiff, the defendant, and the interested person in an administrative dispute, and then focuses on the rules on representing the parties before this specialized court. Subsequently, the author explores the current case law established by the Administrative Court.*

Key words: *parties, plaintiff, defendant, interested person, Administrative Court, administrative dispute, representation of the parties*

1. INTRODUCTORY CONSIDERATIONS

The principle of the separation of powers is an expression of citizens' aspiration for liberty, equality and fraternity. Its origins can be traced back to the French Civil Revolution (1789), which was a response to the unlimited power of the monarch who had all the power concentrated in his hands. We may recall the words of Louis XIV, asserting: "*The State is Me*".

Article 4 of the Constitution of the Republic of Serbia (2006)[1] clearly prescribes the separation of powers into the legislative, the executive and the judicial branch, particularly emphasizing that the judiciary is independent. Article 11 of the Act on the Organization of Courts[2], designated as "Courts in the Republic of Serbia", prescribes that Serbian courts are classified into courts of general jurisdiction and courts of special jurisdiction, The courts of general jurisdiction include: the basic (municipal) courts, high courts, appellate courts,

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[1] Article 4 of the Constitution of the Republic of Serbia, *Official Gazette of the RS*, No. 98/2006
[2] Article 11 of the Act on the Organization of Courts (hereinafter: Courts Organization Act)· *Official Gazette of RS*, No. 116/2008, 104/2009, 101/2010, 31/2011-another law, 101/2011, 101/2013, 106/2015, 40/2015-another law, 13/2016, 108/2016, 113/2017, 65/2018 - CC decision, 87/2018 and 88/2018 - CC decision)

and the Supreme Court of Cassation, while the courts of special jurisdiction include commercial courts, commercial courts of appeal, misdemeanor courts, misdemeanor courts of appeal, and the Administrative Court.

The Administrative Court was established as a court of special jurisdiction by the Act on Seats and Areas of Courts and Public Prosecutor's Offices[3], which entered into force in January 2010. Thus, the Administrative Court started its work on 1 January 2010[4], as a court of special jurisdiction with the seat in Belgrade and three departments in Kragujevac, Niš and Novi Sad[5]. In addition to the aforementioned Courts Organization Act, the jurisdiction of the Administrative Court is also regulated in Article 1 of the Act on Seats and Areas of Courts and Public Prosecutor's Offices, which stipulates that the Administrative Court judges hear administrative dispute and perform other tasks determined by law, and provide international legal assistance within their competence. In administrative dispute proceedings, Article 3 of the Administrative Disputes Act (2009)[6] specifies that the Administrative Court decides on the legality of final administrative acts pertaining to the right, obligation and legal interest in respect of which the law does not provide for other judicial protection. In relation to the former Administrative Disputes Act (1996),[7] the new Administrative Disputes Act (2009) has made systemically different decisions regarding the establishment of facts. Thus, in Chapter 7, Articles 33-39 of the ADA refer to the public hearing, establishing facts, hearings in special cases, scheduling hearings, the management of a hearing, the absence of the parties from a hearing, and the course of the hearing. The new 2009 Administrative Disputes Act was proclaimed by the Decree of the President of the Republic of 2009[8].

In theory, an administrative dispute is defined differently but what most authors agree on is that it is a special form of judicial control of the administration. It can be said that an administrative dispute is a type of judicial control of the administration and its administrative activities, while the subject matter of control is the legality of the final administrative act. It can be conducted even when the administrative act has not been passed, in case of "the silence of the administration", or when it is assumed that a negative[9] final administrative act has been passed; it may also be instituted against other final individual acts deciding on a right, an

[3] Act on Seats and Areas of Courts and Public Prosecutor's Offices, *Official Gazette of the RS*, No. 111/2009

[4] The Administrative Court did not begin its work on 1 October 2002, as previously planned, nor within the postponed deadlines that were extended until the adoption of the new Constitution Instead of the Supreme Court, the new Constitution (2006) envisages the Supreme Court of Cassation as the highest court in the Republic of Serbia. Article 6 (para.2) of the Constitutional Act on the Implementation of the Constitution stipulates that the deadline for the courts shall be determined by the laws by which their competence and organization are harmonized with the Constitution. The implementation was completed at the end of 2008 (Milosavljević, 2018 a: 135-136).

[5] Under Article 8 (para.7) of the Act on Seats and Areas of Courts and Public Prosecutor's Offices (*Official Gazette of RS*, No. 101/2013), the Departments of the Administrative Court are: Department in Kragujevac (for the areas of higher courts in Jagodina, Kragujevac, Kruševac, Kraljevo, Novi Pazar, Užice and Čačak); Department in Niš (for the areas of higher courts in Vranje, Leskovac, Nis, Prokuplje and Pirot); Department in Novi Sad (for the areas of higher courts in Zrenjanin, Novi Sad, Sombor, Sremska Mitrovica, Subotica and Šabac).

[6] Administrative Disputes Act, *Official Gazette of RS*, No. 111/2009.

[7] Administrative Disputes Act, *Official Gazette of the FRY,* No. 46/1996.

[8] Decree on the Proclamation of the Administrative Disputes Act, issued by the President of the Republic Boris Tadić, stated as follows: "The Act on Administrative Disputes, adopted by the National Assembly of the Republic of Serbia at the Seventh Session of the Second Regular Session in 2009, December 29, 2009, is promulgated." (Decree on the Proclamation of the Administrative Disputes Act, PR No. 257 of 29.12.2009, Belgrade).

[9] In theory, there are several classifications of administrative acts. They are classified as follows: meritorious and procedural administrative acts; positive and negative acts; constitutive and declarative acts, binding and discretionary act; simple and complex acts; individual and general acts; and administrative acts adopted *ex officio* and those adopted upon request (B. Milosavljević, Administrative Law, Projuris, Belgrade, 2018, p. 51

obligation or a legal interest in respect of which the law does not provide different judicial protection; when the party has the right to be issued an administrative act and it does not happen, the party can go to court. What is common is that the dispute is seen as a situation in which there is a conflict between the two parties. According to the classical conception, a dispute brought before a court arises from the opposition of two parties who, unable to reconcile their respective claims, ask the court to resolve it; therefore, a dispute is defined as a conflict between two subjects of law. This view has been the subject of much criticism by Leon Duguit who claimed that a dispute may also exist when a legal issue arises that needs to be resolved, which may not be related to cases where there are two opposing parties (Auby, Drago, 1962: 3).[10]

The Administrative Disputes Act (ADA, 2009) envisages the jurisdiction of the Administrative Court, which decides on an administrative dispute in a panel of three judges (Article 8 ADA), and the Supreme Court of Cassation, where a panel of three judges decides in proceedings on a request for review of a court decision against a decision of the Administrative Court (Article 9 ADA). According to Article 3 of the ADA, in administrative dispute cases, the competent court decides on:

a) legality of final administrative acts, except for those in respect of which different judicial protection is provided;
b) legality of final individual acts deciding on a right, an obligation or an interest based on law, if no other judicial protection is provided by law, and
c) legality of other final individual acts when provided by law.

The subject matter of an administrative dispute may also be the silence of the administration (Article 15 ADA), as well as the return of the confiscated items and compensation for the damage caused to the plaintiff by the execution of the contested administrative act (Article 16 ADA).

The author of this article emphasizes that an administrative dispute is a special type of judicial control of the administration whose existence is provided by the Constitution of the Republic of Serbia (2006). Namely, according to Article 198 (para.2) of the Serbian Constitution, the legality of final administrative acts is subject to review before a court in an administrative dispute, unless the law provides for different judicial protection in a certain case. In short, an administrative dispute is a dispute over the legality of a final administrative act. This practically means that the court is an active subject-controller while the administration is a passive subject-controlled. Taking into consideration that the administrative acts issued by state (administrative) bodies directly decide on the rights, obligations and legal interests of natural and legal persons (such as: restitution, expropriation, the right to enjoy property, rights from pension and disability insurance, customs, taxes, etc), it is clear that the jurisdiction of the court is diverse. For this reason, it is of great importance that the Administrative Court, as an independent and impartial body in charge of ensuring legal protection, shall protect the rights of the parties in administrative dispute proceedings. Otto Mayer claimed that a state that has no law for its administration is not a state governed by the rule of law (Mayer, 1895: 66)[11], which the author fully supports.

[10] J.M. Auby, R. Drago, *Traite de contentieuxadministratif*, I, LGDJ, Paris, 1962, p. 3
[11] Otto Mayer, *Deutsches Verwaltungsrecht*, Duncker und Humblot, Leipzig, 1895, p.66.

2. PARTIES IN ADMINISTRATIVE DISPUTE PROCEEDINGS

Unlike administrative proceedings which involve only one party and where the competent administrative body usually decides on the party's rights, obligations or legal interests (Article 1 of the GAPA)[12], administrative dispute proceedings always involve two opposing parties, whose dispute is decided by the administrative court.[13] Thus, it can be clearly concluded that the obligatory parties in an administrative dispute are the ***plaintiff*** and the ***defendant***, whose position is directly conditioned by their position in the previously conducted administrative procedure. In addition to the plaintiff and the defendant as obligatory parties in the administrative dispute, *an* ***interested person*** may also participate as a party, as indicated in Article 10 of the Administrative Disputes Act (Administrative Court Bulletin, 2008: 62)[14]

2.1. Plaintiff

In order to initiate an administrative dispute, the plaintiff has to meet certain conditions regarding the procedural capacity to act as a plaintiff. The person authorized to initiate an administrative dispute must have active procedural legitimacy. An administrative dispute may be initiated only by authorized persons, whose circle is limited.

The plaintiff in an administrative dispute is primarily a natural or a legal person who considers that an administrative act has violated a right or a legal interest (Article 11 para.1 ADA). In addition, certain collective bodies (state bodies, an autonomous province body, a unit of local self-government, an organization, a part of a company authorized in legal transactions or settlement, a group of persons and others who do not have the status of a legal entity) may initiate an administrative dispute as plaintiffs if they are holders of rights and obligations that are the subject matter of the administrative dispute proceedings (Article 11 para. 2 ADA). If they fulfill that condition, they are granted active parties legitimacy in an administrative dispute.

Moreover, both the competent *public prosecutor* (Article 11 para.3 ADA) [15] and *the public attorney* (Article 11 para.4 ADA) [16] may appear as plaintiffs in an administrative dispute. Namely, if the administrative act violates the law to the detriment of the public interest, the administrative dispute is initiated by the competent public prosecutor (Article 2 para. 1 of the Public Prosecutor's Office Act), and if the administrative act violates

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[12] "Administrative procedure is a set of rules that state bodies and organizations, bodies and organizations of provincial autonomy, and bodies and organizations of local self-government units, institutions, public enterprises, special bodies through which the regulatory function is exercised, and legal and natural persons entrusted with public powers (hereinafter: the authorities) apply when acting in administrative matters" (Article 1 of the General Administrative Procedure Act/GAPA, *Official Gazette of the RS*, No. 18/2016 and 95/2018-authentic interpretation).

[13] See: Dragan Milkov, Administrative Law, III, Faculty of Law, University of Novi Sad, 2013, 80-83; Zoran Tomić, General Administrative Law, Faculty of Law, University of Belgrade, 2015, 383-385; Ratko Marković, Administrative Law, Slovo AD, Belgrade, 2002, 527-531.

[14] Legal understanding of the Department for Administrative Disputes of the Supreme Court of Serbia dated April 28, 1982, *Bulletin of the Administrative Court* No. 4/2008

[15] Under Article 2 (para.1) of the Public Prosecutor's Office Act, the Public Prosecutor's Office is an independent state body that prosecutes perpetrators of criminal offenses and takes measures to protect constitutionality and legality. (Public Prosecutor's Office Act, *Official Gazette RS*, No. 116/2008, 104/2009, 101/2010, 78/2011-other law, 101/2011, 38/2012-CC decision, 121/2012, 101/2013, 2014-CC decision, 117/2014, 106/2015, 63/2016-CC decision.

[16] Notably, a new Public Attorney's Office Act (*Official Gazette RS*, No. 55/2014) was adopted in 2014, where the former institution of "Public Attorney's Office" was renamed into "Attorney General's Office ". In line with this change, the author believes that an appropriate change should be introduced in the Administrative Disputes Act, which still includes the institution of "the Public Attorney's Office ".

property rights and interests of the Republic of Serbia, autonomous province or local self-government unit, the dispute is initiated by the competent public attorney's office (Article 2 para.1 of the Public Attorney's Office Act).[17] The explicit position of the former Public Attorney of the Republic of Serbia speaks in favor of this understanding: "Moreover, we believe that it would not be expedient for anyone, except the defendant body itself, not even the Public Attorney's Office, who represents state bodies and special organizations in administrative disputes where the legality of administrative acts that these state bodies and special organizations pass as government bodies is examined, deciding on administrative matters within its competence. As these state bodies and special organizations were educated specifically for the purpose of performing administrative activities and resolving administrative matters, in which they make decisions that are subject to judicial control in administrative disputes, they are most directly informed about the disputed legal relationship and thus professionally and otherwise prepared to participate in an administrative dispute, which is actually a continuation of the same administrative procedure where those bodies issued a decision whose legality is being examined in an administrative dispute".[18] In the above context, when talking about the prosecutor and his/her active legitimacy to participate in the procedure, it is important to emphasize that it should not be equated with the question of the merits of the claim filed in a lawsuit[19], given that active legitimacy is exclusively a procedural presumption of participation in the procedure.

