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THE GERMAN ENERGY REVOLUTION THE EXIT FROM NUCLEAR AND FOSSIL-FUEL ENERGY

Dr. Peter Ertl[1]

Abstract:

Germany opted for a model of energy transition, or better – due to its profound economic impacts – energy revolution. This revolution aspires not less than reshaping the current system of energy supply including the generation of electricity. The aim is to shift Germany's energy supply from carbon-fuel based consumption to 60% renewable sources of energy until 2060, while reducing primary energy consumption by 50% and cutting emissions of climate-damaging gases by 80-95%.

This article aspires to analyze and lay out the legal framework governing the politics of "Energiewende" (the German term for "energy revolution") and to describe its objectives and the methods applied to realize those goals, plus gives an overview over its impact on the legal system.

Furthermore, this article lays down the legal, political and social framework connected to that endeavor of restructuring Germany's current energy system. The article delves into the underlying historical and political background involved in order to facilitate the understanding of the relevant ideological and political aims connected to it. The concrete goals set out and the implications to the legal system are explored. Finally, a comparison with some industrialized countries completes the picture, i.e. the uniqueness of that undertaking and its gigantic dimension.

[1]The German author, jurist by trade, is currently working in Kosovo in the area of legal consulting

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I. Introduction to the topic:

1. Actual significance of the concept of "environmental protection" in political discussion:

Talking about politics these days, it almost seems to constitute a "law of nature" to end up mentioning the name "Donald Trump". His striking willingness to adopt different political approaches to existing problems fuels the political debate, encompassing every aspect of political and economic life. One outstanding example almost feels like going back in time when suggesting to attribute much more importance to coal extraction in the United States underlining the importance of that source of energy. This suggestion sums up to nothing less but turning back the tide on a long development concerning the relationship between energy production and environmental issues[2]. Notwithstanding the importance of "money" for our economies (as was shown drastically through the financial crisis in 2009), providing sufficient amounts of inexpensive energy is the "live-blood" of any modern industrial society. The comparison with "blood" depicting a liquid energy carrier indicates "energy" itself claiming this leading role in fueling modern economic advances. The industrial revolution was based upon the availability and the extensive usage of coal. Continuing with the oil boom in the 19th century, petroleum or crude oil meanders like a black river through American history and therefore world politics. It has even being argued, that the prize of crude oil in our times has assumed the role of the prize of bred in the 18th century, determining invariably our daily life and well-being and even happiness capable of triggering rebellions, so that modern industrial democracies are intrinsically based upon that substance's adequate prize[3]. This was shown in a paradigmatic way during the oil crisis in 1973. But in recent years that importance was challenged. The "Spiegel" (in its online edition "Spiegel Online"), one of Germany's most renowned political magazines, questioned that leading role of petroleum describing a world without oil[4]. That central question, i.e. how best to supply our societies with the necessary amount of energy in a sustainable way, accompanies German

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[2] Smog definitely is a severe problem in Pristina/Kosovo during winter times. And having lived through one winter of that kind, one prima facie might come to the conclusion that maybe it is not such a good idea to lean on coal heavily once again

[3] Michael Stürmer, *„ÖlbestimmtunserLeben"*, Berliner Morgenpost online, 02.06.2004, http://www.morgenpost.de/printarchiv/politik/article103517124/Oel-bestimmt-unser-Leben.html (last visit: 12.04.2017)

[4] Anselm Waldermann, *„Eine Welt ohneÖl – wiesichunserLebenverändernwird",* Spiegel online, 23.05.2008, http://www.spiegel.de/wirtschaft/energie-krise-eine-welt-ohne-oel-wie-sich-unser-leben-veraendern-wird-a-554891.html (last visit: 12.04.2017)

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national and international discussion for decades now. On a national German level, this discussion sparked the birth of a new political party, *"Die Grünen"* or "The Green"[5], founded in West Germany in 1980 with a strong focus on politics guaranteeing social and ecological sustainability. On an international level, that development is mirrored in several international agreements, just to mention a few of the most important ones like the Kyoto protocol, the Montreal protocol, culminating in the United Nations Climate Change Conference in 2015 in Paris. In the wake of that awakening environmental conscience, several international treaties targeted environmental issues ranging from biodiversity, the ozone layer, desertification etc., just to mention a few as *pars pro toto.* In Germany, the identified problem of climate change led to a radical decision taken by the federal government. Germany, up so far being the only major industrial nation, opted in favor of an "energy revolution", or in German, *"Energiewende"*. 'This term stands for drastic change in policy leaving behind the economic model of carbon consumption, instating instead a sustainable economic model, achieved by producing energy in a sustainable, i.e. renewable form, thus basing sustainable development on energy efficiency.
Given the worldwide implication of environmental impacts at large scale, this discussion seemed to transcend and escape the usual day-to-day political mechanisms. Even the United States, traditionally reluctant to join international treaties imposing legal obligations and restrictions on their economy, seemed to come around and join.
Due to Donald Trump's new approach, president Obama's legacy now seems to be turned upside down re-instating old mechanisms[6], basing the energy supply on combustion of hydrocarbons once again.

2. Actual political background:

That very same tendency is true for German politics as well. Only two days past the last general elections on federal level (22.09.2013), an article in the online-edition of the popular newspaper "Die Welt" proposed to abandon the *"Energiewende"* and stipulated the need for a reorientation regarding the

[5] After a merger in 1993 the name changed to *"Bündnis 90/Die Grünen"*, in English: *"Alliance 90/The Greens"*

[6]ToraldStaud, *„Die Zerstörung von Obamas Klimaschutzerbebeginnt"*, ZeitOnline, 26.03.2017, http://www.zeit.de/politik/ausland/2017-03/donald-trump-klimawandel-dekret-klimaforschung-klimaschutz-usa, (last visit: 12.04.2017)

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politics governing energy production[7]. Under the headline "Wish list of the German economy – after the elections trade associations push forward to abandon the politics of energy revolution" an article was published advocating a rethinking of the energy revolution. And since this fall – exactly four years after the publication of this article (24.09.2017) Germany will hold elections on federal level once again, it will be interesting to see if – reinforced by Trump's arguments – this claim will resurface once more. To describe such a phenomenon Germany coined the phrase "After the reform is before the reform"[8] (literal translation). A more elegant translation would be "the end of one reform signifies the start of the next one".
Due to the uniqueness of this German environmental political approach, combined with the constant questioning of it, the legal background and aspects of that ongoing political debate is imminently virulent within the framework of that debate and shapes its outlines.

3. Methodology:

In accordance with the aforementioned political background and debate, this article aspires to analyze and lay out the legal framework governing the politics of *"Energiewende"* and to describe its objectives, its methods to realize those goals and its impact on the legal system.
In order to enhance and facilitate the understanding of the underlying principles and political motivation governing this gigantic endeavor, the first part of this article is dealing with the historical parameter with regard to social and political developments, aiming at highlighting the cultural atmosphere in which this process is embedded in. The second part aims at describing the legal aspects using several aspects to exemplify the underlying principles involved. Due to the nature and restrictions of the format in question, the examples are not comprehensive, but rather selective. The selection criterion was the usefulness in outlining the central and common threads running through this energy policy. The third part consists in a short analysis and recompilation of some exemplary countries counterpointing different approaches to that issue.

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[7] Jan Dams/Stefan von Borstel/Flora Wisdorff, *„Der Wunschzettel der deutschenWirtschaft",* Welt Online, http://m.welt.de/print/welt_kompakt/print_wirtschaft/article120328541/Der-Wunschzettel-der-deutschen-Wirtschaft.html (last visit: 12.04.2017)
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II. Overall picture and synopsis of the concept of *“Energiewende”:*

Based on what has been said before, the first task at hand is to outline the essential content of the “energy revolution” or *“Energiewende”* in Germany.

1. Concept characterization:

As indicated above, this political concept signifies a transition away from the current economic model based on the combustion of hydrocarbons towards sustainable forms of energy. This means no less than a profound and most likely long-term structural shift in the modalities in which energy is produced and provided. Therefore it is feasible to speak of “energy transition”. The discussion often revolves around decentralized forms of production leaning on renewable forms of energy, combined with a significantly enhanced degree of energy efficiency. One major aspect of it consists in the replacement of nuclear energy production. Coined “nuclear power phase-out”[9], this program is comprised of two aspects. First, there is a ban on new nuclear power plants, and second, to slowly phase out and eventually shut down existing nuclear power plants. But the concept of *“Energiewende”* does not stop at power plants, but consists in the abolishment of coal as well. The declared goal is to amount the creation of energy by means of renewable energy sources to 60% by 2050 (electricity to 80%), reducing the percentage of non-renewable energy production sources accordingly. This replacement encompasses various forms of renewable forms of energy, such as biomass, wind, hydropower, solar power, geothermal or oceanic power. Fossil fuels to be replaced are coal, oil, natural gas and uranium-based nuclear fuel.
The major goal to be achieved – neglecting national energy independence – is tackling the global warming crisis.
Since the overall perception is that there is no silver bullet resolving that problem in all its multiple aspects, the coping strategy leans on piecemeal measures. The limited potential of each aspect is countered by a multiple, multi-faceted approach combining energy conservation (it is self-evident that what is not consumed does not have to produced) measures like building insulation, smart electric metering systems taking advantage of inexpensive time periods for consumption with the aforementioned alternative and renewable sources of production. The ultimate goal is to reach the point where 100% of all energy is derived from renewable sources in 50 years.