Generally speaking, the plaintiff is a dissatisfied party who is discontent with the decision rendered in the general administrative procedure. However, under the presented legislation, the aforementioned state bodies have active legitimacy to act as a parties in administrative disputes even though they did not participate in the previous administrative procedure. The rationale is to be sought in the protection of the public interest, the protection of property rights and interests of the Republic of Serbia, the autonomous province and local self-government units, given that these state bodies were essentially established for the protection of these rights and interest in administrative and any other court proceedings. The Administrative Court has stated in its practice that a lawsuit cannot be filed with the Administrative Court by a person who was not a party in the procedure of passing the disputed decision, as well as when that decision did not refer to any of the person's rights or legal interests[20].The author also points out the legal position taken by the Administrative Court pertaining to a company exercising public powers which have been entrusted to it by the law; such a company cannot be a prosecutor in an administrative dispute against an act of a second instance body because it acted as a first instance body in administrative matters; in effect, the first-instance body has no legal interest in filing a lawsuit and, thus, no legitimacy in the administrative dispute because the administrative act did not violate any of its rights or legal interests.[21] The Administrative Court is also of the opinion that the first instance body is not allowed to initiate an administrative dispute

[17] Under Article 2 (para.1) of the Attorney's Office Act, the Attorney's Office is a body that performs activities aimed at ensuring the legal protection of property rights and interests of the Republic of Serbia, autonomous provinces or local self-government units.

[18]Olga Jovicic, "Representation in the administrative dispute of the Republic of Serbia, its bodies and organizations and other legal entities whose financing is provided in the budget of the Republic of Serbia or from other funds of the Republic of Serbia", *Bulletin of the Republic Public Attorney's Office*, 1/2012, 39.

[19] Administative Court, Uiss-478/74 of 23 Aug. 1974. *Collection of court decisions*, book I/3, decision no.412, 1976

[20] Decision of the Administrative Court 24 U 14240/2014 of 4.12.2014, Paragraf Lex , Electronic legal database.

[21] Decision of the Administrative Court, 9 U 26434/2010 of 28 July 2011, Paragraf Lex, Electronic legal database

against the second-instance decision of administrative bodies deciding on appeals against decisions of first-instance bodies because it has no legitimacy in a specific situation to review decisions of immediately higher bodies.[22] Unlike civil proceedings, there is no intervener on the prosecutor's side in an administrative dispute. Having in mind the administrative court practice, a person who wants to interfere in an administrative dispute on the prosecutor's side has a procedural position of a prosecutor and the court will treat him accordingly (Pljakić, 2011: 192). [23]

When it comes to the prosecutor's role, the author believes that special attention should be paid to the legal wording "if he considers that an administrative act has violated a right or a legal interest" (Article 11 para.1 ADA), which is not always easy to determine in practice. Thus, a person may have a dilemma whether he/she has the active legitimacy at all to initiate a lawsuit and participate in the proceedings. The provisions of the 1952 ADA defined it as "direct personal interest based on law", giving a closer definition of the above wording. Although this formulation is no longer part of our positive law, the author considers that courts should take into account the provisions of the former ADA.

2.2. Defendant

Pursuant to the applicable Administrative Disputes Act, the defendant in an administrative dispute is the body whose administrative act is contested, or the body which did not pass an administrative act upon the request or complaint of the party (Article 12 ADA). Thus, all legal entities which are issuers of administrative acts that may be the subject matter of administrative disputes may have the legal standing of a defendant in an administrative dispute proceedings; it includes ministries, administrations and inspectorates, institutes, agencies, secretariats and directorates, authorities of autonomous provinces and local self-government units, non-governmental bodies, public companies and institutions, and other organizations that exercise public authority (e.g. the Republic Election Commission, the Bar Association, Anti-Corruption Agency, etc.).When it comes to an administrative dispute that is being initiated due to the silence of the administration (Article 15 ADA)[24], the body that should have issued an administrative act, or did not decide on an administrative act under the conditions provided by law, has passive legitimacy. The defendants in an administrative dispute may be the ministries (which is often the case in practice) and administrative bodies within the ministries of the Republic of Serbia, local governments, the Republic Pension and Disability Insurance Fund, other funds and foundations, public companies established by the Government of the Republic of Serbia and the Government of the Autonomous Province of Vojvodina.

2.3. Interested parties

The interested party is "the person to whom the annulment of the disputed administrative act would be directly detrimental" (Article 13 ADA). Therefore, bearing in mind the previously mentioned legislation and the fact that the annulment of the disputed

[22] Decision of the Administrative Court, Uv. 19/2014 of 15.5.2014. Paragraf Lex, Electronic legal database

[23] Ljubodrag Pljakić, Practicum for Administrative Dispute with Commentary, Judicial Practice and Forms for Application in Practice, INTERMEX, Belgrade, 2011, p. 192.

[24] Article 15 of the Administrative Dispute Act (ADA): "An administrative dispute may also be initiated even when the competent authority has not issued an administrative act on the request or complaint of the party, under the conditions provided by this Act."

administrative act would cause damage to a third party, the law recognizes such a person as a party to the dispute, thus ensuring that the person can protect his/her rights and interests acquired in law. Given that the obligatory parties in an administrative dispute are the plaintiff and the defendant, it is clear that the interested person is a possible party that may or may not participate in the procedure.

The possibility of an interested person's participation in an administrative dispute proceedings was first envisaged in Article 29 of the Administrative Disputes Act (1922)[25]. When participating in a dispute (which is not often the case in practice), the interested party participates on the side of the defendant, considering that their legal interests are identical (in terms of the nature of the administrative matter); it means that the defendant and the third interested party are against the amendment or annulment of the administrative act.[26] Due to the parties' status in the procedure, the Administrative Court is obliged to provide the interested person with all relevant documents (a transcript of the lawsuit, the defendant's answer to complaint, submissions, summons for an oral public hearing) and to deliver a judgment or decision on how to use legal remedies. In practice, in one-party administrative matters where an administrative dispute is initiated by a party filing a lawsuit (which is often the case in practice), there is usually no interested person. In multi-party administrative matters, a third interested person is much more often a party in administrative proceedings, where the annulment of the administrative act would be directly to the detriment of the rights or legal interests acquired by the disputed administrative act. The author also points out that an interested person can appear in one-party administrative matters in case an administrative dispute is initiated by a competent state body, i.e. a competent public prosecutor or public attorney's office, to protect the public interest or property interests of the state, an autonomous province and a local self-government unit.

The practice of the Serbian Administrative Court shows that the procedure before the court is terminated in the event that an interested person who has the status of a party in that procedure dies during the administrative dispute proceedings.[27]. When it comes to the interested person, the current Administrative Disputes Act states that "the procedure completed by a final judgment or a court decision will be repeated upon the party's lawsuit […] if the interested person is not enabled to participate in the administrative dispute" (Article 56 para.1 item 6 ADA). To participate in an administrative dispute, it is necessary that the party requesting a retrial at least makes it likely that he/she has a legal basis for retrial.[28] Given the above, but also in order to respect the principle of procedure economy, it is important to determine at the outset who the stakeholders are in a particular case. The person concerned is not an intervener in the administrative dispute but a party directly affected by the subject matter of the administrative dispute. An interested person may not only initiate an administrative dispute but may also appear in an ongoing administrative dispute. It is important to emphasize that the Serbian Administrative Court does not recognize the status of an interested person. Hence, the author points to the practice of the Croatian Administrative Court, which stated: "In an administrative dispute against the decision on dismissal of the Secretary of the Assembly, the person who was

[25] Article 29 of the Administrative Disputes Act (1922): "In any case, the court has the opportunity to hear the persons who would be harmed by the annulment of the administrative act", Paragraf Lex, Electronic legal database.
[26]"Therefore, the interested person in the sense of Article 13 of the ADA is always the person who is satisfied with the disputed administrative act, whose interest is to defend the disputed administrative act, and not to attack it." (Zoran Tomić, Commentary on the Law on Administrative Disputes, *Official Gazette RS*, Belgrade, 2012, 385.)
[27] Decision of the Administrative Court, 2Uv 390/2017 of 12.12.2017, Paragraf Lex, Electronic legal database.
[28] Decision of the Administrative Court, III-9 Cf. 183/2012 of 4 April 2013, Paragraf Lex, Electronic legal database.

appointed to that position after that dismissal does not have the capacity of an interested person".[29] In another case, the court ruled that "a person intervening with the prosecutor in an administrative dispute has a procedural position of the prosecutor and not of the interested person as referred to in Art. 15".[30]

3. Participation of the Parties in Administrative Dispute Proceedings

Article 74 of the Administrative Disputes Act (ADA) stipulates that the provisions of the law governing civil proceedings, and in that sense every person, shall be applied to the procedure of resolving administrative disputes not regulated by this law. Parties who have active or passive party legitimacy according to the law governing civil proceedings may also participate in the procedure before the administrative court. The principles of party autonomy and dispositiveness also apply in administrative disputes. Thus, the prosecutor and the interested person can, in principle, take action in the dispute, and they can also hire a proxy who will take action in their name and on their behalf. It is important to emphasize that in administrative disputes (possibly in the proceedings that precede it) there are basically administrative matters that are very professional and specialized It is clear that a party can benefit much more from hiring a lawyer, given that a person with such a title will better represent the party's interests than the party itself as an ignorant party.

A prosecutor who is a fully capable legal or natural person is free to decide independently whether to take action independently in the proceedings before the administrative court or to hire a proxy, which often happens in practice, since the dissatisfied parties hire an attorney at law[31] to act in their name and on their behalf (Article 4 of the Advocacy Act). The attorney would first draw up a lawsuit initiating an administrative dispute, and then participate in an oral public hearing, if the administrative court schedules it to determine the facts, taking into account the provisions of the Civil Procedure Act (Article 85 of the CPA).[32] Every adult or a person who has married or become a parent, and thus acquired full contractual capacity, is able to independently take actions in an administrative dispute in the role of a plaintiff or an interested person. When it comes to persons who have partial contractual capacity, it is valid for them that they can take actions in the procedure only within the limits of their legal capacity.

When the competent public prosecutor's[33] office or the public attorney's office appear as a plaintiff in an administrative dispute, no special question arises regarding the manner of their participation in the procedure because these are state bodies established for the purpose of protecting the public interest, i.e. property rights and state interests of autonomous

[29] Decision of the Administrative Court of Croatia, US-381/83 of 30.03.1983. *Bulletin of the Administrative Court of Croatia*, No. 10/83

[30] The High Judicial Council, U. 2784/2001 of 12 April 2002, Paragraf Lex, Electronic legal database.

[31] An attorney at law is a person who is registered in the directory of lawyers and has taken the oath on office and practicing law (Article 4, para.1, item 2, Advocacy Act (*Official Gazette RS*, No 31/2011 and 24/2013-CC decision).

[32] The attorney of a natural person may be a lawyer, a blood relative in the direct line, a brother, sister or spouse, as well as a representative of the official legal aid unit of the local self-government unit who has passed the bar exam. The attorney of a legal entity may be a lawyer, as well as a law graduate who has passed the bar exam and is employed by that legal entity (Article 85 para. 2 and para. 4 of the Civil Procedure Act).

[33] According to the Constitution, the organization of the Public Prosecutor's Office exists as the highest public prosecutor's office in the Republic of Serbia, headed by the Republic Public Prosecutor's Office, four appellate offices, twenty-five higher offices and fifty-eight basic public prosecutor's offices. (Bogoljub Milosavljević, Constitutional Law with the Text of the Constitution of the Republic of Serbia and the Act on the Constitutional Court and Organization of Justice, 7th updated edition, Belgrade 2018. p.159)

provinces or local self-government units. As already emphasized, the ADA does not regulate the issue of representation in addition to the Civil Procedure Act, the issue of public prosecutor's office or attorney's office but, as *lex specialis*, we take into account the Public Prosecutor's Office Act and the Attorney's Office Act, the Provincial Assembly decision on the Attorney's Office of the Autonomous Province of Vojvodina, as well as the decisions of local self-government units.

As for the defendant**,** taking into account the above, the defendant is the body whose administrative act is disputed, or the body which at the request or complaint of the party did not pass an administrative act; thus, the question of their participation in the procedure is indisputable for several reasons. Namely, since the defendant is always the body that passed the disputed administrative act against which the plaintiff initiates an administrative dispute, it is assumed that such a body (whose main activity is to adopt administrative acts and decide on rights, obligations and legal interests) has enough professional knowledge to defend before the Administrative Court the position stated in the administrative act that is being challenged. The prerequisite legal conditions (in terms of knowledge, skills, characteristics, attitudes and abilities) required for the lection of a civil servant[34] speak in favor of the above, as well as the competitive selection procedure; hence, it is difficult to imagine that there is a need and justification for a proxy to appear instead of the defendant body in the administrative dispute.

When talking about the participation of an interested person in an administrative dispute, that person is free to choose whether to participate in the procedure independently or to hire a proxy. Accordingly, having in mind that the ADA does not specifically regulate procedural institutes on issues related to the aforesaid representation, validity and credibility of the power of attorney, the relevant provisions of the Civil Procedure Act (CPA) should be taken into account. However, in order to provide for legal certainty and efficiency of administrative court proceedings, the author considers that it would be better to regulate all issues of this special judicial control of administrative acts in a single legislative act, while allowing for the application of the CPA in case an issue is not regulated by the ADA. First, the author takes the position that, when interpreting the provisions on representation, it is necessary to take into account the specifics of the administrative dispute, but also the formulation of the provision which allows for interpretation because it refers to the appropriate provision governing representation in civil proceedings. Second, the author warns of numerous and obvious differences between administrative dispute proceedings and civil proceedings. As the roles of civil and administrative courts are not the same, in situations where the legislator refers to the application of civil procedure provisions, administrative courts are obliged to find an appropriate civil procedure provision which they will apply in the administrative dispute proceeding. Furthermore, the author emphasizes that the entire administrative dispute needs to be conducted in accordance with the Administrative Disputes Act and its principles. As already pointed out earlier in this paper, in most administrative dispute cases where the plaintiff is represented by a lawyer/an attorney, it is necessary to pay attention to the costs of the procedure, as well as to who is obliged to pay those costs. The fees for engaging a lawyer/proxy are prescribed in the Tariff on Remuneration and Reimbursement of Attorneys'

[34] A civil servant is a person whose position consists of tasks within the scope of state administration bodies, courts, public prosecutor's offices, the State Attorney's Office, services of the National Assembly, the President of the Republic, the Government, the Constitutional Court, and services of bodies elected by the National Assembly, IT, financial, accounting and administrative affairs (Article 2, para. 1 of the Civil Servants Act).

Fees[35] (hereinafter: Lawyers' Tariff), which states that a party has certain financial obligations to his/her attorney. In accordance with tariff numbers 42, 43, 44 and 45, a lawyer can charge the amount of 16,500 RSD for drafting a complaint and filing a lawsuit, the amount of 30,000 RSD in case of customs and foreign exchange procedures, and the amount of 36,000 RSD for filing a submission in the so-called other disputes before the Administrative Court, The fees for representation in court hearings range from 18,000 RSD and 31,000 RSD to 37,500 RSD (respectively), while the fees for representation in appeal proceedings range from 33,000 RSD to as much as 72,000 RSD. In accordance with tariff number 46 ("Representation of several parties"), when the lawyer in the dispute represents several parties, his/her reward is additionally increased by 50% for each action he/she undertakes for each subsequent party. On the other hand, unlike other proceedings where the court fee is conditioned by the value of the subject matter of the dispute, in administrative disputes it seems to be rather symbolic, given that the court fee for filing a claim (lawsuit) with the Administrative Court is 390 RSD while the fee for the final decision is 980 RSD.[36]. Considering that the current ADA does not regulate the issue of reimbursement of costs, the relevant provisions of the Civil Procedure Act are applied accordingly; thus, as a rule, the party that loses the dispute in its entirety is obliged to reimburse the opposing party for costs; if the party partially succeeds in the dispute, the court may determine that each party bears its own costs or that one party reimburses the other (proportionate share of costs)[37]. This also applies to the costs of the interested person when participating in the procedure as a party; if that person decides to hire a lawyer, he/she is entitled to reimbursement of costs in proportion to the success of the proceedings. The costs of the dispute are decided by the Administrative Court. It is also important to emphasize that Article 60 of the former ADA (1996) stated that "in administrative disputes each party bears its own costs", which was a rigid legal solution which paid no attention to the outcome. Thus, the author believes that the wording contained in the current ADA is much better.

The benefits of quality representation in all court proceedings, including administrative disputes, are enormous. Quality representation allows the parties to avoid "wandering" in the legal space, and facilitates the detection of possible irregularities in the proceedings. As the parties are often unfamiliar with the specifics of the procedure, the attorney will acquaint the client with all the specifics of the case in a valid way and instruct the client about his/her procedural rights and duties. Considering that the law prescribes different deadlines within which certain actions can be taken, but also other features that require excellent handling of complex issues, it is clear that hiring a proxy can help foreigners to exercise their rights and legal interests before the court. For example, in France, administrative proceedings are conducted at three levels: the administrative courts and courts of first instance, the administrative courts of appeal, and the State Council and the Court of Cassation, which decide only on matters of law and not on matters of facts. Legal representation before the courts of the first instance is not obligatory. In the second instance, the law prescribes the obligation to be represented by a lawyer, which is not the case in practice. Given the other features that require excellent knowledge of complex legal issues, it is clear that the engagement of a proxy can help a party in exercising their rights and legal interests before the court.

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[35] Tariff on Remuneration and Reimbursement of Attorneys' Fees, *Official Gazette RS*, No. 121/2012, 99/2020 and 37/2021.

[36] Article 21 and Article 30 of the Court Fees Act, Official Gazette RS, No. 28/1994, 53/1995, 16/1997, 34/2001, 9/2002, 29/2004, 61/2005, 116/2008, 31/2009, 1017/2011, 93/2012 and 93/2014.

[37] Articles 150-167 of the Civil Procedure Act, Official Gazette RS, No. 72/2011, 49/2013-CA decision, 74/2013-CA decision, 55/2014, 87/2018 and 18/2020.

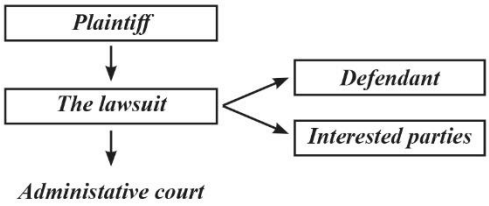

Fig. 1 Graphic Representation of an Administrative Dispute

4. Other Participants in Administrative Dispute Proceedings

In addition to the "obligatory" persons in administrative dispute proceedings (the plaintiff and the defendant) and "optional" interested persons as secondary parties, other persons in administrative dispute proceedings may be the legal representatives or proxies of the parties, witnesses, expert witnesses, interpreters, translator, etc.

When talking about ***witnesses,*** we take into account the appropriate provisions of the Civil Procedure Act. Namely, a witness is a person who has direct or indirect knowledge of the facts established in the proceedings before a court or administrative body. Every person who is called as a witness is obliged to respond to the summons and to testify, unless otherwise provided by law. As a rule, witnesses are heard directly at the hearing, but there are exceptions to this rule; so, the court may decide to present evidence by reading a written statement of the witness stating the findings of important disputed facts, where the witness has learned about them, and his relationship with the parties to the proceedings, whereby the written statement of the witness must be certified by the court or by a person exercising public authority. It should be noted that persons summoned as witnesses must refuse to respond to questions pertaining to confidential information (that the party has entrusted to him as his attorney, that the party or another person has entrusted to the witness as a religious confessor, the facts learned by the witness as a lawyer, a doctor or in the exercise of another occupation) if there is a duty of professional secrecy. A witness may also refuse to answer certain questions if there are justified reasons for that, especially if his/her answer to those questions would expose him/her to severe shame, significant material damage or criminal prosecution of the witness or his/her blood relatives in the direct line (regardless of the degree) and in the collateral line up to the third degree, his/her spouse or extramarital partner or relatives by affinity up to the second degree (even if the marriage has been dissolved), as well as his guardian or protégé, adoptive parent or adoptee A witness who does not understand the official language of the proceedings will be heard by ensuring the assistance of an interpreter. If the witness is deaf, he/she will be asked questions in writing; if he is mute, he will be called to provide a response in writing. If the witness cannot be heard in that manner, an interpreter will be provided (Articles 244- 258 of the CPA).

An expert witness is a professional person who must meet certain criteria in order to be able to provide his/her expertise. First, a natural person may be appointed as a expert witness if he/she meets the general conditions for work in state bodies as prescribed by the law; in addition, he/she has to meet the special conditions prescribed in the Court Experts Act (2010): to have a specific field of expertise, to have at least five years of work experience in the profession, to have professional knowledge and practical experience in a particular field of expertise, and to be worthy to perform expert work (Article 6 of the Court

Experts Act).[38] The Administrative Court will present evidence with expertise if an expert has knowledge that the court does not have relevant facts and is required to establish or clarify a fact (in practice, the court most often hires permanent court experts in the field of economics, finance and construction). The party that proposes the presentation of evidence by an expert witness is obliged to indicate the subject matter of expertise in the proposal, and may also propose a certain person as an expert witness. As a rule, the expertise is performed by one expert, and if the expertise is complex, the court may appoint two or more experts. The court determines the subject matter of the dispute, the subject matter of expertise, the deadline for submitting findings and opinions in writing, the personal name or the name of the person entrusted with expertise, as well as data from the register of experts, whereby the deadline for submitting findings and opinions to the court cannot be longer than 60 days. The written finding of the expert must contain an explanation stating the facts and evidence which the finding is based on and the expert opinion, information on where and when the expertise was performed, information on persons who attended the expertise or persons who did not attend and were duly summoned, and information on attached documents. Each party has the right to submit objections to the given finding and opinion of the expert; each party is also entitled to hire another expert from the register of experts who will make objections or submit a new finding and opinion in writing. At the hearing, the court discusses the objections and tries to reconcile the findings and opinions of the experts. If more than one expert is appointed, they may submit a joint finding and opinion, if they agree on the findings and opinion. If the findings and opinions differ, each expert shall present his/her findings and opinion separately (Articles 259-273 of the CPA)

A court interpreter is a person who has a high knowledge of a certain foreign language, a sign language or other form of communication with deaf, mute or blind persons. In court proceedings, the interpreter is invited to translate for foreigners or other participants who do not understand the Serbian language and the Cyrillic script which are in official use in the Republic Serbia, the language of the national minority that is in official use, as well as to interpret court proceedings for deaf, blind or mute persons. The request for entry in the register of permanent court interpreters is submitted to the Ministry of Justice. We may distinguish between court interpreters for certain foreign languages and court interpreters for tactile signing for blind, deaf or mute persons (Article 256 of the CPA).

A translator may be a person who has a higher education and meets the statutory requirements for employment as a civil servant; he/she also has to meet the following special conditions: to have an appropriate higher education for a particular foreign language; to have comprehensive knowledge of the language from or into which the written text is translated; to know the legal terminology used in the language from or into which the text is translated; and to have at least five years of experience in translation from/into the specific language[39].

5. Publicity in Administrative Dispute Proceedings

The Administrative Disputes Act prescribes that in an administrative dispute the court decides on the basis of facts established at an oral public hearing. The court may decide without holding a public hearing only if the subject matter of the dispute is such that it

[38] See: Article 6 of the Court Experts Act, Official Gazette RS, No. 44/2010.
[39] Article 3 of the Rulebook on Permanent Court Interpreters, Official Gazette of RS, No. 35/2010, 80/2016 and 7/2017, Ministry of Justice, Belgrade, https://www.mpravde.gov.rs/

obviously does not require direct hearing and special determination of facts. In that case, the parties have to expressly agree to this. Although the law prescribes resolving the subject matter of a dispute in an administrative dispute on the basis of facts established at a public oral hearing; unfortunately, in practice, it is still more an exception than the rule. The ADA also prescribes special cases when the hearing has to be held. Thus, Article 34 (para.1) of the ADA stipulates that "the court panel will always hold a hearing due to the complexity of the dispute, or to clarify the situation". In Article 30 (para.2 and para. 3) of the ADA, the legislator points out that the hearing is mandatory if two or more parties with opposing interests participated in the administrative procedure, as well as when the court determines the factual situation for the purpose of adjudicating the case in full jurisdiction. Relying on the linguistic interpretation of legal provisions, we may draw a demarcation line between the wordings "the hearing is mandatory" and "the panel shall hold a hearing", whereby the latter implies the court's discretionary assessment that the case is complex and that the hearing shall be held to clarify the situation.

Article 35 (para.1) of the ADA prescribes that the hearing is public, which means that the hearing may be attended by any interested person. Publicity of the debate is a principle, but it can be excluded in specific cases for reasons provided by law, including the protection of the interests of national security, public order and morals, the protection of the interests of minors, and the protection of privacy of participants in the procedure. The general public may be excluded for the whole debate or for a certain part of the debate. The exclusion of the public is decided by the court panel whose decision must be explained and made public. It is clear that the legal provision envisaged in Article 35 (para.1) of the ADA represents the practical application of Article 32 para. 3 of the Constitution of the Republic of Serbia, which refers to the public hearing as a segment of the right to a fair trial, as one of the fundamental rights protected by international law. The affirmation of this right raises the quality of legal protection of citizens to a level that corresponds to European standards, enables democratization of the entire society and the exercise of other human rights. In effect, the course of proceedings, the content of the hearing, as well as the publicity of proceedings (except in cases explicitly enumerated by the law) imply that all parties in the proceedings have to be absolutely prepared (the plaintiff, the defendant and the interested person, whose relationship is controlled and directed by the presiding judge of the panel, who can ask questions related to clarifying the facts). For this reason, plaintiffs are advised to hire attorneys.

6. Conclusion

As previously noted, the administrative dispute is the basic and most important means to judicially check the legality of the work of administrative authorities. Given the specificity of the procedure and the specificity of the administrative dispute, the author considers it necessary to reduce the accordant application of the Civil Procedure Act to the bare minimum. In order to facilitate the participation of different parties and other participants in the administrative procedure, the author believes that it is necessary to regulate the delivery, the hearing, the position of all parties to the administrative dispute, as well as the roles of attorneys and legal representatives in a much more detailed way. It should also be borne in mind that the administrative dispute and the additional judicial protection for citizens in cases where their rights to protection against decisions of public authorities cannot be exercised in another court proceeding; as such, it is provided for in the European Convention for the Protection of Human

Rights and Fundamental Freedoms the rights and legal interests which belong to them under the Constitution and the law[40]. Given that administrative law is extensive, covering diverse and often completely different administrative areas, it is difficult to assume that a legislative act including only 79 articles can fully cover this matter, particularly considering the fact that the Administrative Court decisions are binding and final, and that extraordinary legal remedies may be filed against them (in cases specified by the law).

In addition, the author explains why the representation by proxy should be provided to a wider circle of people in administrative disputes, and a restrictive stance should not be taken/ why there should be no restrictions on the parties' final choice in accordance with the principles of autonomy and dispositiveness. The parties themselves shall choose who will best represent their interests, as well as whether they will be represented at all. All things considered, we cannot say that the issue of administrative dispute parties is fully regulated in the applicable law: nor can we defend (in terms of parties) the position that it is wise to apply the provisions of the Civil Procedure Act. Namely, in administrative dispute proceedings we cannot strive for the ideal of equality of the parties that exists in civil proceedings because litigation is not preceded by the procedure before public authorities, which is the case with administrative disputes.

Serbia belongs to the group of countries with the longest tradition of judicial control of the administration. Over time, the state has created a specialized judiciary in this area and the legal framework focusing on the matter of judicial control of the administration. There is no doubt that the roles of parties and their valuable participation in administrative dispute proceedings will eventually become clearer, which would ensure not only the exercise of the abstract right to control of the administrative power by the court but also the right to a fair trial guaranteed by the Constitution.