[9] Several German denominations are predominant; some popular ones are *“Atomausstieg*”, (which literally means“atomic exit“), *“Kernkraftausstieg”*(literal for „nuclear power exit“) „oder*“Atomverzicht”*(in its literal meaning “renunciation of atomic power”)

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This would dramatically reduce the emissions of greenhouse gases, therefore countering global warming.
The lack of a “royal road” is counteracted with an ample bundle of measures, which in combination are supposed to achieve the overall goal. Energy conservation and efficiency are attributed a key role in that process.
These key elements are as follows:

- Energy conservation: improvements of insulation of buildings adjusted to the climate needs predominant in Germany
- Energy efficiency: co-production of both heat and electricity. Hot water for example may be a by-product of energy production, but can easily serve to satisfy the need for hot water directly and on-the-spot without taking the detour of using the produced energy to heat up water elsewhere
- Energy efficiency: the intelligent new generation electric meters are capable of steering energy consumption. Taking advantage of periods of little demand, energy surpluses available can account for lower energy costs (late night or early morning are prime examples)

Bottom line, these measures add up to more intelligent and conscious forms of energy production and consumption.

2. Original meaning of the term *“Energiewende”* or energy revolution:

The term commonly used to describe this process is *“Energiewende”*. This literally means “energy turnaround”, making reference to the political shift into the other direction. For its radicalness, this article adopted “energy revolution” as key translation. This term reflects the colossal social impact necessary associated with this new energy model imposed on both economy and society. Building on the gradual character of the process to undergo, another term baptizes this political endeavor as “energy transition”. This word depicts the slow process – over the course of several decades – necessary to transform the existing energy model into the targeted one. Transition being defined as “the process or period of changing from one state or condition to another”[10], this term does not pay tribute to the enormity of the task at hand, but could also be perceived as easy, short or not challenging. A “turn”[11] in politics occurs frequently, therefore the uniqueness and

[10] Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/transition (last visit: 12.04.2017)
[11] In German: *„Wende“*

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vastness of this process would not be reflected adequately in its wording. And one major aspect of that transition, namely changing a state perceived as artificial into one considered natural, would also not be reflected.

3. Emergence of the term *"Energiewende":*

The first appearance of the term *"Energiewende"* took place in 1980 in a publication of the German *"Öko-Institut"*, an ecological institute endorsing the downright abolition of energy production based on petrol or atomic power. On 16th of February the same year, the Federal Ministry for Economic Cooperation and Development[12] hosted a symposium in Berlin titled "Energy Transition: Nuclear Phase-Out and Climate Protection". The first public reactions to the Öko-Institut's proposal were strong and almost unanimously negative, sparking a strong opposition to that idea rejecting both the need and aim of the proposal. But during the years to come, that attitude gradually faded until the energy revolution was adopted as official state policy.

4. Broad meaning of the term *"Energiewende"*:

In conjunction with this gradual process of universal adoption and recognition of the term "Energiewende", its meaning became more comprehensive including more and more aspects.
The aforementioned shift from centralized forms of production in large-scale power production plants towards small and decentralized units combining energy and hot water production under one roof became part of its logic. But not only lead this to the effect of a means to achieving the goal (decentralized production) becoming an inseparable part of the goal (decentralization as a desirable goal without regard to potential economic and ecological gains) itself, forging a dogmatic and sometimes ideological cluster. Along with this profound cultural change challenging the underlying doctrine of a surplus production model providing goods and services in abundance, and in most cases surpassing the actual demand, arose a more eco-conscious attitude replacing the surplus by means of energy-saving.
In an even broader social context this adds up to no less than the democratization of energy and/or energy production. According to the old model, this energy production was limited to a handful of gigantic enterprises

[12] BundesministeriumfürwirtschaftlicheZusammenarbeit und Entwicklung
http://www.bmz.de/de/index.html

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In an even broader social context this adds up to no less than the democratization of energy and/or energy production. According to the old model, this energy production was limited to a handful of gigantic enterprises

[12]BundesministeriumfürwirtschaftlicheZusammenarbeit und Entwicklung
http://www.bmz.de/de/index.html

managing humongous production sites[13]. A very few concentrated, centralized units supplied energy for virtually everybody. Consequentially, this production form led to the existence of market-dominating structures. Their domination summed up to an oligopoly or even a monopoly, both in an economical as well as in a political sense. Renewable energy production contrasts substantially with that scheme establishing a much more widespread system accessible to large parts of society reached by the wide range of production methods. Wind parks or solar energy parks carry the potential for wide parts of society[14] to take part in that economic activity, and not only to supply their own demand. This is even more true when it comes to energy saving and the avoidance of unnecessary consumption. Farmers for example can expand their economic activities aggregating energy production methods (like wind generators or solar panels) thus optimizing their economic benefits. The same can be said about small (and often rural) communities taking advantage of their natural environment. Their short-distance access to the consumer in question allows for a significant production advantage putting them ahead of commercial entities. Some municipalities making good use of that chance generate considerable income, often turning a precarious economic situation into rain-making activities.

5. Temporary results:

In the analysis of the legal framework established, it is therefore crucial to bear in mind not only the obvious implications of the term, but also take into consideration the underlying political and cultural changes attributed and connected with that concept.

III. Historical background:

Due to the ideological dimension in play, the historical backdrop sparking such a radical and – notwithstanding is evolutionary process – genuine revolutionary character has to be explored. Its genesis took place at the very end of the last millennium, starting in the 80s of the 20th century. Given the complex and diverse nature of its emergence, a closer look at the historical background is merited to lead to a better understanding of German society's

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sensitivities as far as this topic is concerned. As mentioned before, its implications reach far beyond the strict realm of energy production, touching the very cultural and ideological basis.

1. English antecedents:

Right from the very beginning of human discovery and usage of different forms on energy, the relevant advantages and disadvantages lay at the heart of every scientific debate. Originally, the decisive factor in that discussion was the scarcity or availability of the basic materials necessary for its production. This extended not only to the local difficulties in accessing the relevant source of energy, but also took into consideration the finite nature and instability of fossil fuel supply. As early as the 16th century, scholars voiced their concern about a possible depletion of natural resources due to their limitedness. These considerations even manifested themselves in parliamentary debates, where the prohibition of coal exportation was advocated. Indeed, Scotland adopted such a legislative provision proscribing such exports in the year 1563. But in the overall picture, this legislation remained an isolated incident. The predominant view of that time adopted the conviction of the inexhaustibility of coal. Nevertheless, a precedent was set by Scotland, and found its way into public debate all over the European continent. The birth land of industrial revolution, England, for some time showed no explicit concern as to the limited supply of coal. It needed until 1865, when the English economist William Stanley Jevons published a dissertation inducing the intensification and radicalization of public debate. In the debate triggered by his publications, this author wrote a diatribe for the first time exposing a coherent and systematic approach to this complex topic of carbon supply for the British industry. He postulated a non-linear, but rather exponential development sparking the mathematically correct conclusion that every kind of raw material or energy source would finally come to an end, no matter how large its supply. The only varying factor would consist in the time period elapsing before the ultimate consumption of the commodity in question.

2. Situation in Germany during the 19th century:

Influenced by the English public debate, German debaters slowly picked up that line of argumentation. It took until the final decade of the 19th century, before the question of a possible future depletion of natural resources became virulent in public debate. This culminated in an extensive analysis

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questioning the never-ending availability of natural raw materials needed by the German industry. This growing energy resource consciousness took place during an area of exorbitant economic growth. Partly due to extensive war reparations France had to pay to Germany[15], the newly founded nation underwent a large-scale industrial revolution. Neutralized politically and condemned to public silence, the middle class focused fervently on activities related to economic and/or scientific character. The common term for this epoch, *"Biedermeier"*, toys with two German words. The second part, *"Meier",* is a very popular and typical, if not stereotypical family name. The first part is based on the German word *"Biedermann"*. This word describes an upright, law-abiding citizen, an honest man, used as a synonym for a person of integrity, combining the consonance of *"Meier"* and *"Mann"* into *"Biedermeier"*. It took the press not long to trivialize that term, depicting a man belonging to the middle class, conservative but apolitical, thus disparaging the bourgeois parts of society depraved of political influence at that time. The outlet to this political suppression consisted in a devote dedication to work in general, and more specifically, economic and scientific endeavors triggering a "golden age" of science, leading for example to an impressive list of Nobel prize winners. Combined with the spoils of the war against France, the indemnifications, this area turned into the cradle of contemporary German industry. Numerous of the crème de la crème – or who's who – of German businesses date back to this area. The phase *"Gründerzeit"*, historically speaking the "period of promoterism", describing years of rapid industrial expansion in Germany at the end of the 19th century, picked up on this effect. This constituted an ideal climate for the growing demand in raw materials, and accordingly, a public discussion as to its limitations. One outstanding paradigmatic example for the described process is physicist Rudolf Clausius. In 1885, he published a dissertation under the title *„Ueber die Energievorräthe der Natur und ihre Verwerthung zum Nutzen der Menschheit"*[16]. One central argument brought forward in his *opus* consisted in the acknowledgement of the limited nature of world's raw materials. He drew the conclusion, that the "introduction of a wise economy"[17] making good use of the existing natural resources was necessary. He warned that earth had to be regarded as a legacy from past generations, being of irreplaceable character. Therefore one of mankind's pressing obligations consisted in the duty – not only to oneself, but also to future generations – to make optimal use of raw materials. According to him, the public way to deal with that issue had to change drastically, and the sooner

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the better. A fact noteworthy is that public opinion supported his ideas, instead (as used to be the case in earlier times) of opposing his views fervently. The public opinion had swung around.