In the end, although it has been criticized by the author (for comprising only 79 articles), the Administrative Disputes Act (2009) clearly defines who can be the plaintiff, the defendant and the interested person in a comprehensive and understandable way, taking into account the rights, obligations and legal interests of natural and legal persons, state bodies and organizations, local communities and groups of persons who do not have the status of a legal entity, but also the public interest and property rights and interests of the Republic of Serbia, autonomous provinces and local self-government units. Thus, it contributes to strengthening citizens' trust in administrative judiciary but also promotes the rule of law principle.

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STRANKE U UPRAVNOM SPORU

Rad je posvećen razmatranju pitanja ko može biti stranka u upravnom sporu, zastupanje i zaštita prava stranaka pred Upravnim sudom koji je kao sud posebne nadležnosti osnovan Zakonom o sedištima i područjima sudova i javnih tužilaštava i Zakonom o uređenju sudova, a koji je sa radom počeo 1. januara 2010. godine. U radu se ispituje ko je tužilac, ko tuženi, a ko zainteresovano lice u upravnom sporu, pravila o zastupanju stranaka pred ovim specijalizovanim sudom, kao i aktuelna sudska praksa koja je uspostavljena od strane Upravnog suda.

Ključne reči: *stranka, tužilac, tuženi, zainteresovano lice, Upravni sud, upravni spor, zastupanje stranaka*

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Review Paper

SPECIAL ORGANIZATIONS

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Abstract. *The paper explores the normative framework on special organizations in the Republic of Serbia. Being an integral part of the state administration, they have features which are common to all organizations as well as some specific and highly distinctive features. Special organizations are primarily instituted to perform professional and related administrative activities whose nature requires a higher degree of independence when compared to the independence required in the work of administrative authorities within the organizational structure of ministries. In this paper, the author discusses the concept, characteristics, significance and specific position of special organizations, as well as their activities and organizational structure.*

Key words: *special organizations, specific features, professional activities, administrative affairs, independence, ministries*

1. INTRODUCTION

According to the State Administration Act (SAA)[1], the state administration encompasses ministries (as the basic form of state administration authorities which are established to perform state administration tasks in one or more interrelated administrative fields), administrative bodies within the ministry, and special organizations. Unlike other administrative authorities primarily in charge or administrative activities, special organizations are in charge of performing administrative activities related to professional activities of administrative bodies (e.g. statistics, meteorology, surveying, procurement, storage of products, etc.) (Dimitrijević, 2019: 101).

In the Republic of Serbia, special organizations are an integral part of the state administration. As such, they have all common features stemming from their relationship with the state. Yet, they are not primarily formed for the purpose of exercising administrative power but for the purpose of executing specific professional tasks.

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[1] The State Administration Act (SAA), *Official Gazette RS,* no. 79/2005, 101/2007, 95/2010, 99/2014, 47/2018 and 30/2018– other law.

Special organizations are formed in the same or similar way as administrative authorities. Their internal organization and managerial (personnel) composition are determined in a similar manner, they are financed in a similar way, and there are similar rules governing the employees' responsibility. At the republic level, special organizations are formed in the same way as administrative authorities, as prescribed by the law. The heads (directors) who manage their work, deputy directors and assistant directors are appointed and dismissed by the Government, and the Government supervises their work (Milkov, 2009: 82).

Under the State Administration Act, the legislator may designate a ministry to supervise the work of a special organization. In the course of supervision, the ministry is only authorized to request reports and data about the work of a special organization, to establish the state of affairs in the execution of assigned tasks, to warn the organization about observed irregularities, to give instructions (guidelines), and to submit a proposal to the Government to take measures within its scope of competences (Article 50 SAA).

In the Republic of Serbia, special organizations are established for the purpose of performing professional and related executive tasks which call for a higher degree of independence when compared to the independence of administrative authorities in the organizational structure of ministries (Article 33 SAA). Notably, special organizations may be the executors of administrative functions (Popović, Petrović, Prica, 2011: 97-98). In Serbia, special organizations can be organized as agencies, institutes, secretariats, commissariats, directorates, administration offices and centers.

2. Definition and Charateristics of Special Organizations

Special organizations are an important part of state administration. While administrative authorities are in charge of exercising state administration authorities, special organizations are authorized to perform highly specific professional activities. As a rule, the execution of certain professional, technical and other similar activities calls for establishing a collective body, a specially organized service which should be authorized to decide on certain professional, technical and related administrative issues (Popović, Marković, Petrović, 2002: 97-98).

Special organizations are primarily established for the purpose of performing professional activities (e.g. in the field of statistics, hydrometeorology, public procurement, storage of certain products, etc.) rather than for the purpose of exercising administrative powers (which is the task of state administration authorities). Yet, considering the need to ensure the undisturbed execution of their basic activities, special organizations may also have some administrative authorities. At the republic level, special organizations are formed in the same way as administrative authorities, in compliance with the State Administration Act and other subject-specific legislative acts, depending on the type of organization.

However, special organizations also have some specific and distinctive features in relation to administration authorities. The essential differences are reflected in the basic activities they perform, which generate other differences. In addition, special organizations may have the status of a legal entity (as prescribed by the law), which means that they can act in their own name and on their own behalf. It does not mean that special organizations are completely self-financed. Unlike administrative authorities, they may have their own sources of income but they also receive funds from the budget. The activities of special organizations are not market-oriented; as they are executed in the state interest, they are financed by the state.

The Serbian State Administration Act envisages different forms of special organizations, which have a different status, depending on their positions in the organizational structure. The basic types of special organizations are secretariats and institutes but, as already noted, special organizations can also be organized as agencies, commissariats, directorates, administration offices and centers. A secretariat is established for the purpose of performing professional tasks and related executive tasks important for all state administration authorities. An institute is in charge of performing professional tasks and related executive tasks that require the application of subject-specific knowledge and methodology (Article 34 SAA).

3. Special Organizations in the Law of the Republic of Serbia

The normative framework for establishing special organizations is not uniform. They may be established in compliance with the Ministries Act and other subject-specific legislative acts, depending on the type of special organizations, they (e.g. the Security-Information Agency Act, the Refugees Act, the Railways Act, etc.).

According to the State Administration Act, a special organization is managed by a Director, who is appointed by the Government for a period of five years, upon the proposal of the Prime Minister in accordance with the law regulating the status of civil servants, and who shall be accountable to the Government (Article 35 SAA). A special organization may also have a Deputy Director, who is accountable to the director for his work. A Deputy Director assists the Director within the scope of competences determined by the Director and replaces the Director in case of his/her absence or incapacity to work. A Deputy Director may not be authorized by the Director to issue regulations. A Deputy Director is also appointed by the Government for a period of five years, upon the proposal of the Director and in accordance with the law regulating the status of civil servants (Article 36 SAA). In addition, a special organization may have one or more assistant directors, who are accountable to the Director for their work. An Assistant Director manages a sector-specific field of work of the special organization; he/she is appointed by the Government for a period of five years, upon the proposal of the Director and in accordance with the law regulating the status of civil servant (Article 37 SAA).

In the Republic of Serbia, there are eighteen special organizations:

1. the Security Information Agency;
2. the Geological Survey Institute of the Republic of Serbia;
3. the Railways Directorate;
4. the Intellectual Property Office;
5. the Social Insurance Institute (Office)
6. the Commissariat for Refugees and Migrations;
7. the Republic Agency for Peaceful Settlement of Labor Disputes;
8. the Republic Directorate for Property of the Republic of Serbia;
9. the Republic Directorate for Commodity Reserves;
10. the Republic Geodetic Authority;
11. the Statistical Office of the Republic of Serbia
12. the Republic Seismological Institute;
13. the Republic Secretariat for Legislation;
14. the Republic Secretariat for Public Policies;
15. the Republic Hydrometeorological Institute (Service);

16. the Public Procurement Office;
17. the Traffic Accident Investigation Center, and
18. the Mine Action Center of the RS.[2]

In the following subheadings, we will explore some special organizations in more detail. These special organizations have been selected for analysis because of the highly specific activities they perform within the public administration system.

3.1. The Security Information Agency

The Security Information Agency (*Serb. BIA*) was established by the Security Information Agency Act (hereinafter: SIA Act)[3], which entered into force on 27 July 2002. It is a special organization of the Government of the Republic of Serbia which has the status of a legal entity (Article 3 SIA Act). The Security Information Agency is a civilian, national security service, and it is part of the unitary security and intelligence system of the Republic of Serbia. Its operates on the basis of and within the framework of the Constitution, legislative acts, general acts and other regulations, the national security strategy, the defense strategy, and the established security and intelligence policy of the Republic of Serbia.[4]

The primary tasks of the Security Information Agency are to protect the security of the Republic of Serbia, to detect and prevent the activities aimed at undermining or disrupting the constitutional order of the Republic of Serbia, to research, collect, process and assess the security and intelligence data and information significant for the security of the Republic of Serbia, to inform the competent government authorities about such data, and to perform other activities envisaged in the Security Information Agency Act (Article 2 SIA Act).

The Security Information Agency is managed by the Director, who is appointed and discharged by the Government (Article 5 SIA Act). The Director is accountable to the National Assembly and the Government for the operation of the Agency. The Director may have a Deputy Director, in accordance with the law. The Deputy Director assists the Director within the scope of competences entrusted to him/her by the Director and replaces the Director in case of absence, temporary incapacity and other cases prescribed by the SIA Act. (SIA, 2022: 8)[5]

The organizational units of the Security Information Agency are: the Director's Office/Cabinet, the Situation Center, the Administration, and the Regional Center. The Director's Office performs various activities for the Agency, the Director and the Deputy Director. The Situation Center at the Agency's headquarters performs the activities aimed at ensuring the SIA operative alertness and coordination of activities. The Administration is the basic organizational unit is in charge of a number of interrelated tasks: planning, organizing, coordinating, directly implementing and controlling the performance of all assigned tasks within its sphere of activity; it is also in charge of developing operative and functional cooperation with all other organizational units of the Agency. The Administration is competent and responsible for the actual performance of SIA activities on the entire

[2] See: Republic Election Commission of the RS (2022): Ministries and special organizations, available at https://www.rik.parlament.gov.rs/tekst/93/ministarstva-i-posebne-organizacije.php.
[3] Security Information Agency Act (hereinafter: SIA Act), *Official Gazette of the RS*, no. 42/2002, 111/2009, 65/2014 – CC decision, 66/2014 and 36/2018
[4] The Security Information Agency (2022), available at https://www.bia.gov.rs/lat/bia/
[5] The Security Information Agency (2022): SIA Bulletin, last updated 6 January 2022, https://www.bia.gov.rs/sites/default/files/2022-01/informator_2022_0.pdf

territory of the Republic of Serbia. The Regional Center is a basic territorial organizational unit of the Agency which plans and directly executes the tasks within the competence of the Agency in a certain territory (SIA, 2022: 7).

In 2013, upon the proposal of the Security Information Agency, the Government of the Republic of Serbia established the National Security Academy. It is an independent higher education institution of special interest for the security of the Republic of Serbia.[6]

3.2. The Commissariat for Refugees and Migrations

The Commissariat for Refugees and Migrations is a special organization in the state administration system established by the Refugees Act[7] for the purpose of performing professional and other administrative duties related to care, return and integration of refugees, in accordance with the Refugees Act. After the adoption of the Migration Management Act (2012)[8], the Commissariat for Refugees has continued to operate as the Commissariat for Refugees and Migrations (hereinafter: the Commissariat), in accordance with the competencies envisaged in the Migration Management Act and other laws.

According to the Migration Management Act, the Commissariat performs the following activities: proposing the goals and priorities of migration policy to the Government; proposing measures for emanating the positive effects of legal migration and combatting illegal migration; monitoring the implementation of migration policy measures; providing state administration authorities, autonomous provinces and local self-government units with relevant data important for drafting strategic documents in the field of migration; proposing projects in the field of migration management within the scope of its work; and submitting an annual migration management report to the Government (Article 10 MM Act).

In accordance with ratified international agreements and generally accepted rules of international law regulating the position and rights of refugees to care, integration and reintegration (voluntary return to their country of origin), the Commissariat initiates and pursues international assistance from the United Nations and other international organizations. The Commissariat also cooperates with the Red Cross organization, various humanitarian, religious and other organizations, associations and citizens at the national and international level.

The National Strategy for Resolving Issues of Refugees and Internally Displaced Persons for the period 2015-2020 defines the basic goals and directions of the Commissariat in terms of providing permanent and sustainable solutions to the refugee problem in the Republic of Serbia, ensuring their access to all rights, services and resources on equal terms as Serbian citizens and working to improve their living conditions during the displacement period and their full social inclusion. The Commissariat is headed by a Commissioner, who has a deputy and an assistant.[9]

3.3. The Traffic Accident Investigation Center

The Traffic Accident Investigation Center is a special organization which performs professional activities related to the investigation and analysis of accidents and serious incidents in air traffic, in railway traffic, as well as maritime and navigation accidents and

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[6] See: The Security Information Agency (2022), https://www.bia.gov.rs/akademija/o-akademiji/

[7] The Refugees Act, *Official Gazette of RS*, no. 18/92, *Official Gazette of FRY*, No. 42/02– FCC and *Official Gazette of RS*, no. 30/10.

[8] Migration Management Act, *Official Gazette of RS*, no. 107/12.

[9] The Commissariat for Refugees and Migration (2022), https://kirs.gov.rs/eng/about-us/about-the-commissariat

incidents in water transport. The Center has the status of a legal entity. In order to exercise its competencies, the Center must have professional, technical and financial capacities. The Center is functionally, organizationally and financially independent from all authorities and organizations responsible for air, railway and water transport, as well as from all legal entities and individuals whose interests may be contrary to the tasks and authorities of the Center.

Professional activities related to accident investigation are independent from criminal investigations or other concurrent investigations. The investigation and discovery of the causes of traffic accidents is not aimed at establishing criminal, misdemeanour, economic, disciplinary, civil or any other form of liability. The Center may conduct investigation proceedings in cooperation with competent accident investigation authorities for other countries in accordance with the law and ratified international agreements. The competent judicial authorities conducting the investigation of air traffic, railway traffic and water transport accidents may submit copies of files and documents to the Center which are necessary for conducting the investigation if it does not interfere with the investigation in accordance with the law governing criminal proceedings.[10]

The Center is managed by the Chief Investigator, who has the position of Director of this special organization. The Chief Investigator is appointed by the Government for a five-year term, at the proposal of the Prime Minister. In addition to the requirements prescribed by the law regulating the status of civil servants, the person who is appointed chief investigator must have at least nine years of work experience in air, rail or water transport, at least three of which shall be related to handling matters pertaining to safety in air, rail or water transport and accident investigation. The Chief Investigator has one assistant chief investigator for each area: Chief Air Traffic Investigator, Chief Railway Traffic Investigator, and Chief Water Transport Investigator. In addition to the requirements prescribed by the law regulating the status of civil servants, the Assistant Chief Investigators must have at least nine years of work experience in air, rail or water transport, at least three of which must be related to handling matters pertaining to security in air, rail or water transport and accident investigation. The Center may also engage relevant experts and seek professional assistance of competent authorities, organizations and legal entities, in exchange for a fee which is determined on the basis of the length of engagement and the complexity of work. The Chief Investigator, the assistant chief investigators for air, railway and water transport, all Center employees, and all persons involved in the investigation of accidents are obliged to keep the information obtained during the investigation secret.[11]

3.4. The National Hydrometeorological Service of the RS

The National Hydrometeorological Service of the RS is a state administration authority and a special organization with the status of a legal entity which performs meteorological and hydrological activities of interest to the Republic of Serbia, as well as defence against hailstorms and protection against floods, natural disasters, pollution, etc. (Article 1 MHA Act)[12] The organizational structure of the Hydrometeorological Service includes the following basic units: Department of meteorological and hydrological forecasts, warnings and alerts; Department of meteorological observation system; Department of hydrological observation system and analysis; Department of the national center for climate change,

[10] The Traffic Accident Investigation Center (2022), https://www.cins.gov.rs/o-nama.php#centar
[11] The Traffic Accident Investigation Center (2022), https://www.cins.gov.rs/o-nama.php#centar
[12] The Meteorological and Hydrological Activities Act (MHA Act), *Official Gazette of RS*, No. 88/2010.

climate model development and risk assessment of natural disasters; and Department of hydrometeorological computer-telecommunication system, general affairs and joint services. common affairs. In addition, the Hydrometeorological Service includes several internal units: Center for defense against hail; Department for international cooperation, European integration and public relations; Professional regulations and standards group; Public Procurement group; and Internal Audit group. [13] Certain tasks within the scope of the Hydrometeorological Service, which require special expertise and independence in work, are performed by independent experts outside the basic internal units. (Hydrometeorological Service, 2021: 5).[14]

The Hydrometeorological Service performs professional and state administration tasks related to meteorological and hydrological activities, including: a) planning, establishment, maintenance and development of the national network of meteorological and hydrological stations; b) systematic meteorological and hydrological measurements and observations in the network of meteorological and hydrological stations; c) planning, establishing, operating and developing meteorological and hydrological computing and telecommunication system for collection, exchange and distribution of data and information on actual and forecasted weather, climate and water conditions, as well as data about air and water quality; d) establishing, operating and developing a meteorological and hydrological analytical system, forecasting system and hydrometeorological early warning system in case of disasters, incidental pollution, hailstorms, etc.; d) establishing, developing and maintaining databases in the field of meteorology, hydrology and hail protection in accordance with the law; e) international cooperation and implementation of international conventions and standards in the field of meteorology, hydrology agrometeorology, biometeorology; f) research and monitoring of climate changes, air and water quality; etc. (Article 5 MHA Act).

In accordance with ratified international agreements, the National Hydrometeorological Service represents the Republic of Serbia in international meteorological and hydrological organizations, conventions and protocols in the field of hydro-meteorology (Article 27 MHA Act). The National Hydrometeorological Service is part of the system of regional climate centers within the World Meteorological Organization (WMO). As a subregional climate change center for Southeast Europe, the Hydrometeorological Service performs professional, technical, operative, research and development activities (Article 28 MHA Act).

The Director of the Hydrometeorological Service represents and manages the work of this special organization in accordance with the law. The Director is a civil servant in position; he is appointed and dismissed by the Government, upon the proposal of the Prime Minister, and he is accountable for his work to the Prime Minister and the Government of the Republic of Serbia. In accordance with ratified international agreements, the Director of the Hydrometeorological Service is the permanent representative of the Republic of Serbia in the World Meteorological Organization (WMO), and represents the Republic of Serbia in the Intergovernmental Panel on Climate Change (IPCC), the European Center for Medium Term Forecast (ECMWF), and the Earth Observation Group (GEO). The Director of the Hydrometeorological Service also represents the Subregional climate change center for Southeast Europe, which was established within the National Hydrometeorological Service. The Director of the Hydrometeorological Service makes decisions in accordance

[13] *See:* The National Hydrometeorological Service (2022), https://www.hidmet.gov.rs/eng/orhmz/struktura.php
[14] Hydrometerological Service of the Republic of Serbia (2021): Hydrometerorological Service Bulletin, https://www.hidmet.gov.rs/data/download/Informator_o_radu_RHMZ%20-%2001.12.2021.pdf

with his competences envisaged in relevant legislative acts and bylaws. The sectoral departments are managed by assistant directors (Hydrometeorological Service, 2021: 45).

3.5. The Public Procurement Office

The Public Procurement Office is a special organization which performs a range of professional activities in the field of public procurement, supervises the implementation of public procurement regulations, adopts bylaws, monitors the implementation of public procurement procedures, controls the implementation of certain procedures, manages the Public Procurement Portal, prepares public procurement reports, proposes measures for the improvement of the public procurement system, provides professional assistance to procuring entities and bidders, and contributes to creating conditions for economical, efficient and transparent use of public funds in the public procurement procedure. The organisation and operation of the Public Procurement Office is regulated by legislation governing public administration, unless otherwise provided by the Public Procurement Act (Articles 178 -182 PP Act).[15]

The Public Procurement Office performs the following activities: 1) prepares the strategy for the development and improvement of public procurement in the Republic of Serbia; 2) monitors the implementation of public procurement legislation and prepares the annual reports on the conducted monitoring; 3) files a request to initiate misdemeanor proceedings for misdemeanor offences prescribed by the PP Act; files a request for the protection of rights and initiates other appropriate proceedings before competent authorities pertaining to observed irregularities in the implementation of public procurement regulations; 4) participates in drafting laws and other regulations, and adopts bylaws in the field of public procurement; 5) provides opinions on the application of the provisions of the PP Act and other regulations in the field of public procurement; 6) provides professional assistance, prepares guidelines, manuals and other publications in the field of public procurement, and ensures that they are equally accessible to contracting authorities and economic entities free of charge; 7) collects statistical and other data on conducted procedures and concluded public procurement contracts, and prepares a special annual report on public procurement; 8) prescribes the procedure and conditions for obtaining the certificate for public procurement officer and maintains the register of public procurement officer; 9) manages the Public Procurement Portal; 10) undertakes necessary activities related to the EU accession negotiations in the field of public procurement; 11) cooperates with domestic and foreign institutions and experts in the field of public procurement in order to improve the public procurement system; 12) cooperates with other state authorities and organisations, bodies of territorial autonomies and of local self-governments; and 13) performs other activities in accordance with the law (Article 179 PP Act).

The Public Procurement Office is managed by the Director who is appointed by the Government from among the ranks of public procurement experts; he must have at least seven years of work experience in public procurements and meet other requirements set forth for the work in state administration bodies (Article 178 PP Act). The Director organizes, consolidates and directs the work of the PP Office, assigns tasks to the heads of internal units, and performs other activities within the competency of the Office. A Deputy Director performs tasks within the scope of PPO activities by acting on the Director's order,

[15] The Public Procurement Act, *Official Gazette of the RS*, no. 91/19.

assigns tasks to the heads of internal units, assists the Director within the assigned competences, replaces the Director in case he is absent or incapacitated to work, and performs other tasks within the scope of the PPO activities. Given the fact that two sectors have been established as organizational units (the Sector for regulation and monitoring of the implementation of public procurement legislation and the Sector for the development of the public procurement system and financial and material affairs), these sectors are managed by assistant directors. An Assistant Director plans and manages the work of civil servants in the sector, establishes cooperation with other bodies and organizations within the scope of Sector activities, performs the most complex tasks within the scope of the Sector, and performs other tasks acting upon the order of the Director (Public Procurement Office, 2022: 14-15)[16]

One of the most important activities of state administration is to ensure national security and safeguard the public interest but also to provide a safe and organized state administration system. These special organizations have been selected for analysis because of the highly specific activities they perform within the public administration system.

4. CONSLUSION

While administrative authorities are in charge of executing state administration authorities, special organizations are authorized to perform important and highly specific professional and related executive activities which require a higher degree of independence when compared to the independence of administrative authorities. Notably, special organizations may also perform some administrative authorities. Special organizations may be under the supervision of the Government (if they are independent) or they may be under the supervision of a ministry (if they are not independent but they have a higher degree of independence than the administrative authorities in the organizational structure of ministries).

Under the State Administration Act, the legislator may designate a ministry to supervise the work of a special organization. In supervising the work of a special organization, the designated ministry is only authorized to request reports and data about the work of a special organization, to determine the state of affairs in the execution of the assigned tasks, to warn the organization about the observed irregularities, to give instructions and to propose to the Government to take measures within its scope of authorities (Article 50 SSA).

Special organizations are part of the state administration. They are established for the purpose of performing professional tasks aimed at accomplishing the general public interests as dynamic expressions of the common good. For this reason, special organizations need to be part of the state administration; they are an expression of the need to coordinate and direct the execution of professional activities, which are an inseparable part of state administration and essential for the successful functioning of the state as a territorial community.

Professional tasks are also performed by individual holders of public authorities (e. g. public agencies), which do not belong to the state administration and are not subject to official supervision of the Government or a competent ministry. The holders of public authorities are subject to inspection or legality control (e.g. local self-government authorities) while special organizations are subject to official supervision of the Government or a ministry. Thus, holders of public authorities may be independent, which is not the case with special organizations.

[16] The Public Procurement Office (2022): Public Procurement Office Bulletin, http://www.ujn.gov.rs/

In the Republic of Serbia, there are eighteen special organizations whose status, characteristics and organizational structure differ. Some special organizations have a distinctive status and perform highly specific activities. For example, due to the specific nature of its activities which are aimed at preserving the constitutional order, territorial integrity, sovereignty and national security, the Security Information Agency has a very high level of independence.

Another important special organization in the state administration system is the Commissariat for Refugees and Migrations, which is established by the Refugees Act. The Commissariat cooperates with different humanitarian, religious and other organizations, associations and citizens. Due to its cooperation with international bodies and organizations in resolving the status of refugees and migration issues, the Commissariat is essential for solving the global migrant crisis and ensuring humanitarian assistance to all refugees and migrants.

The Traffic Accidents Investigation Center is a special organization which is functionally, organizationally and financially independent from all state authorities and organizations responsible for air, railway and water transport, as well as from all legal entities and individuals whose interests may be contrary to the tasks and authorities of the Center. The most prominent feature of this Center is its operative independence, particularly in relation to the judicial authorities. The primary function of the Center is not to conduct investigations and prosecute offenders but to act preventively and ensure the preservation of traffic safety.

The National Hydrometeorological Service is a special organization with the status of a legal entity which performs meteorological and hydrological activities of interest to the Republic of Serbia, including protection against hailstorms, floods, natural disasters, pollution, etc.

The Public Procurement Office is a special organization which performs a range of professional activities in the field of public procurement, supervises the implementation of regulations and adopts bylaws, monitors the implementation of public procurement procedures, and prepares reports, proposes measures for the improvement of the public procurement system, provides professional assistance to procuring entities and bidders, and ensures transparent, efficient and cost-effective use of public funds in the public procurement procedure.

In the Republic of Serbia, special organizations are an integral part of the state administration. As such, they have all common features pertinent to any other organization but they also have some distinctive features. Depending on how they are established, they may have a greater or a lesser degree of independence. In Serbia, they are organized as agencies, institutes, secretariats, commissariats, directorates, administration offices and centers.

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POSEBNE ORGANIZACIJE

Rad je posvećen posebnim organizacijama, koje imaju sva obeležja koja ima i bilo koja druga organizacija, ali i određene specifičnosti. Posebne organizacije u Republici Srbiji se obrazuju za vršenje stručnih i sa njima povezanih izvršnih poslova čija priroda zahteva veću samostalnost od one koju ima organ uprave u sastavu ministarstva. U ovom radu biće reči o pojmu, karakteristikama, značaju i specifičnom položaju posebnih organizacija, kao i o njihovoj delatnosti i organizacionoj strukturi.