3. Situation in Germany in the 20th century:

At the beginning of the 20th century, energy production in Germany was scattered and decentralized. In the third quarter of that century, large-scale production within a few large entities took over. Notwithstanding the fact that right from the very beginning sustainable forms of energy production like wind mills produced energy, the economic advantages of large steam engines, combined with the unfavorable natural climate conditions in Germany constituted a solid basis for the success of mass energy production. In contrast, renewable forms had a tendency to be unreliable and erratic, thus yielding to more controllable and therefore reliable methods of production. The need for a constant flow of energy which could be adjusted to the prevailing needs at any time hardly left any room for natural and therefore mostly fluctuating forms of production.

4. Impacts of the 1973 oil crisis:

The oil crisis 1973 left a deep imprint in the worldwide collective memory. This effect was intensified by the neither so famous nor so intense second oil crisis of 1979. Both combined resulted in intensive reflections about the utilized energy sources and alternatives to modify the existing system. Undergoing this painful historical development and its aftermath, Germany became increasingly aware of the enormous economic risks associated with energy production based on non-renewable forms of energy production, while at the same time the ever-growing hunger for energy activated the need for increasing the production. US-president Jimmy Carter asserted 1977, that *"conservation is the quickest, cheapest, most practical source of energy. Conservation is the only way we can buy a barrel of oil for a few dollars"*[18]. Large parts of the German population shared that view expressed. Some measures adopted in the wake of the heightened public awareness were short-lived. One example was the "car-free Sunday", an action outlawing the use of private vehicles during selected Sundays. The measure was soon

[18]Energy Transition: The German Energiewende; The oil crisis http://energytransition.de/ (last visit: 12.04.2017)41

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relinquished, but showed ostentatiously the heightened sensitivity and perceived public need to increment effectiveness of non-renewable forms of energy. The Federal Ministry for Economic Affairs propagandized a campaign titled "Conservation – our best source of energy"[19]. An important step forward was taken by the adoption of the Federal Law on Energy Conservation[20] 1976. This legislative act aspired to increase the efficiency of energy use. The objective consisted in the reduction of import of commodities linked with energy production. The law imposed an obligation to apply measures mitigating heat losses when constructing new buildings. An intended spin-off was the adjustment of an unfavorable trade balance, brought about by the installation of more effective means of insulation. Until today, the law in force regulating the conservation of energy reiterates this objective repeating almost the exact words as applied by the law of 1976. The next step was taken by German parliament. The first chamber of the German parliament, the *"Bundestag"*, established an investigative commission dealing with the future of nuclear power. The findings of that commission were presented on 27th of June, 1980. The central recommendation concluded by the commission consisted in the necessity to enhance energy conservation, combined with a significant increase in renewable forms of production. Those findings led to a vivid public discussion. One of the steps taken was the legal requirement to install catalytic converters in cars. Another one was the introduction of unleaded petrol. This climaxed in the EU ban on unleaded fuel in 2000.

5. Chernobyl disaster:

The prelude to the Chernobyl accident, the incident in the nuclear plant Three Mile Island, a civil nuclear energy facility located in Harrisburg/USA, attracted enormous public attention. But due to the fact that Germany was not affected directly and did not suffer any concrete damage (at least this was the overall perception from the news standpoint), no direct connection was drawn to one's own wellbeing, health or safety. Therefore the aftermath was more or less restricted to a mere news event. But that attitude changed completely when the Chernobyl incident occurred. Arguably this was – in its time – the largest man-made catastrophe negatively affecting the entire planet. Originally, the Soviet Union draw a veil of silence over the matter, later tried to sweep the incident under the rug denying it, until it finally had to concede to the facts and admit them fully. The weekend was very sunny

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and warm, and lots of people were spending time outside enjoying themselves. Therefore almost every German "John Smith"[21] already had been exposed to nuclear contamination. Technicians and politicians repeatedly reassured the public that the catastrophe was exclusively caused by inferior technical standards applied in the Soviet Union. In contraposition to that, nuclear energy in Germany was absolutely safe due to the higher technological standard applied. This position was maintained until 2010, just one year before the nuclear accident of Fukushima/Japan happened (11.03.2011). This nuclear accident finally triggered a massive change of course and ultimately led to the adoption of a policy of energy transition, i.e. the energy revolution.

6. Birth of the political party *"Die Grünen":*

Of course this not having been a single momentary event, but a slowly evolving process over time, multi-faceted and therefore influenced by many factors, but little by little the public attitude swung around starting to regard nuclear energy technology in all its different forms (both military (Germany in those days being the likely first battlefield in a third world war) and civil (development, use and expansion)) as increasingly dangerous and disadvantageous. This led to the formation of the anti-nuclear movement. This newly evolved movement was characterized as an organized umbrella response uniting people, organizations, and political parties inclining towards an expressed anti-nuclear and ecological standpoint. Swiftly this movement transcended the boundaries of "anti-nuclear", but transmogrified from "anti" into "pro", the "pros" being nature and ecology. Given the color mostly associated with nature (plants showing predominantly the color "green"), this movement having turned into a political party was baptized *"Die Grünen",* meaning "The Greens". After the German reunification, this political party merged with another one, *"Bündnis 90"*, "Alliance 90". This organization originally consisted of three non-Communist political groups in the former German Democratic Republic (East Germany), uniting people opposing the communist regime under its roof.
Two examples may suffice as *pars pro toto* in order to illustrate graphically the profound social and political impact that movement had on contemporary German political culture:

- During the 1980s the German government planned and undertook construction of a nuclear reprocessing site for reprocessing and enriching

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- Between 1998 and 2005 the political party Alliance 90/The Greens was junior partner in a coalition government consisting of two political parties headed by Chancellor Gerhard Schröder. So only 20 years after its emergence this political party was able to appropriate governmental political power in its favor and maintain in that position for almost seven years.

These effects show *ad exemplum* the enormous dynamic and political power this social ecologist and anti-nuclear movement had acquired over a relatively short period of time severely shaking the established political system. The use of the word "energy transition" does not adequately reflect this effect, so this article prefers the term "energy revolution" to underline the social and political connotations associated with it.

7. Temporary results:

It is therefore safe to state that this school of thought penetrated all political and social levels of society refusing to stick to traditional ways of political behavior. Every government nowadays has to pay tribute to that line of thinking within German society and adopt its politics accordingly.
This constituted the political basis on which the energy revolution was developed and adopted.

IV. The practical concept of *"Energiewende"*:

1. General outlines:

This adoption took place in 2010[23], when this new energetic approach was transformed into official state politics, and accordingly into laws the

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following year (2011). This legislative package foresaw the reorganization of energy supply on the basis of renewable and therefore sustainable energy sources, combined with the adoption of energetic efficiency measures. Involved in the implementation process are primarily two ministries:

- Federal Ministry for Economic Affairs and Energy[24][25]
- Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety[26][27]

Just by looking at the nomenclature one can easily derive the predominant content ("Environment" and "Nature Conservation") and importance ("Energy" equals "Economic Affairs") of that politics. And it is not "Nuclear Energy", but "Nuclear Safety". This renaming illustrates the underlying change in perception: "nuclear" is perceived as a threat, not as a way of producing energy.

The concept – in gist – is designed to achieve the general objective of supplying Germany predominantly through means of renewable energy sources by 2050.

2. The status quo:

The German energy demand (primary energy consumption) remained more or less stable. It amounted to 14.401 petajoule (PJ) in 2000, peaked at 14.837 PJ in 2006 and then went down to slightly to 13.822 PJ in 2013 and 13.239 PJ in 2015[28].