Ključne reči: *posebne organizacije, specifičnosti, stručni poslovi, izvršni poslovi, samostalnost, ministarstva.*

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Review Paper

A WEB OF CRIMES, ROUTINE ACTIVITY THEORY AND THE DEEPENING SCOURGE OF ARMED BANDITRY IN NIGERIA

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Abstract. *The incidence of banditry in Nigeria has assumed an unprecedented mien which constitutes a major bane to the hitherto troubled security in the country. The phenomenon has created a multi-pronged security challenge that has amplified the spate of destruction of life and property and displacement. Meanwhile, inchoate and nascent erudition is still associated with the incidence of banditry in Nigeria. Thus, this study attempts to satiate this lacuna by annotating the incidence from the Routine Activity Theory standpoint. The study adopts a descriptive and analytical armchair analysis which relies on a secondary source of data. The study found out that the menace of banditry is prevalent in Nigeria, particularly in the Northwest. Some of the methods favoured by bandits include armed robbery, cattle rustling, arson, sexual violence, kidnapping, raiding villages and schools, looting, stealing livestock and gruesome killing. The incidence is attributable to the conflicts between farmers and herders for scarce resources, the influx of Small Arms and Light Weapons (SALW) into Nigeria, an overwhelmed, weak and understaffed security apparatus, illegal mining, slow response and poor engagement of the Nigerian government, and a vast ungoverned forest territory. To adequately address the incidence of banditry in Nigeria, the study recommends a prevention strategy that focuses on the three major areas identified by the Routine Activity Theory: the motivated offender, the suitable target, and the absence of guardianship.*

Key words: *banditry, farmer-herder, insecurity, kidnapping, routine activity theory, violence*

1. INTRODUCTION

The threat of insecurity in Nigeria is perpetual and precariously reinforcing, leading one to presume that Nigeria is a highly volatile and distressed country. This ambience of volatility is a pretext for instability, fragility and disunity, thus underscoring the relevance

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of this study. To be sure, the state of insecurity in Nigeria is multifaceted and, against popular belief, is attributable to the reprehensive activities in the various regions of the country. The North is ravaged by the Boko Haram and splinter Islamic State in West Africa Province (ISWAP) sects (on one end), then cattle rustling, banditry and Fulani herdsmen attack on the other end (Akinyetun, 2016; Nigeria Watch, 2018; Okoli & Ugwu, 2019; Olapeju & Peter, 2021). The Southeast is bedevilled by herdsmen onslaught, kidnapping, banditry, commercial crime and secessionist agitations of the Independent People of Biafra (IPOB) and the Eastern Security Network (ESN) (Igbini, 2020; Nigeria Watch, 2018). Meanwhile, in the Southwest, there has been a dramatic surge in cultism, armed robbery, kidnapping, farmer-herder crisis, local crime, extra-judicial killing, cybercrime and banditry (Nigeria Watch, 2018).

The above is a testament to the spate of insecurity in Nigeria that has in the last decade transmogrified into social anomie that threatens peaceful coexistence, national security, and national integration. Observably, banditry has recently become a recurring security challenge in all parts of the country. The phenomenon is rapidly growing and threatens to plunge the country into an abyss of incessant insecurity. Indeed, the activities of marauders and banditry in Nigeria – largely Hobbesian – has made, nay, is making the life of citizens solitary, poor, nasty, brutish and short. According to the Assessment Capacities Project (ACAPS) (2020) and Barnett (2021), bandits are known for cattle rustling, kidnapping, shooting and killing, raping, looting and torching of villages. They have left scores of displaced persons and fatalities in the wake of their attacks. Between 2018 and 2020, more than 3300 people were killed while over 1600 fatalities were recorded. In addition, banditry violence has led to the displacement of over 247,000 persons while more than 60,000 have been made refugees. Meanwhile, these attacks continue to increase.

Even though the Boko Haram insurgency and farmer-herder crisis have received a wide coverage (Akinyetun, 2020; Barnett, 2021; Igbini, 2020; Nigeria Watch, 2018; Ojewale, 2021), an inchoate and nascent erudition is still associated with the incidence of marauders and bandits in Nigeria (Okoli & Ugwu, 2019; Olaniyan & Yahaya, 2016; Bashir, 2021). Yet, relevant underpinning theories expound on the 'why' of the prevalence of banditry is also incipient. The extant scholarly works on the subject matter (Abdullahi, 2021; Bashir, 2021; Umaru, 2020) have not offered comprehensive theoretical explanations of the phenomenon. This study is an attempt to satiate this lacuna by annotating the incidence of banditry in Nigeria from the Routine Activity Theory standpoint. The study seeks to answer analytical posers such as: What is banditry? What is the prevalence of banditry in Nigeria? What are the causes and effects of banditry? How does the Routine Activity Theory explicate the occurrence?

Given the sparse research on the matter, this study adopts a descriptive and analytical armchair theorization to advance literature and provide a theoretical basis for further research. This will be done by relying on secondary data sourced from journal articles, government reports, local and international newspaper articles, agency reports and internet materials. The study will be thematically discussed under the following subsections: introduction, literature review, theoretical underpinning, conclusion and recommendations.

2. Literature Review

1.1. What is banditry?

The conceptualization of banditry can only be made clear by understanding who a bandit is. The perception of a bandit has undergone several stages. A bandit could be referred to as a freedom fighter, in the context of the 19th century Americas and Europe, whose duty was to fight for the liberation of the colonized. In the 21st-century African context, a bandit could be seen as one who commits the crime of armed robbery, killing and destruction of properties, particularly, of herders, merchants and business owners (Olapeju & Peter, 2021). These bandits have come to be known as 'armed bandits' or 'weaponized bandits' due to their penchant for the use of small arms and light weapons. According to Umaru (2020), a bandit perpetuates violence along a country's borderlines and rural interiors. An armed bandit engages in an array of criminal offences, which include kidnapping, armed robbery, destruction of life and property, and cattle rustling. In the Nigerian context, they are also notable for arson, rape, raids and extrajudicial killings. These bandits have become associated with intimidation, threat and outright elimination. Their motives are either to amass material and wealth or to promote an ideology. Orjinmo (2021) says that the word bandit, as used in Nigeria, is a loose term referring to armed robbers, kidnappers, armed militia, cattle rustlers and Fulani herdsmen whose motivation is pecuniary.

Okoli and Ugwu (2019) distinguish between the economic and political motives of banditry. Banditry motivated by economic factors is geared towards material accumulation whereas politically motivated banditry involves the spread of fear to promote a political ideology. Egwu (2016) defines banditry as an economic-based act of criminality that involves stealing cattle from herders. This activity often involves rape, looting, attacks and kidnapping. It also destabilizes the pastoralist transhumant activities of herders that requires periodic migration to satisfy environmental and ecological needs. For Olapeju & Peter (2021), banditry is "the totality of incidences of armed robbery or allied violent crimes, such as kidnapping, cattle rustling, village raids as well as highway raids which involves the use of force, or threat to that effect, to intimidate a person or a group of persons to rob, rape, kidnap or kill the victims" (Olapeju & Peter, 2021:4). From the foregoing, therefore, banditry involves an array of illicit activities that involves raiding, arson, armed robbery, killing, kidnapping, cattle rustling and maiming for primitive accumulation of material wealth or to propagate an ideology. This suggests that there are typologies of banditry that espouses the various contexts within which banditry takes place.

Okoli and Ugwu (2019) provide useful insights in this regard by advancing a typology of banditry. The authors argue that the motive behind banditry could be to provoke a social awakening against societal ills, such as inequality. Thus, they mention social banditry. Meanwhile, banditry could also be aimed at achieving a political or economic objective. Another factor that drives banditry is the location that causes bandits to move from rural to urban areas, from the frontier to countryside or mainland as a result of climate change, scarcity of water and land resources or desertification. Maritime banditry is restricted to the sea and often takes the form of piracy. Likewise, the structure of banditry in terms of headship has informed mercenary and autonomous typologies. In effect, bandits can be contracted by an agency to foment trouble but they can also be self-motivated to act autonomously. Regarding formation, bandits can be organized under a network or syndicate, or as petty bandits lacking in organization. In terms of operation, bandits can be seen to be mobile or settled (Table 1).

Table 1 Typology of banditry

Type	Typological index
Social vs. political vs. economic	Intent or motive
Rural vs. urban	Location
Mercenary vs. autonomous	Agency and autonomy
Organized vs. petty	Form and formation
Roving vs. stationary	Operational mode
Frontier vs. countryside	Location
Maritime vs. coastal vs. mainland	Location

Source: Okoli & Ugwu (2019)

According to Abdullahi (2019) and Olapeju & Peter (2021), the primaeval internecine conflict that characterizes the historical development of most African states over economic resources is plausible for the incidence of banditry in the continent as the occurrence has come to be a means of survival. This is evidenced in the prevalence of banditry in the Niger Republic, where cattle rustling is associated with the high level of poverty in the country. The situation in Mali is by no means better as the lack of service delivery, ignited by religious extremism and insurgency, has increased the chances of banditry. Meanwhile, the scarcity of pasture, water and animal feeds and the resultant conflict with local groups has necessitated banditry in Mauritania. Meanwhile, in Nigeria, Egwu (2016) notes that identity-based conflicts between the Fulani and Hausa fuels banditry. The Fulani (predominantly herders) perceive themselves as marginalized and lacking in having a voice, while the Hausa (mostly farmers) see the Fulani as violent; these local groups often clash with each other, with the latter accusing the former of being deliberately armed to destroy its crops. As Egwu (2016) puts it, "there is a negative perception of pastoralists; in the frequent violent conflicts with agricultural farmers, the pastoralists are often blamed for problems related to crop damage, farming along cattle routes, and access to water" (Egwu, 2016:17). The conflict has become more pronounced and has contributed to the rise in banditry in the country..

2.2. Incidence of Banditry in Nigeria

Banditry has a long-checkered history in Nigeria which dates back to 1901, when 210 merchants transporting grains on a 12,000-camel train were killed in Western Hausaland. Since then, the disaster of ungoverned spaces where the state's authority is weak has become dominant (Anyadike, 2018). Umaru (2020) adds that banditry started in pre-colonial Nigeria, when travelling merchants were waylaid and robbed by bandits. Anyadike (2018) posits that bandits have generally been excluded from government control as they are notable for invading rural towns and assuming local authority. The competition for resources by the Hausa and the Fulani pastoralists has been compounded by banditry which is majorly brandished by the latter as compensation for excision from local political power by the former. Although presently a national security challenge, the prevalence of banditry is linked to Northwest states of Kaduna, Katsina, Kebbi, Niger, Sokoto and Zamfara (Bashir, 2021; ACAPS, 2020; Nigeria Watch, 2018) while Sokoto, Niger and Zamfara are said to be the hotspots (Anyadike, 2018).

The vicious contestation between farmers and herders for scarce resources is at the heart of incessant conflicts. Banditry is enclosed in a range of broader issues, such as religious dissimilarity, identity crisis, ethnic tension and indigene/settler dichotomy which fuels the

struggle for water and land resources. This is further complicated by resource scarcity, rapid population growth, desertification and environmental changes, which drive herders to go in search of arable lands and locks the farmers and herders in continued hostility. This lack of consensus and the recurring clashes have led each group to arm itself, thus providing the impetus for banditry and aggravating insecurity. For instance, the acquisition of land by the grazer without payment of corresponding compensation and the tension caused by court cases related to crop damage, and land disputes exacerbates the farmer-herder crisis and gives impetus to banditry (ACAPS, 2020; Egwu, 2016; Igbini, 2020).

The epidemic of insecurity caused by banditry remains a bane of peaceful coexistence and national cohesion (Igbini, 2015). In the last decade, banditry has evolved from being a localized herder-related activity to a highly militarized national issue that mimics a non-state armed group (NSAG) (ACAPS, 2020). According to Amnesty International (2018), the recurring clashes between herders and farmers in Zamfara engendered the recent armed banditry, when 200 people were killed in April 2014 in Yar Galadima village, Zamfara. Villages in Shinkafi and Maradun Local Government Areas were subsequently attacked by armed bandits on November 16 and 17, 2017, respectively, where many people were also killed. These gruesome attacks have continued unabated ever since. Ojewale (2021) submits that the farmer-herder crisis in the country is more lethal than the Boko Haram insurgency, six times over. Al Jazeera (2021) and Olaniyan & Yahaya (2016) report that armed bandits have carried out numerous attacks in the Northwest by raiding villages and schools, cattle rustling, abduction, looting, stealing livestock, burning homes, sexual violence, kidnapping students for ransom, and wanton killing. There have also been alleged attacks by bandits in other parts of the country. Barnett (2021) and Olaniyan & Yahaya (2016) aver that it is suspected that bandits have formed alliances with Boko Haram, which resulted in the kidnapping of school children in December 2020 in Katsina state. For sure, banditry is gradually becoming a precursor to jihadism (Barnett, 2021).

Ojewale (2021) corroborates that what is commonly downplayed as banditry is terrorism. The presence of terrorist groups (such as the Islamic State in West Africa Province, Jama'at Nusrat al Islam wal Muslimin, and the Islamic State in the Greater Sahara) in the Northwest lends credence to this submission. More so, the act of attacking villages, kidnapping residents and abducting school children models the footprint of the Boko Haram sect which kidnapped schoolgirls in Chibok, Borno State, in 2014. Orjinmo (2021) argues that the abduction of schoolgirls in Chibok by Boko Haram and the publicity it garnered has encouraged the shift in the choice of the victims from road travellers in the Northwest to school children in various parts of the country. As Orjinmo (2021) puts it, "kidnapping hundreds of students rather than road travellers guarantees publicity and government involvement in negotiations, which could mean millions of dollars in ransom payments" (Orjinmo, 2021:1).

According to the West Africa Network for Peacebuilding [WANEP] (2021) and Orjinmo (2021), one of the most favoured methods used by the Boko Haram sect and armed bandits in Nigeria is kidnapping or kidnap-for-ransom. Kidnapping has become prevalent and continues to rise. The incidence of secondary school students' abduction by bandits in 2020 alone (on February 17 in Kagara, Niger State; on February 26 in Jangebe, Zamfara State; on December 11 in Kankara, Katsina State; and on December 19 in Mahuta, Katsina State) are cases illustrating the point. Meanwhile, between January and February 2021, 120 incidents of kidnapping were recorded, where 1,181 people were kidnapped (WANEP, 2021). This is a sharp increase in the number of kidnapping incidents within the same

period in 2020, where 467 people were kidnapped. The major victims of these kidnapping incidents are school children. The WANEP reports that about 730 secondary school students were abducted from Niger, Katsina and Zamfara states, between December 2020 and February 2021. Further analysis shows that these kidnaps took place across various regions in the country: South-south, Northcentral, Southwest, Southeast, Northeast and Northwest, the last of which has the highest incidents of kidnapping (Figures 1 and 2).

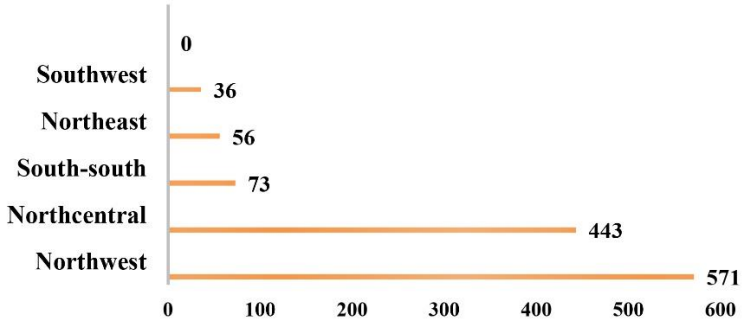

Fig. 1 Incidence of kidnapping in Nigeria (January-February 2021)
Source: WANEP (2021) | Authors' computation

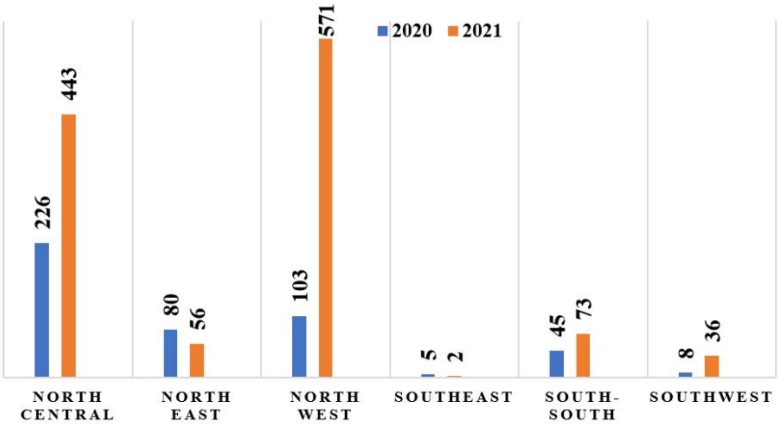

Fig. 2 Incidence of kidnapping by region (Jan-Feb 2020 & Jan-Feb 2021)
Source: WANEP (2021) | Authors' computation

According to Hamrouni (2021), since the beginning of 2021, no fewer than 7,660 Nigerians have fled to the neighbouring Niger Republic, bringing the total of Nigerian refugees in the region to 77,000 since the proliferation of armed banditry. Unfortunately, the attacks have spread into the host region where 22,153 have become displaced in Maradi, Niger. Meanwhile, Maradi is hitherto troubled by the displacement crises of two different regions; Lake Chad Basin and the Sahel, which has led to the displacement of over 5 million people since 2009. There is no gainsaying that the incidence of banditry in Northwest Nigeria has degenerated into a cross-border phenomenon.

2.3. Causes and effects of banditry

Banditry has recently become a courted phenomenon due to its profitability. The payment of ransoms, for instance, has made banditry attractive to criminals (Orjinmo, 2021). Rustling is made popular by the increasing demand for livestock and beef in the Southern parts of Nigeria, thus promising a quick turnover for money (Anyadike, 2018). More so, cattle rustling is run like a syndicate of organized crime that boosts an underground economy free from taxation (Olaniyan & Yahaya, 2016). The Governor of Borno State, Shetima, noted:

> "*Our security agencies have reasonably established that most of the cattle being traded at the markets [in Borno State] were the direct proceeds of cattle-rustling perpetrated by insurgents [and] were sold at prohibitive costs to unsuspecting customers through some unscrupulous middlemen who use underhand ploy[s] to deliberately disguise the transactions as legitimate. The money realised from such transaction[s] would then be channelled to fund their deadly activities"* (Ogbeche, 2016).

Egwu (2016) describes this as the crimes of the dominant classes and the crimes of the dominated classes. Crimes of the dominant classes refer to "those who have turned rustling into a criminal activity with discernible hierarchical networks that link rustlers with markets in a thriving underground economy that generates untaxed wealth"; crimes of the dominated classes refer to "actors who are involved in cattle rustling within the rural economy as part of a coping mechanism responding to socio-economic pressures" (Egwu, 2016: 24).

Banditry is caused by reinforcing factors such as the inflow of Small Arms and Light Weapons (SALW) from the Sahel and Libya to the Northwest, the absence of efficient security forces, and conflicts over cattle and land. Egwu (2016) opines that about 8million illegal SALW are in circulation in Africa; while Nigeria has the highest number. Bandits have been seen wielding sophisticated arms, the influx of which has been on the increase since the 2011 civil war in Libya. Akinyetun (2016) decry the change in orientation of herders from the use of staff to a gun, indicating their readiness for conflicts. Akinyetun stresses that "the availability of illegally obtained arms fuels violent clashes and crisis. To continue to let the dastardly act linger on will proportionately lead to increase in and demand illegal arms needed as a tool of war" (Akinyetun, 2016: 41).

Concerning security forces, the police suffer from institutional challenges such as underfunding and shortage of manpower which has made the prompt response to attacks nearly impossible. Anyadike (2018) argues that one of the factors giving impetus to banditry is the shrunk police force in Nigeria. There are few (yet poorly trained and unmotivated) policemen in Nigeria as against the huge population which makes the rural communities generally undeserving of police attention. Rather, state governments have turned to vigilantes to make up for the shortfall, providing them with hunting rifles and motorbikes to confront banditry. However, due to late and inconsistent payment of allowances, some vigilantes themselves became bandits.

Meanwhile, the Nigerian Army are overwhelmed with the burden of confronting the Boko Haram insurgency in the Northeast. Regarding conflicts over cattle, the Fulani have over time accused the Hausa of stealing their cattle and taking over their grazing routes. As a result, several Fulani youths have taken to crime in a bid to even the scores (Olaniyan & Yahaya, 2016). According to Egwu (2016), the Fulani herders have also been accused of cattle rustling and banditry. Egwu notes that "there are documented instances of pastoralists who resort to rustling after losing cattle to disease, inclement weather, and

violence; there also are Fulani nomads active in the international syndicate of cattle rustlers" (Egwu, 2016:18). Meanwhile, the porous borders in Nigeria are yet another factor that has increased the incursion of Malians and Nigeriens into Nigeria under the guise of pastoralism. The free unrestricted movement of people from Niger, Mali and Burkina Faso encourages the proliferation of sophisticated weapons and amplifies the incidence of terrorist activities in the region (Barnett, 2021; Ojewale, 2021).

Olapeju & Peter (2021) note that banditry in Nigeria is a result of poverty, weak leadership, bad governance, arms proliferation, weak state institutions, corruption, state fragility and a centralized security structure. The years of military interregnum left the security of the state in the hands of the federal government, thus incapacitating the role of governors as the chief security officers of their states. As a result, governors are administratively handicapped in responding swiftly to the security challenges in their political domain. Oladejo (2021) and WANEP (2021) add that widespread unemployment, extreme poverty and pervasive inequality (which are common symptoms in the Northwest) also fuel the occurrence of banditry. Some of the poorest states in the country are located in the northwest region (e.g., the Kebbi, Jigawa, Sokoto, Zamfara and Katsina states). This level of exclusion and deprivation concentrated in one region is a recipe for disaster. It exposes the youth to criminal activities and makes them highly susceptible to recruitment by terror groups.

The slow response and poor engagement by the Nigerian government have also emboldened bandits. As Akinyetun (2016) observes, "when conflicts, due to improper handling, degenerate into violent-conflict, they are thus gradually being internalized, patterned and conventionalized" (Akinyetun, 2016: 41). This submission captures how the government's laxity has provided the unjustified impetus for the menace to thrive. It was not until 2014 that the government launched the Cattle Rustling and Associated Crime Task Force. Despite being saddled with the responsibility of intelligence gathering on cattle rustling and other related crimes, the Task Force has been slothful. In 2015, some governors of Northern extraction launched a joint operation that involved the police, the military, the civil defence corps and the state security service. This also ended up being lethargic. Another notable response was from Nasir El Rufai, the governor of Kaduna State, which included strengthening state border and tracking herds with computer chips to dissuade bandits from stealing cattle. Unfortunately, this is still a proposal (Binniyat, 2015; Olaniyan & Yahaya, 2016; Yusuf, 2015). ACAPS (2020) adds that the government response also provoked banditry activities when the amnesty programme instituted by the governors of Zamfara and Katsina government neglected the two most prominent groups (Dogo Gyedi and Buharin Daji), while the deal was also criticized for being in the favour of the Fulanis. This further deepened the tension between the Fulani herders and the Hausa vigilantes.

Igbini (2015) notes that the state of insecurity in Nigeria as occasioned by banditry is better imagined than experienced. This has been worsened by ethnic chauvinism, secessionist agitations, corruption, government insincerity and a weak security apparatus. This has thrown the brigandage of banditry into a free-for-all mode. According to the WANEP (2021), the governments of Katsina, Yobe, Sokoto, Jigawa, Zamfara, Niger and Kano states ordered the closure of all boarding schools in March 2021 while the Federal Government declared Zamfara a no-fly zone. Yet, bandits abducted 150 students from a secondary school in Tegina, Niger State, in June 2021 (UNICEF, 2021). Olaniyan & Yahaya (2016) and Oladejo (2021) opine that the large forests in the northern parts of the country provide the perfect hideout and operational base for bandits to thrive free from interference by security operatives. The forests have thus become ungoverned spaces where bandits have sovereignty. The terrain is sparsely populated and free from surveillance. When left ungoverned, these areas experience a power vacuum that

often gets filled with felonious groups. Umaru (2020) adds that the illicit trades and unregulated mining that takes in the vast forest spaces provides incentives for bandits to attack the mining sites and neighbouring communities. In some cases, the vigilante resistance of the communities evokes the lethality of the bandits.

According to Ogbonnaya (2020), mining used to be a great source of employment in the north, employing about 600,000 people and boosting local development. It has been hijacked by criminals who exploit the people and racketeer the process. The unholy alliance between political actors and Chinese companies in promoting illegal gold mining is responsible for the proliferation of banditry and conflicts, particularly in the Northcentral, Northwest and some parts of the Southwest. Ogbonnaya avers that over 5000 people have been killed between 2016 and 2021 in Zamfara due to the conflicts arising from illegal mining. This figure does not take into account the number of people killed in other states like Kebbi, Katsina, Plateau and Kaduna. In addition, there have been clashes between the army and bandits on one hand, and bandits and the police on the other hand. These clashes have led to the death of soldiers and bandits. Ogbonnaya (2020: 1) claims that two Chinese were arrested for illegal mining in 2020. In an interview for Roots TV on 19 June 2021, the President of the Northern Consensus Movement (NCM) Awwal Abdullahi Aliyu claimed that:

> "*… we have a deposit of gold in Birnin Gwari that is more than the deposit of gold in South Africa and Ghana and that is why we are having the banditry also in Birnin Gwari axis so that we would not be allowed to harness it. The same goes to Zamfara and that is why we are having the banditry within that axis*." (Roots TV, 2021)

The above submission is substantiated by Ogbonnaya (2020) who submits that that banditry in the Northwest is directly linked with mining, and further claims that the resulting conflict is two-fold. First, the sponsors of these mining activities, under the protection of state governments, fight for control over the fields. Secondly, these sponsors also finance cattle rustling and banditry to enflame violence among herders. The essence of this is to promote displacement and create opportunities for illegal mining to fester. This worsens the extent of poverty in the community and makes youths vulnerable to recruitment for illegal mining. In other words, banditry is sponsored to create a condition of double-jeopardy in the communities. This view finds a kindred spirit in Barnett (2021), who avers that the incidence of banditry in Nigeria as follows: "…politicians or business people in the Northwest are sponsoring the bandits in one way or another, whether for personal enrichment, to harm the interests of political rivals, to coerce populations into voting a certain way, or to reward Fulani herders for previous political support" (Barnett, 2021:1).

The effect of the phenomenon is extensive. According to the ACAPS (2020), the crisis has led to the following effects:

a) *Displacement*: Banditry has led to the displacement of residents of Northwest Nigeria in their thousands to the Republic of Niger while others are scattered around Internally Displaced Camps; most of which are lacking in quality, without access to potable water, health care, basic utensils, toilets, and sleeping materials. The majority of these IDP have therefore resorted to begging to make a living.
b) *Lack of protection*: Recurring bandit attacks have been recorded in the Northwest while children and women are at the risk of being sexually violated. This coupled with the overstretching of the Nigerian Army against Boko Haram and the inefficiency of the Police has subjected the residents of the region to attack. As a result, they have had to turn to vigilante groups for protection while others have been left to defend themselves.

c) *Food insecurity*: Given that farming and animal rearing are the mainstay of the economy in the northwest, cattle rustling has significantly impaired animal rearing. More so, the attacks on rural villagers and farmers, and the consequent displacement of many more, has made farming, cultivation and harvest impossible. These developments increase the chances of food insufficiency, food insecurity, poverty, hunger and malnutrition.
d) *Health risks*: Due to the lack of safe water and poor sanitation occasioned by open defecation, overcrowdedness, poor toilet facilities, the displaced persons run the risk of diarrhoea and cholera outbreaks in their respective camps (ACAPS, 2020).

According to Igbini (2020), banditry has deteriorated the social, economic and political activities in the country generally, and the Northwest in particular. It has discouraged economic activities such as trading, farming, mining and foreign investment.

Banditry has also increased the incidence of poverty in the Northwest. The north is a generally poor region compared to other regions of the country when applying the dimensions of multidimensional poverty (living standard, education and health). Concerning the living standard, banditry has deprived victims of the goods, property and businesses required for economic sustenance. The subsistence and commercial efforts of herders/farmers have been thwarted while a majority of these herders/farmers have been forced to abandon their farmlands, cattle and livestock. This intensifies the prevalence of poverty, unemployment, marginalization and social exclusion in the north. The most vulnerable groups are women and children (ACAPS, 2020).