For the year 2012 the German structure of energy production displayed the following features:

[24] In German: *"BundesministeriumfürWirtschaft und Energie"*

[25]The namewas slightly changed from *"Technologie"* ("technology") to *"Energie"* meaning "*Energy*"

[26] In German: *"BundesministeriumfürUmwelt, Naturschutz, Bau und Reaktorsicherheit"*

[27]The name underwent some minor changes („building" (*"Bau"*) was added)

[28] Federal Ministry for Economic Affairs and Energy (*BundesministeriumfürWirtschaft und Energie)*http://www.bmwi.de/SiteGlobals/BMWI/Forms/Listen/Energiedaten/energiedaten_Formular.html?&addSearchPathId=304670 (last visit: 12.04.2017)

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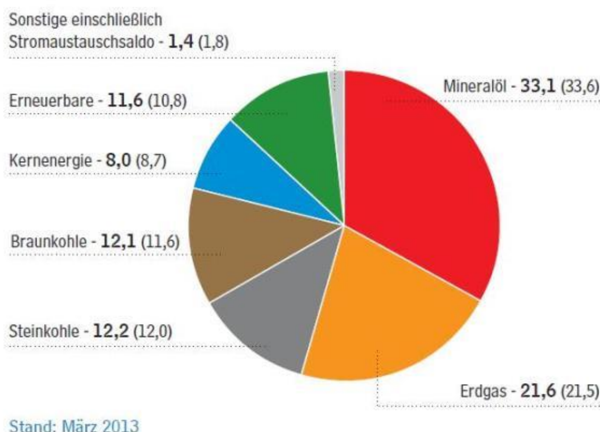
[25]The namewas slightly changed from *"Technologie"* ("technology") to *"Energie"* meaning "*Energy*"
[26] In German: *"BundesministeriumfürUmwelt, Naturschutz, Bau und Reaktorsicherheit"*
[27]The name underwent some minor changes („building" (*"Bau"*) was added)
[28] Federal Ministry for Economic Affairs and Energy (*BundesministeriumfürWirtschaft und Energie)*http://www.bmwi.de/SiteGlobals/BMWI/Forms/Listen/Energiedaten/energiedaten_Formular.html?&addSearchPathId=304670 (last visit: 12.04.2017)



Source: Federal Ministry for Economic Affairs and Technology[29][30]

Explanation:

- Mineralöl (33,1 %): Mineral oil (petroleum)
- Erdgas (21,6 %): Natural gas
- Steinkohle (12,2 %): Black coal
- Braunkohle (12,1 %): Brown coal
- Kernenergie (8,0 %): Nuclear energy
- ErneuerbareEnergie (11,6 %): Renewable energy
- Sonstige (1,4 %): Miscellaneous

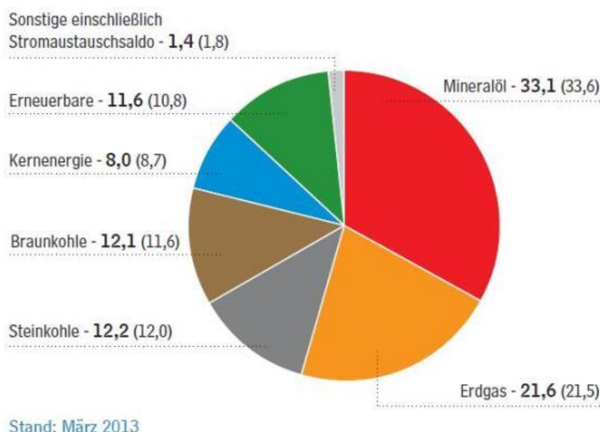
Electricity production amounted to 617,6 terawatt hours (TWh).

3. The goals to be achieved (in broad strokes):

This moment in time may serve as an excellent starting point for the implementation process and therefore as reference or base line. The goals to be achieved can be categorized as three primordial objectives serving as milestones on the way to sustainability and energy efficiency:

a) Reduction of greenhouse gases by 80% until 2050
b) Renewable sources of energy account for the bulk of energy supply

[29] *“BundesministeriumfürWirtschaft und Technologie“*
[30] http://www.bmwi.de/BMWi/Redaktion/PDF/E/energiestatistiken-energiegewinnung-energieverbrauch,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf (last visit: 12.04.2017)



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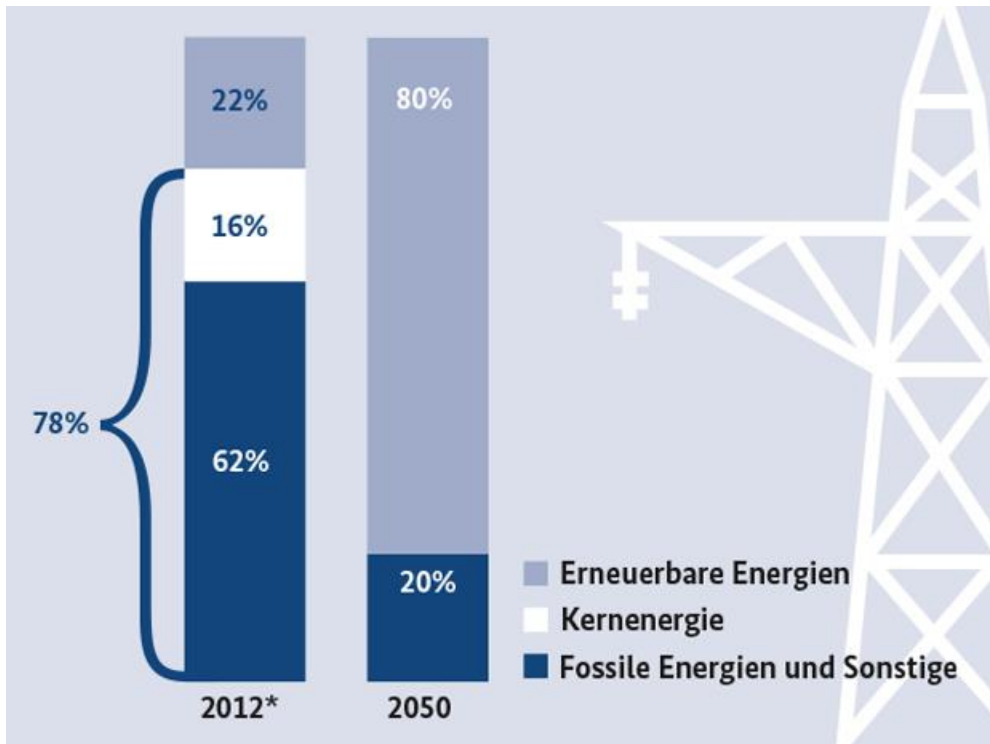


The aim is to achieve an "energy-mix" composed of renewable and conventional forms of energy production by 2050. This mix (2012 as reference point, 1990 as base line, 2050 as target point) should be composed according to the following graphic:

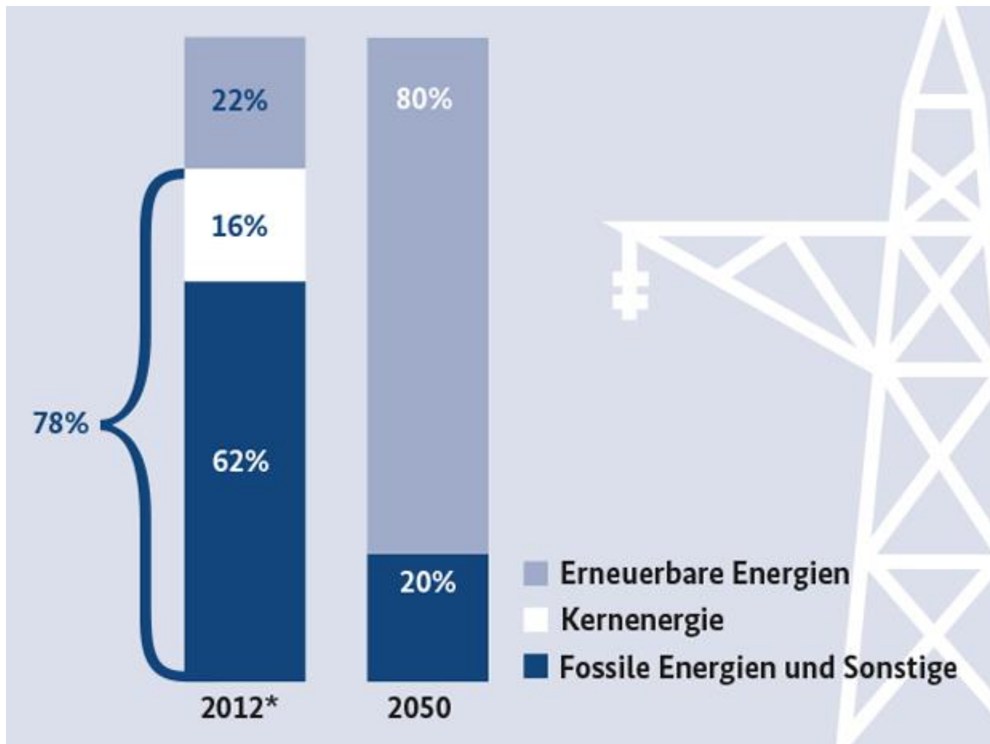
Source: Federal Ministry for Economic Affairs and Technology[31][32]

Explanation:

- ErneuerbareEnergien: Renewable sources of energy
- Kernenergie: Nuclear energy
- Fossile Energien: Fossil fuels/energy

c) The overall quota of energy consumption shows a significant decline, the ratio of energy efficiency experiences a significant rise

[31] *"BundesministeriumfürWirtschaft und Technologie"*
[32] http://www.bmwi.de/DE/Themen/Energie/Energiewende/energiekonzept.html(last visit: 12.04.2017)



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4. Concrete objectives:

The Federal Ministry for Economic Affairs and Technology[33] listed the concrete objectives to be achieved by 2050 including the important milestones as follows[34]:

- Compared to 1990 (the chosen base line) the overall number of climate-damaging emissions (gases) has to be reduced according to this sliding scale:
  - until 2020: 40 %
  - until 2030: 55 %
  - until 2040: 70 %
  - until 2050: 80 – 95 %
- Primary energy consumption will recede as follows:
  - until 2020: by 20 %
  - until 2050: by 50 %
- Energetic productivity has to be augmented by 2,1% every year
- Consumption of electricity – compared to 2008 – will drop
  - until 2020: by 10 %
  - until 2050: by 25 %
- Demand for heating of buildings will decline
  - until 2020: by 20 %
  - until 2050: by 80 %
- Percentage of renewable forces of energy will augment to
  - until 2020: 18 %
  - until 2030: 30 %
  - until 2040: 45 %
  - until 2050: 60 %

- Renewable sources of energy will contribute to gross consumption of electricity
  - until 2020: 35 %
  - until 2030: 50 %
  - until 2040: 65 %
  - until 2050: 80 %

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5. Actionfields:

The Federal Ministry for the Environment, Nature Conservation and Nuclear Reactors[35] identified the following action fields and actions to be pursued in the process of achieving the set goals[36]:

a) Renewable sources of energy serve as main pillar in supplying energy in the future
b) Energy efficiency is key
c) Combination of nuclear and fossil plants
d) More efficient and potent electricity infrastructure
e) Both energetic renovation of existing buildings and new constructions
f) Challenge is maintaining high level of mobility
g) Research with the aim to create innovation and find new technologies
h) Set up an integrated energy supply system aligned with European and international partners
i) Public acceptance and transparency

6. Trends 2016:

Of course the time elapsed since the adoption of the new policy is not very long. But it is worth to have a short closer look at the numbers in order to determine if there is movement into the right direction.
The think tank "Agora Energiewende"[37] in March 2016 listed some trends triggered by the energy revolution[38] (selection):

a) Renewable sources of energy in the year 2015 produced nearly twice as much electricity as was the case in 2010. Their ratio amounts to 30,1 % (as compared to only 16,6% in 2010) of the overall production. Energy produced based on wind more than doubled, photovoltaic electricity tripled.
This signifies quite a remarkable achievement in such a short period of time in favor of reaching the objectives of the energy revolution.

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b) Nuclear power plants lost importance. Their share of energy supply dropped from 22,2% in 2010 to 14,1%. Nine nuclear power plants were decommissioned since 2010. Their production capacity was more than replaced by renewable sources.
This significantly adds to one of the primary objectives, it is the obliteration of nuclear power production.

c) Lignite-fired power stations working on brown coal in 2015 produced around 6% more electricity than 2010. This might be due to falling CO2-prizes in emission trade. This constitutes an undesired effect working against the intended trend, so has to be qualified as negative.

d) 2015 the quota of export to neighboring countries rose to 8% of the produced electricity. This resembles a triplication of electricity exports compared to the baseline 2010. One possible explanation or danger associated with this effect is that subsidized German electricity may replace foreign energy production, the other one is that the undesired forms of energy production may only exported, not eliminated. It is too early to tell exactly, but that development has to be monitored closely.

These developments may only represent a snapshot, and maybe not even an accurate one. But one inference can be drawn without a shred of doubt: renewable and therefore sustainable forms of energy production are on the rise.

7. Legal roadmap:

The ambitious objectives resemble no less than an overall reconstruction and re-organization of a key element of our modern industrialized society, therefore trigger implications, i.e. need for adoption in practically all legal and administrative areas. The overwhelming extension of these legal consequences would overburden this format, so the article will limit itself on outlining a panoramic overview of the legislation involved in that mega-project.
To illustrate the enormous complexity of the endeavor undertaken, the legal system governing the supply system of gas and electricity may serve as an example outlining the strategy turned into legislation and the adopted ordinances to successfully implement that strategy. The Federal Ministry for

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Here the list in alphabetical order (according to German naming):

a) ***Atomgesetz (ATG):*** **"Atomic Energy Act"**
This legislative act, literally translated as "Atom Law", but in a wider sense to be understood as "Law on nuclear matters", provides as objective the protection of society against all negative effects caused by nuclear energy. In particular it deals with ionizing radiation. The law defines the fundamental legal basis concerning nuclear power plants and transposes international obligations into applicable national rules.

b) ***Bundesbedarfsplanungsgesetz (BBPlG):*** **"Federal needs planning act"**
The law specifies the planning necessities associated with the modification and amplification of infrastructure needed to re-organize the high voltage transmission lines grid.

c) ***Bundesimmissionsschutzgesetz (BImSchG):*** **"Federal emission control act"**
The statute's objective is to protect human lives, animals, plants, soil, water, and the atmosphere against detrimental influences generated by emissions (contamination of air, noise, seismic effects, light, heat, and beams).

d) ***Bundesnaturschutzgesetz (BNatSchG):*** **"Federal nature conservation act"**
This law pretends to establish protection of nature and a natural environment.

e) ***Energieleitungsausbaugesetz (EnLAG):*** **"Law on Energy Line Extension"**
The law establishes the legal regime governing the construction and amplification of the infrastructure in the area of high-voltage energy lines. Sites of sustainable production of energy do not coincide with areas of consumption, so a vast need to transport energy over long distances is

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generated. The enhancement of the existing net of energy lines therefore is a key component for ensuring the ongoing energy supply.

f) ***Energiesicherungsgesetz (EnSiG):*** **“Energy Security Act“**
This act stipulates the rules guiding the case of a supply gap.

g) ***Energie- undKlimafondsgesetz (EKFG):*** **“LawonEnergy and ClimateFund”**
This act sets up a fund in order to finance additional needs related to energy transition.

h) ***Energieverbrauchskennzeichnungsgesetz (EnVKG):*** **Act on Energy Consumption Labelling“**
This law imposes an obligation on a broad variety of products to label the energy consumption. This is designed to enable the consumer to make a conscious choice, based on the energy consumption of the product in question. This ultimately concerns life-time energy cost of the product, therefore provides the consumer with important information as to the economic advantages provided by this product. This is intended to enhance energy efficiency, caused by a reduction of energy consumption.

i) ***Energiewirtschaftsgesetz (EnWG):*** **“Energy Industry Law”**
This federal act sets the framework with intend to ensure a safe, reliable and economic supply of gas to the consumer.

j) ***Erneuerbare-Energien-Gesetz (EEG):*** **“Renewable Energies Law”**
This legislative Act is concerned with facilitating and subsidizing research in the field of renewable sources of energy.

k) ***Stromsteuergesetz (StromStG):*** **“Electricity Tax Law”**
This law levies taxes dealing with electricity. The purpose is to regulate the imposition of taxes on electricity and ultimately steer its consumption according to the guiding principles of the energy revolution. By that means a leverage effect is aspired. This means that by granting economic advantages to certain desired forms of electricity while “punishing” others through comparatively higher costs common sense or economic prudence will cause a feedback multiplying the desired effect, i.e. ultimately lead to the intended forms of consumption and production.

l) ***Treibhaus-Emissionshandel s- Gesetz (TEHG): “Glasshousetradelaw”***
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This law stipulates righs of emission and asigns – or allocates – them to specific objectives to be achieved.

The vast majority of these laws described are new, adopted with the purpose of implementing the political plan of energy transition. They contain the legal framework and guidelines governing this implementation process. These changes in the legal order come accompanied and reinforced by an almost endless number of modifications of existing laws and ordinances. Listing them all simple exceeds the possibilities of this format. As mentioned before, the primary concern and focus of this article is in facilitating a general understanding of the outlines of that mega-project. It being in flux, details are subject to change anytime anyway. Therefore it would not make much sense to dwell on them and just draw the overall picture.

8. Temporary results:

Realizing this energy transition implies the creation of formerly unknown fields of law generating the need to develop a completely new legal framework. Not even the most skilled lawyer versed in all kinds of different areas of law is capable of comprehending the means and every single detailed regulation coming with it. This effect is aggravated by the general complexity of the German legal system and the applied legal technique, owed to a federal state comprised to different layers of legislations.
The overall impression remains, and that is that environmental law as a legal matter of its own experiences and finds itself in a substantial upward trend spiraling to the top of legislative attention.

V. Development in other countries:

As contraposition – or more precisely – juxtaposition a short overview over some selected countries is merited to further a general understanding of their overall approach to the matter. This will allow a deeper insight into the uniqueness of the German energy revolution, both in depth and width.

1. Denmark:

Due to the almost absolute dependency on the importation of crude petroleum, Denmark was shaken seriously by the aftermath of the oil crisis. In order to escape that dependency, there were numerous considerations to diversify the energy production, especially the construction of nuclear power plants. A strong anti-nuclear movement put a halt on those planes. Denmark

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nowadays puts great emphasis on renewable sources of energy. One feature of those diversification plans builds on specific climate conditions predominant in Denmark, i.e. the frequency and intensity in the occurrence of wind. Accordingly, wind energy plays a key role in Denmark's energy policy.

2. France:

It took until 2012 to spark a public discussion in France dealing with the topic of energy transition. In September 2012 the Minister of Environment, DelphineBatho, coined the phrase "environment patriotism". In the wake of that growing public concern, government adopted a plan for a future energy transition. France today relies heavily on nuclear power plants and generates approximately 75% of its electricity in such installations. Therefore an energy transition does confront the energy-wise mono-structured country with profound challenges. Nuclear energy traditionally enjoys a strong support of the population, or at least no serious opposition. Having said this, it is obvious that the anti-nuclear movement is weak compared to other countries, especially Germany.

3. Japan:

Due to the Fukushima incident/catastrophe, the Japanese government in 2012 decided to gradually abandon nuclear energy. The actual number of nuclear power plants in action producing electricity in Japan is around 43 (2016) as compared to around 50 in 2012 plants. For some time after the Fukushima incident all remaining nuclear power plants went out of service, but are meanwhile back online producing electricity again. In recent years Japan seems to turn around once more and initiate renunciation of the abandonment once more putting great emphasis on nuclear power[43].