Regarding education, the abduction of school children by bandits have forced many nearby schools to close down while the ones in operation have recorded fewer students for fear of kidnap. This further increases the level of illiteracy and out-of-school children in the north. According to Orjinmo (2021), "the bandits, motivated by money, might be ideologically different from groups like Boko Haram in the north-east, which are against secular education, but together, they are having a devastating effect on education across northern Nigeria" (Orjinmo, 2021:2). Meanwhile, concerning health, the consequent displacement that trails bandit attacks has exposed victims to health risk such as cholera, whilst forcing them to violate Covid-19 health guidelines (Bashir, 2021).

Umaru (2020) opines that banditry has negatively impacted food and human security and has subjected the victims to violence, abuse, fear and unnecessary want. Bashir (2021) submits that there is a general case of human rights violation wherever bandits attack. In addition to its economic and political effects, the psychological impact of banditry on the victims of rape, abuse, arson and kidnap remains untold. It has further created an unprecedented rural-urban drift wherein residents of affected communities have had to desert their homes and relocate to urban areas for fear of being attacked [again] by bandits. Egwu (2016) affirms that banditry has created a humanitarian tragedy with far-reaching consequences for an increase in internally displaced persons (IDPs), forced migrations, deaths and cattle rustling.

3. Theoretical Underpinning

3.1. Routine Activity Theory

Routine Activity Theory (hereafter: RAT) is a construct that explains crime patterns as an opportunity caught in specific space and time. The theory was advanced by Cohen and Felson (1979) with the core argument that "the convergence in time and space of three

elements (motivated offenders, suitable targets, and the absence of capable guardians) appears useful for understanding crime rate trends. The lack of any of these elements is sufficient to prevent the occurrence of successful direct-contact predatory crime" (Cohen & Felson, 1979: 604). Kitteringham & Fennelly (2020) aver that the thrust of RAT is that the necessitating factors for the incidence of crime are an offender, a suitable target, and the absence of a capable guardian. The theory adopts the same rational choice methodology as situational crime prevention techniques. Sasse (2005) opines that "victimizations occur when there is a convergence in space and time of a motivated offender, a suitable target, and an absence of a capable guardian" (Sasse, 2005:547). Meanwhile, the motivation to offend may be intrinsic or extrinsic.

Purpura (2013) submits that RAT considers both the routine activities of the offender and the victim. A potential offender may routinely rove around a community, seeking suitable targets that are vulnerable to raiding. The presence of neighbours in the community may deter the criminal activity while the absence of a capable guardian will motivate the offender to attack the target. Rossmo & Summers (2015: 20) aver that RAT studies crime patterns related to conditions (such as: offender, victim, conducive environment, space and time) and proposes the following crime equation:

"*crime = (offender + target − guardian) (place + time)*"

As conceived in this study, RAT is based on a treble logic that is centred around the motivation to commit a crime, the crime opportunities ensuing from the presence of a suitable target, and the absence of the relevant authority to prevent the crime (see Figure 3).

Fig. 3 Illustration of Routine Activity Theory
Source: Choo (2011)

RAT is hinged upon the following assumptions (Cohen & Felson, 1979; Kitteringham & Fennelly, 2020; Okoli & Ugwu, 2019; Purpura, 2013):

a) Crime is likely to occur when there is a spatial-temporal convergence of three essential elements of crime: a motivated offender, an attractive target, and the absence of capable guardianship;
b) The factors that render a particular target attractive are situational and crime-specific;
c) Crime can be perpetrated by anyone who has the opportunity in terms of capability and availability of vulnerable target;
d) Victims have choices on whether to be victims mainly by possibly avoiding situations where a crime can be committed against them.

The theory addresses crime from an offender's view. A crime will only be committed if a potential offender finds a target fitting and if guardianship is absent. Therefore, the occurrence of crime is dependent on the potential offender's assessment of a situation and level of motivation. This is because "a potential criminal must be motivated at the time of the encounter" (Rossmo & Summers, 2015:20). Sasse (2005) argued that:

> "…*Motivations, or the desires to commit crimes—which includes armed robbery, are not necessarily realized immediately with the presentation of the right opportunity at the right moment. While this process will vary depending on the offence and where it happens as Routine Activities literature argues, the victimization processes do not always occur in the heat of the moment, may take years to come to fruition, and will vary according to the motivations of the offender*" (Sasse, 2005:547).

According to Turvey & Freeman (2014), the factors that propel an offender to carry out an attack influences victim selection, i.e. how a motivated offender selects his victim. The authors classified victim selection into two broad categories: a targeted victim and an opportunistic victim. *A targeted victim* is the primary object of crime. The victim is purposefully selected for various reasons including, among other things, acquaintance with the offender, possession of what the offender is interested in, or a victim who poses a threat to the offender. *An opportunistic victim* is often secondary and merely selected by circumstance. Such circumstances include vulnerability, proximity, location and availability. Such victims could also be chosen because they represent a symbol to the offender, or because they possess a trait which is considered desirable by the offender.

Felson & Cohen (1979) and Turvey & Freeman (2014) describe a suitable target as the victim of crime who is perceived to be weak. In one way or another, such a vulnerable victim fits into the offender's *modus operandi*. They refer to a capable guardian as a person or institution whose presence can deter an offender from perpetuating a crime. Examples include family members, friends, respected individuals, security officers and law enforcement agencies. These individuals are believed to be capable guardians because they are capable of preventing the crime from taking place, and they can respond when such crime is committed.

When applied to the incidence of banditry in Nigeria, this theory holds substantial relevance. It expounds on the relationship between a motivated offender, a suitable target and the absence of a capable guardian. In this discourse, *the motivated offender* are herders, unemployed and poverty stricken-youths, victims of cattle rustling, victims of displacement, marauders, victims of illegal mining activities, and victims of other forms of attack seeking to get even. Thus, the motivation of these potential offenders is fueled by socio-economic, socio-political and socio-cultural factors that have limited their functioning and capability in society. *The suitable target* refers to objects/subjects presumed to have caused the predicament of the potential offender, or objects/subjects believed to have the solutions to their woes. This includes farmers, government properties and agents, political actors and unharmed citizens. These targets fit into the classification of a targeted or an opportunistic victim. Meanwhile, the absence of a capable guardian implies the weak presence of the security forces in the areas of attack.

As formerly observed, the Nigerian police are understaffed, unmotivated, enmeshed in corruption, and lacking adequate training. As a result, the police have been weakened in carrying out their primary objective of maintaining law and order. This explains why banditry attacks continue to rise and why the perpetrators are yet to be identified, arrested and prosecuted. The ungoverned spaces have thus become a shadow enclave where the government's presence is not felt, hence the rise in banditry and criminality. The absence of

capable guardians in the form of government institutions (e.g. police stations, army barracks and courthouses) coupled with the presence of suitable targets is a motivation for crime.

Okoli & Ugwu's (2019) contribution on this subject matter is highly valuable:

> "*...the presence and prevalence of under-policed and unregulated hinterlands, forestlands and borderlands have provided an enormous opportunity for rural criminality. In addition, the presence of a viable but vulnerable rural economy based largely on animal husbandry, crop production and informal mining, equally provides an avalanche of handy crime objects/ targets: cattle, cash, treasure, etc. In this context, the virtual absence of governmental security apparatus in most rural communities gives incentive for criminal opportunism and impunity as well*". (Okoli & Ugwu, 2019:205)

RAT provides a social structural explanation to the incidence of banditry in Nigeria that crime (banditry) thrives because of the expanse of land and ungoverned spaces and the perceived accruals of crime in the face of an overstretched and inefficient security apparatus. Rossmo & Summers (2015) maintain that one must identify the context of crime occurrence to have a grasp of the crime's chemistry. However, crime chemistry is crime specific. Thus, the spatial pattern and conditions necessary for banditry to take place are different from those for burglary. For instance, the context (time and place) required for banditry is different. The offender has to consider the access to and escape from the location of the attack. Rossmo & Summers (2015) opine that:

> "*Most crime is not random; rather, it is spatially structured, occurring where the awareness space of the offender intersects with perceived suitable targets (desirable targets with an acceptable risk level attached to them). The awareness spaces of offenders, in turn, are shaped by their routine activities*" (Rossmo & Summers, 2015:20).

The above clarifies why the present incidence of banditry in Nigeria is centred in rural areas with access to vast forests and majorly lacking in guardianship.

As any other theory, RAT is subject to criticism. This theory has been criticized for emphasizing the assessment of crime by a motivated offender without considering the variation in motivation per offender. Moreover, while the theory is rooted in opportunity, it fails to account for the circumstances in which the motivated offender and a suitable target converge in the absence of guardianship (Argun & Daglar, 2016). Brunet (2002) argues that the presence of a capable guardian is not enough to deter the occurrence of crime. In most cases, it moves the offender to perpetrate the attack in another location. It also ignores the psychological attributes of the offender, such as self-esteem and identity. RAT is also criticized (Degarmo, 2011) for being excessively reliant on basic assumptions of space and time, thus confining the theory to a particular location rather than considering inter-related crime beyond a specific location.

Regardless of criticisms, RAT remains relevant by providing a simple yet empirical explanation of the occurrence of crime. It shows the importance of time and space in characterizing crime, and how the absence of a capable guardian enables an offender, as in the case of Nigeria.

4. Conclusion and Recommendations

The challenge of armed banditry is a terrifying menace threatening the security of Nigeria. As this study has shown, the phenomenon is predominant in the northwest region of the

country, thus subjecting the North and indeed the entire country to a multi-pronged security challenge. The incidence of banditry has led to the destruction of life and property, displacement, poverty, unemployment, hunger and a devastating humanitarian crisis. Some of the methods favoured by bandits include armed robbery, cattle rustling, arson, sexual violence, kidnapping, raiding of villages and schools, looting, stealing livestock and gruesome killing. The incidence is attributable to the conflicts between farmers and herders for scarce resources, the influx of Small Arms and Light Weapons into Nigeria, an overwhelmed, weak and understaffed security apparatus, illegal mining, slow response and poor engagement by the Nigerian government, and a vast ungoverned forest territory. These factors are reinforced by bad governance, poverty, corruption and a weak state institution.

To adequately address the incidence of banditry in Nigeria, any proposed prevention strategy must focus on the three major areas identified by Routine Activity Theory: the motivated offender, the suitable target and the absence of guardianship. Therefore, the authors of this study make the following recommendations

1) As for the motivated offender(s), the incessant herder-farmer crisis should be addressed by creating livestock ranches to reduce the chances of moving around or encroaching on the farmlands of farmers. Meanwhile, frantic efforts should be made to reduce the incidence of poverty and unemployment in the country to reduce youths' vulnerability to banditry. Policies targeted at rural development, social inclusion, social protection and social cohesion should be given prominence.
2) Considering the victims of displacement, cattle rustling and other forms of attack should be compensated through a joint effort of the government, the private sector, civil society organizations, and non-governmental organizations. In addition, the government should secure the interests of suitable targets such as farmers, government institutions, political actors and ordinary citizens by improving the security situation of the country.
3) Regarding a capable guardian, the government must devise a comprehensive security plan that will combat arms proliferation, illegal mining, porous borders, and ensure adequate surveillance of the large ungoverned territories. The security forces in the country should be trained on the use of technology to track criminal activities and illicit trades in the country.

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MREŽA ZLOČINA, TEORIJA RUTINSKIH AKTIVNOSTI I POŠAST ORUŽANOG RAZBOJNIŠTVA U NIGERIJI

Učestalost oružanog razbojništva poprimila je neviđene razmere u Nigeriji. Ova pojava nanosi veliku štetu već problematičnoj državnoj bezbednost i predstavlja višestruki bezbednosni izazov jer prouzrokuje novi talas uništavanja ljudskih života, imovine, kao i raseljavanje stanovništva. S druge strane, naučno-teorijska istraživanja se još uvek bave pojavom razbojništva u Nigeriji. Ovo istraživanje nastoji da popuni postojeću prazninu kroz analizu pojavnih oblika oružanog razbojništva sa stanovišta Teorije rutinskih aktivnosti (engl. Routine Activity Theory). U radu se koristi deskriptivna i analitička metoda koja se oslanja na sekundarne izvore podataka. Istraživanje ukazuje da je opasnost od oružanog razbojništva (banditizma) prilično rasprostranjena u Nigeriji, posebno u severozapadnim oblastima. Neka od najčešćih krivičnih dela su: oružane pljačke, krađa stoke, paljevine, seksualno nasilje, otmice, upadi u sela i škole, otimačina, imovinske krađe, i brutalna ubistva. Učestalost ovih krivičnih dela može se pripisati brojnim faktorima: dugogodišnjim sukobima između farmera i stočara oko oskudnih resursa; prilivu malokalibarskog i lakog naoružanja u Nigeriju; preopterećenom i slabom bezbednosnom aparatu koji je hronično opterećen nedostatkom kvalifikovanog osoblja; sporoj reakciji, lošoj organizaciji i neadekvatnom angažovanja nigerijske vlade u rešavanju ovih problema; prisustvu protivzakonitih rudarskih aktivnosti, kao i ogromnih šumskih prostranstava koja su velikoj meri neregulisana. Kako bi se država na adekvatan način pozabavila pojavom oružanog razbojništva u Nigeriji, u radu se preporučuje strategija zasnovana na Teoriji rutinskih aktivnosti koja identifikuje tri ključna cilja u prevenciji ovih krivičnih dela: motivisani prestupnik, privlačna/osetljiva meta, i odsustvo "sposobnog čuvara".

Ključne reči: *Nigerija, oružano razbojništvo, zemljoradnik-stočar, nasilje, nesigurnost, Teorija rutinskih aktivnosti.*

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