4. Austria:

Austria's geographical particularity traditionally engendered a strong orientation towards renewable sources of energy, above all hydroelectric power. At this point Austria generates around 76% of its electricity

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[43]SueddeutscheZeitungvom 11.04.2014, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=0ahUKEwi4m_m0kZzTAhWCbhQKHUujBJUQFggyMAQ&url=http%3A%2F%2Fwww.sueddeutsche.de%2Fpolitik%2Fdrei-jahre-nach-fukushima-japan-setzt-wieder-auf-atomkraft-1.1935179&usg=AFQjCNHK7ToSqPso_16IJQ9g7mukv98Cnw (last visit: 12.04.2017)

nowadays puts great emphasis on renewable sources of energy. One feature of those diversification plans builds on specific climate conditions predominant in Denmark, i.e. the frequency and intensity in the occurrence of wind. Accordingly, wind energy plays a key role in Denmark's energy policy.

2. France:

It took until 2012 to spark a public discussion in France dealing with the topic of energy transition. In September 2012 the Minister of Environment, DelphineBatho, coined the phrase "environment patriotism". In the wake of that growing public concern, government adopted a plan for a future energy transition. France today relies heavily on nuclear power plants and generates approximately 75% of its electricity in such installations. Therefore an energy transition does confront the energy-wise mono-structured country with profound challenges. Nuclear energy traditionally enjoys a strong support of the population, or at least no serious opposition. Having said this, it is obvious that the anti-nuclear movement is weak compared to other countries, especially Germany.

3. Japan:

Due to the Fukushima incident/catastrophe, the Japanese government in 2012 decided to gradually abandon nuclear energy. The actual number of nuclear power plants in action producing electricity in Japan is around 43 (2016) as compared to around 50 in 2012 plants. For some time after the Fukushima incident all remaining nuclear power plants went out of service, but are meanwhile back online producing electricity again. In recent years Japan seems to turn around once more and initiate renunciation of the abandonment once more putting great emphasis on nuclear power[43].

4. Austria:

Austria's geographical particularity traditionally engendered a strong orientation towards renewable sources of energy, above all hydroelectric power. At this point Austria generates around 76% of its electricity

[43]SueddeutscheZeitungvom 11.04.2014, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=0ahUKEwi4m_m0kZzTAhWCbhQKHUujBJUQFggyMAQ&url=http%3A%2F%2Fwww.sueddeutsche.de%2Fpolitik%2Fdrei-jahre-nach-fukushima-japan-setzt-wieder-auf-atomkraft-1.1935179&usg=AFQjCNHK7ToSqPso_16IJQ9g7mukv98Cnw (last visit: 12.04.2017)

production (but one should keep in mind that home production does not satisfy the growing demand, Austria thereby heavily relying on import) by means of renewable forms of energy. Austria adopted a law prohibiting the use of nuclear power plants for the purpose of energy and/or electricity production. In compliance with that stipulation, Austria does not dispose of nuclear power plants.

5. Great Britain:

Great Britain puts great emphasis on wind energy. It occupies a leading position worldwide. But the country also leans on nuclear power very heavily.

VI. International project “Desertec”:

This overview would not be complete without at least mentioning very briefly the international “Desertec” project. The project started as a large scale project supported by a consortium named “Desertec industrial initiative (DII)” in Germany. The project’s aim was directed at organizing a global energy supply plan based on renewable sources of energy, primarily voltaic. The idea – in very broad strokes – was to generate energy in locations where solar radiation was intense – for example, the sun-rich Sahara deserts. The generated electricity would then have to be transferred by means of high-voltage currents to the consumption sites. This project is special with regard to setting a counter-trend to decentralization away from centralized units and large suppliers. Here an international initiative strived to establish energy production based renewable energy.
For Europe this project would primarily signify the import of electricity produces in the sunny African deserts. There the degree of effectiveness of that specific form of photovoltaic energy production being optimal, production – provided cost-efficient means of transportation – would be both efficient and economic.

VII. Final results:

As indicated several times above, the discussion revolving around the energy revolution or transition has not even remotely come to an end. One current in public opinion questions the project as a whole seeing the only solution capable of realization in a strong orientation towards nuclear energy. Others do not deny the course in general, but doubt the feasibility of the objectives and advocate a less radical approach. On the other end of the spectrum, it is argued that the energy revolution is not even remotely revolutionary enough,

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stopping way short of a 100% of reliance on renewable energy. Erasing all forms of non-renewable energy is considered the only way to achieve the goals set forth, especially to counter the greenhouse effect. Only wiping out every major contributor would ensure success. The long period of time until 2050 naturally yields leeway for ample adoptions and modifications. And not even the strongest supporter would deny the general need for re-adjustments in response to future developments and influences.
Not matter what standpoint one prefers to adopt, there is one common denominator in public discussion: energy revolution or transition – notwithstanding the evolutionary character – resembles an open heart surgery of contemporary German economy.
It is not necessary to possess prophetic skills in order to foresee that there are two key factors in play: first, the price of energy (the lifeblood of economy), and second, stability and reliability of energy supply. Now the prize question is: will both parameters stay within the forecasted limits over such a long period of time? Of course the project has a price. For the time being, Germany seems to be willing to pay that prize. Until what point, that is the question. And do people think long-term or short-term? Maybe in the long run advantages will surpass the cost and disadvantages connected with it by far. But will German society have such a long breath and stamina?

Only time will tell.

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SELF-DEFENSE IN OPERATION: THE ANTICIPATORY AND PREEMPTIVE USE OF MILITARY INSTRUMENT

Prof. Dr. Qerim Qerimi
European Collage of Kosovo

I. INTRODUCTION

The key question to be explored in this article relates to the legality of the use of armed force in self-defense. The focus, however, goes beyond what could be conceived as a classic notion of self-defense, meaning the use of military instrument by a state against another state after the attack has occurred. In contrast, the ultimate aim here is to appraise the legality of the use of force in anticipatory and preemptive self-defense.

More specifically, two scenarios or situations will be particularly examined: (1) the anticipatory self-defense in cases of terrorist threats or threats to, or use of, nuclear weapons; and (2) the use of force in self-defense in cases when the source of attack has been a non-state actor rather than an independent and sovereign state.

Under the first question, the case of the 2003 Iraqi invasion by the United States and its allies, principally the United Kingdom and Australia, will be analyzed in particular. The notion of anticipatory self-defense will be considered in light of the *Caroline* doctrine. In order to determine and evaluate the criteria that furnish the legal use of force in anticipatory self-defense, a number of other cases will be discussed, including the Israeli attack on Osirak nuclear reactor in Baghdad in 1981, the 1962 Cuban Missile Crisis, the Israeli attacks in Egypt in the Six-Day War in 1967, as well as the US attacks in Afghanistan and Sudan in 1998 in response to the Embassy bombings in Kenya and Tanzania. In this connection, the article considers a whole set of criteria that could be used to measure the test of legality of the force used in self-defense. Considerations will also be given to the report of the Secretary-General's High-Level Panel on Threat, Challenges and Change, entitled "A More Secure World: Our Shared Responsibility."

With regard to the second question, the article will appraise the use of force in response to attacks originating from non-state actors, taking as a lead example the use of military force against Afghanistan in the aftermath of the September 11 (2001) attacks in the United States. This very context dictates the need for addressing the notion of attribution of state responsibility in international law over the acts of non-state actors or entities. First, however, a general discussion about the principles that define the use of force in self-defense will be offered.

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II. USE OF FORCE IN SELF-DEFENSE

A right exercised for centuries, and known in different times with different labels and regulated under different rules, is both a fundamental instrument in the world constitutive process and yet a subject of much debate and controversy. Although constantly present in the world practice, the bases for initiating the use of force or the *jus ad bellum* in contemporary international law is mostly codified in the United Nations Charter. Article 51 of the Charter is its spirit:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[44]

There is no difficulty in understanding that there ought to be an armed attack. The focus of debate is around the point whether the individual or collective resort to force can be exercised against an attack which has not yet taken place but is reasonably likely to happen in an immediate future.

Read within its ordinary meaning, Article 51 does not require the occurrence of an armed attack. It does not stipulate the right of self-defense "after an attack has occurred," or "once an attack occurred"; rather, "if an armed attack occurs."

Going back to the preparatory work of the UN Charter, Professor Bowett finds that this work suggests "[o]nly that the article [51] should safeguard the right of self-defense, not restrict it."[45] Further, Committee 1/I pointed out in its report, which received the approval of both Commission I and the Plenary Conference that "[t]he use of arms in legitimate self-defense remains admitted and unimpaired"[46] by the UN Charter.

Moreover, the UN Secretary-General in its report, entitled *In larger freedom: towards development, security and human rights for all*—a substantial plan for reform at the United Nations, presented in September 2005 to the UN Summit—concluded that "[i]mminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as

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[44]*Charter of the United Nations*, art. 51, 1, Can. T.S. 1945 No. 76; [1976] Yrbk. U.N. 1043; 59 Stat. 1031, T.S. 993 (Signed at San Francisco on June 26, 1945; *entered into force* on October 24, 1945) [hereinafter U.N. CHARTER].

[45] Cited by Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963).

[46] Report of Rapporteur of Committee 1 to Commission I, 6 Doc. U.N. Conf. Int'l. Org. 446, 459 (1945).

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1) the Council should come to a common view on how to weigh the seriousness of the threat;
2) the proper purpose of the proposed military action;
3) whether means short of the use of force might plausibly succeed in stopping the threat;
4) whether the military option is proportional to the threat at hand; and
5) whether there is a reasonable chance of success.[50]

The Security Council should henceforth adopt a resolution, declaration of commitment or a code of conduct, employing the stated principles. This notwithstanding, the customary practice of the world community of states with regard to self-defense should be also honored. More on this will follow in the following section.

[47] The Secretary-General, *Report of the Secretary-General: In larger freedom: towards development, security and human rights for all*, 124, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter REPORT OF THE SECRETARY-GENERAL] *See*also Kofi Annan, *"In Larger Freedom": Decision Time at the UN*, FOREIGN AFF. May/June 2005, where the Secretary-General held the view that "[m]ost lawyers recognize that the provision [Article 51] includes the right to take preemptive action against an imminent threat; it needs no reinterpretation or rewriting."
[48]REPORT OF THE SECRETARY-GENERAL, 125. In his article in *Foreign Affairs*, the Secretary-General further notes: "[Y]et today we also face dangers that are not imminent but that could materialize with little or no warning and might culminate in nightmare scenarios if left unaddressed. The Security Council if fully empowered by the UN Charter to deal with such threats, and it must be ready to do so." *Id.*
[49]REPORT OF THE SECRETARY-GENERAL, 126.
[50]*Id.*

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[48]REPORT OF THE SECRETARY-GENERAL, 125. In his article in *Foreign Affairs*, the Secretary-General further notes: "[Y]et today we also face dangers that are not imminent but that could materialize with little or no warning and might culminate in nightmare scenarios if left unaddressed. The Security Council if fully empowered by the UN Charter to deal with such threats, and it must be ready to do so." *Id.*

[49]REPORT OF THE SECRETARY-GENERAL, 126.

[50]*Id.*

1. The anticipatory and preemptive self-defense

1.1. Caroline Doctrine and customary international law

Legal arguments on anticipatory self-defense are usually based on the criterion of *imminency*. Moreover, the international law requires that an act of self-defense be proportional and necessary to an armed attack that is either imminent or underway. This is also known as the *Caroline* doctrine, dated from an 1837 incident involving the *Caroline*, a vessel used to supply Canadian rebels fighting British rule during the Mackenzie Rebellion.

In this case, British forces crossed into the United States—since they asked the US to put an end to rebel activities on its territory, and it had no results—captured the *Caroline*, set it ablaze, and sent it over Niagara Falls. As a result, two US citizens died. It was later on followed by an exchange of diplomatic notes between the US Secretary of State Daniel Webster and his British counterpart, Lord Ashburton. Webster argued that defensive actions require "[a] necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation … [and must be] justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."[51] This was also accepted by Lord Ashburton and, later on, cited and used as reflection of a principle of customary international law.

In concreto and in line with the *Caroline* doctrine, the general international acceptance of the Israeli pre-emptive attacks in the Six-Day War—known also as the June War or the 1967 Arab-Israeli War—has been viewed as a lawful resort to force in anticipatory self-defense.[52]

In its decision in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* and the *Case Concerning Oil Platforms* (*Iran v. U.S.*), the ICJ endorsed the view that in customary law "[w]hether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defense."[53] The same was held in the Court's advisory opinion in the case of *Legality of the Threat or Use of Nuclear Weapons*: "[t]he submission of the exercise of the necessity and proportionality is a rule of customary international law…"[54]

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[51] Daniel Webster, Secretary of State, Letter to Lord Ashburton, British Plenipotentiary (Aug. 6, 1842), *reprinted in* John Basset Moore, 2 *A Digest of International Law* 412 (1906).

[52] *See* Rosalyn Higgins, *The Attitude of Western States Towards Legal Aspects of the Use of Force*, in A. CASSESE (ED.), THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 435, 443 (1986) (noting that "[t]here appeared to be a general feeling, certainly shared by the Western states, that taken in context this was a lawful use of anticipatory self-defense, and that for Israel to have waited any longer could well have been fatal to her survival." *See* also ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING (vol. I) (1969).

[53] *Military and Paramilitary Activities In and Against Nicaragua* (*Nicaragua v. U.S.*), 1986 I.C.J. 14 (June 27) (Merits). Case Concerning Oil Platform (Iran v. U.S.), 74, 2003 I.C.J. (Nov. 6) (Merits), *available at* http://212.153.43.18/icjwww/idocket/iop/iopframe.htm.

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The origins of anticipatory self-defense can be traced back to the writings of earlier "publicists" of international law. Emmerich de Vattel has described it in the following terms:

On occasion, where it is impossible, or too dangerous to wait for an absolute certainty, we may justly act on a reasonable presumption. If a stranger presents his piece at me in a wood, I am not yet certain that he intends to kill me; but shall I, in order to be convinced of his design, allow him to fire? What reasonable casuist will deny me the right of preventing him? But presumption becomes nearly equal to certainty, if the prince, who is on the point of rising to an enormous power, has already manifested an unlimited pride and insatiable ambition.[55]

Consider also Cicero from a natural law perspective, arguing around 2,000 years ago:

There exists a law, not written down anywhere but inborn in our hearts; a law which comes to us not by training or custom or reading but by derivation and absorption and adoption from nature itself; a law which has come to us not from theory but from practice, not by instruction but by natural intuition. I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. When weapons reduce them to silence, the laws no longer expect one to await their pronouncements. For people who decide to wait for these will have to wait for justice, too and meanwhile they must suffer injustice first.[56]

1.2. The Case of Iraq: An Inquiry into the legality of the Operation "Iraqi Freedom"

In the case of 2003 intervention against Iraq, the fulfillment of the criteria of imminence can hardly be substantiated as now weapons of mass destruction were found and Iraq was not about to launch an attack on or against the United States in the immediate future. Nor there were any compelling evidence that Iraq was distributing weapons of mass destruction to the terrorist organizations or in any other way supporting or harboring Al Qaeda

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The war in Iraq was, however, charged with justifications combining elements of: (a) preemptive self-defense (the war on terror); (b) humanitarian intervention (the regime's abuses with basic human rights and fundamental freedoms); and (c) invocation of an implied authority from earlier Security Council resolutions on Iraq. This approach is in line with the multi-factor approach, used by the United States in the course of its military actions in the past.

The first claim thus concerns preemptive self-defense as opposed to anticipatory self-defense. Although different definitions had been advanced, the line between the two is often drawn on the nature and the level of threat. Preemptive self-defense is perceived as broader and includes such circumstances, where the threat is not yet imminent or operational, "[h]ence not *directly* threatening, but that, if permitted to mature, could then be neutralized only at a higher and possibly unacceptable cost."[57] On the other hand, a claim to anticipatory self-defense "[m]ust point only to a palpable and imminent threat,"[58] whereas the claim for preemptive self-defense "can point only to a possibility, a contingency."[59] For example, the claim to engage, in certain circumstances, in a "regime change" is portrayed as a corollary of preemptive self-defense "[f]or if a regime that is animated by unlawful ambitions against its neighbors continues to develop the ABC weapons, and especially if it does so in violation of international commitments, the deprivation of those weapons in a single instance may only reinforce the regime's intentions to try even harder the next time to develop and deploy the weapons so that it can then paralyze subsequent efforts to control it."[60]

Since most of the authors find this action illegal from the point of view of present-day international law, the intention on the side of the US administration has been to "[p]lace the attack within a broader moral, cultural, and humanistic framework."[61] With obvious difficulties to bring arguments for the war against Iraq within the limits of self-defense it is opted

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[57] W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82 (2003).
[58] *Id.* at 87.
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for a more mixed reasoning and the just war framework,[62] which is reflected in the following key dimensions:
(a) As indicated in the National Security Strategy: "The UnitedState has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction - and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively."
(b) Gross violations of human rights - either against Iraqi religious and ethnic minorities or Iraqis in general - has provided one of the most frequently invoked justifications for waging the war. In countless instances President Bush talked of human rights violations by Iraqi regime of Saddam Hussein. "The dictator who is assembling the world's most dangerous weapons has already used them on whole villages… by torturing children while their parents are made to watch. International human rights groups have catalogued other methods used in the torture chambers of Iraq: electric shock, burning with hot irons, dripping acid on the skin, mutilation with electric drills, cutting out tongues, and rape."
(c) In his 2003 State of the Union address, President Bush pointed out to the conduct of the Iraqi regime that poses a threat to the authority of the United Nations and a threat to peace. Few months later (March 17, 2003), President Bush elaborated further on this point while arguing that past Security Council resolutions provide a sufficient authorization and added that "the Security Council has not lived up to its responsibilities."

The use of force during last decades and arguments behind the same, mark a new paradigm in formation in international law. It is the paradigm of a waning of the sovereign state and more frequent targeting states that turn against their own citizens or which by harboring and supporting terrorism pose a threat to international peace and security. Due to peculiarities of processes in which international law is made and absence of sanctions as we know them in national law, we are likely to see a continuation of formally conceived illegal use of force. Such actions will continue to be driven not only by value-blind interests, but also by genuine moral goals aimed at ending grave humanitarian crisis. In addition, from the point of view of the current state of affairs in international law, these actions are also likely to be driven by genuine, yet uneasy, efforts to reform international law. The UN Secretary General's initiative is such an effort. The extent to which these efforts will be followed by the general State practice is a different and most probably also a difficult matter.

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1.3. Resort to force in preemptive self-defense in cases of state and/or terrorist threats to, or use of, nuclear weapons

Arguments favoring preemptive resort to force have been often made in light of the contemporary threats posed by terrorist networks and nuclear proliferation. The new technologies and the determination of terrorist groups to achieve their goals and produce as much harm as one could to their targeting states is a frightening and often a real world materialized scenario. The same holds true with rogue states acquiring nuclear weapons. With this in mind, this section will observe a number of pertinent cases in the field seeking to define the current international legal framework into a more practical-oriented fashion, and modes of responses to possible future threats.

The key operative provision of the ICJ Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons* legitimizes the use of nuclear weapons. Even though the Court did not reach a definitive conclusion, it did not rule against the use of nuclear weapons. The Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable to armed conflict in any circumstances. Thus, the Court held:

"Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake."[63]

The decision, *inter alia*, is considered to be an undermining force of the non-proliferation of nuclear arms. On the other hand, the Treaty on the Non-Proliferation of Nuclear Weapons—which as of 2015 numbers 190 States as parties—controls and prohibits the spread of nuclear weapons technology. Article 1 of the NPT stipulates:

"Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices."[64]

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[63]*Legality of the Threat or Use of Nuclear Weapons*, 97, 1996 I.C.J. 226 (Judgment).
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Article 2 of the NPT puts restrictions on non-nuclear weapon State Parties not to develop in any way nuclear weapons:

"Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices."[65]

However, the Treaty does not prohibit States to develop, produce and use nuclear energy for peaceful means. Article 4 of the NPT provides:

"1. Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with articles I and II of this Treaty.

2. All the Parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy..."[66]

Beyond these formal considerations related to the legal infrastructure concerning the production or use of nuclear weapons, one should pay particular attention to how the state practice has developed and evolved.

In a related situation, on June 7, 1981, Israeli warplanes struck the Osirak nuclear facility near Baghdad. This action by Israel was a pre-emptive strike to deny Iraq the capability of producing nuclear weapons; weapons Israeli intelligence believed was in the works. The Israeli actions raised negative responses and condemnation by the international community. The UN General Assembly in its resolution 40/6 (November 1, 1985) strongly condemned "[a]ll military attacks on all nuclear installations dedicated to peaceful purposes, including the military attacks by Israel on the nuclear facilities of Iraq." In the 2286th meeting of the UN Security Council, ten days after the attack, most of the countries condemned the attack, though the United States blocked the prescription of the act as "aggression" in the wording of relevant Security Council resolution.[67]

The Association of South-East Asian Nations in a statement presented by the representative of Philippines said:

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[65]*Id.* art. 2.

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"The Foreign Ministers condemn the recent unwarranted Israeli air attack on Iraqi nuclear installations near Baghdad and regard it as a serious violation of the Charter of the United Nations and international law. They express grave concern that this dangerous and irresponsible act would escalate existing tension in the area and pose a serious threat to international peace and security."[68]

The Permanent Representative of Hungary made the following comment:

"All people of good sense throughout the world learned with profound indignation the news of the unjustifiable and unprecedented attack carried out by the Israeli Air Force against a nuclear installation near the Iraqi capital."[69]

The Representative of Italy stated as follows:

"My Government views the Israeli military action against the Tamuz nuclear center with the outmost concern and firmly condemns it as an unacceptable breach of international law."[70]

From a more a contemporaneous perspective, judging illegal actions and failures to comply with its international obligations of the Iraqi regime under Saddam Hussein and their condemnation and actions that were taken by the international community, such as the intervention in the Gulf War and regime's further noncompliance, there is at least a general reluctance to not accepting the bombing of nuclear facility in 1981 as a justifiable action. As Professor Reisman notes, "[w]ithin a decade, many of the states who had voted to condemn Israel in the General Assembly, including many of the members of the Arab League, must surely have revised their view of action. Scholars still debate the lawfulness of the Israeli action, though I believe that now the general consensus is that it was a lawful and justified resort to unilateral, preemptive action."[71]

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[68] Statement by the Permanent Representative of Philippines to the Security Council, Summary Record of 2286th mtg. 4, U.N. Doc. S/PV.2286 (June 17, 1981).

[69] Statement by the Permanent Representative of Hungary to the Security Council, Summary Record of 2286th mtg. 58, U.N. Doc. S/PV.2286 (June 17, 1981).

[70] Statement by the Permanent Representative of Italy to the Security Council, Summary Record of 2286th mtg. 72, U.N. Doc. S/PV.2286 (June 17, 1981).

[71] W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 17 - 18 (1999). Professor Reisman further states that, "[t]he attack is also instructive in that it cautions scholars to defer inferences until a certain period of time has elapsed. In the nature of these attacks, the targeted state is often able to command instant sympathy, while the preemptive attacker may require more time to publicize its intelligence information and elaborate its justifications, both of which may ultimately prove to be more persuasive to the international decision process." *Id.* at 18. *See* also W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82 (2003). Rivkin et al. conclude that, "[t]he international inaction strongly suggests a fundamental recognition that Israel acted in

"The Foreign Ministers condemn the recent unwarranted Israeli air attack on Iraqi nuclear installations near Baghdad and regard it as a serious violation of the Charter of the United Nations and international law. They express grave concern that this dangerous and irresponsible act would escalate existing tension in the area and pose a serious threat to international peace and security."[68]

The Permanent Representative of Hungary made the following comment:

"All people of good sense throughout the world learned with profound indignation the news of the unjustifiable and unprecedented attack carried out by the Israeli Air Force against a nuclear installation near the Iraqi capital."[69]

The Representative of Italy stated as follows:

"My Government views the Israeli military action against the Tamuz nuclear center with the outmost concern and firmly condemns it as an unacceptable breach of international law."[70]

From a more a contemporaneous perspective, judging illegal actions and failures to comply with its international obligations of the Iraqi regime under Saddam Hussein and their condemnation and actions that were taken by the international community, such as the intervention in the Gulf War and regime's further noncompliance, there is at least a general reluctance to not accepting the bombing of nuclear facility in 1981 as a justifiable action. As Professor Reisman notes, "[w]ithin a decade, many of the states who had voted to condemn Israel in the General Assembly, including many of the members of the Arab League, must surely have revised their view of action. Scholars still debate the lawfulness of the Israeli action, though I believe that now the general consensus is that it was a lawful and justified resort to unilateral, preemptive action."[71]

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Contrary to this, in another event, in year 1967, the institutions of the international community did not condemn the initiation of the Six-Day War by an Israeli attack on Egyptian airports. According to Professor Reisman, the relation that prevailed between Egypt and Israel at the time may have already been one of belligerency, so that the air attack could have been seen as anticipatory or even reactive, rather than preemptive, self-defense. There is a common understanding within the scholars community that, "[i]f a state of war exists, a belligerent need not wait until its adversary strikes in order to respond militarily, but is entitled, itself, to select the moment of initiation or resumption of overt conflict."[72] Similarly, Professor Dinstein argues that Israel's actions in attacking Egypt, Jordan, and Syria in 1967 were legally justified based upon the hostile measures these states had taken against Israel.[73]

A number of other cases during the 1980s were framed around the borderline between anticipatory and preemptive self-defense. These include the Great Britain's action of 1982 for a two-hundred mile exclusion zone, directed toward all non-British vessels, around the Falkland Islands. One year later, Sweden declared the right to use military force against any submarine sailing within twelve miles of her territorial sea. President Ronald Reagan attacked terrorist targets within Libyan territory to prevent any future terrorist attack against the United States citizens and interests and, in 1989, President George H.W. Bush intervened in Panama. The Administration argued that Panama's Manuel Antonio Noriega posed a threat to the United States service members that were serving in Panama at the time and their families.

From all these cases, however, the 1962 Cuban Missile Crisis is widely viewed as the most prominent example of an anticipatory self-defense. As a preventive measure to the installation of Soviet's short-and intermediate-range offensive nuclear missiles in Cuba, President John F. Kennedy imposed a "quarantine" on the island. The missiles have been supposedly able to reach the United States within a minute's time. The US action in fact intended a blockade of the Soviet ships delivering nuclear missiles and installing them in Cuba. In October 22, 1962, President Kennedy delivered a speech to the nation:

This Government, as promised, has maintained the closest surveillance of the Soviet military buildup on the island of Cuba. Within the past week unmistakable evidence has established the fact that a series of offensive missile sites is now in preparation on that imprisoned island.

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accordance with her rights under international law to anticipate, and foil, attacks before they are launched." David B. Rivkin, Jr., Lee A. Casey, and Mark Wendell DeLaquil, *War,International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Preemption and Law in the Twenty-First Century*, 5 CHI. J. INT'L L. 467, 480 (2005).

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This urgent transformation of Cuba into an important strategic base - by the presence of these large, long-range, and clearly offensive weapons of sudden mass destruction - constitutes an explicit threat to the peace and security of all the Americans, in flagrant and deliberate defiance of the Rio Pact of 1947, the traditions of this nation and hemisphere, the joint Resolution of the 87th Congress, the Charter of the United Nations, and my own public warnings to the Soviets on September 4, and 13 [1962][74]

The Kennedy Administration publicly justified its actions as an act of self-defense. On October 23, 1962, President Kennedy ordered by Proclamation the US forces to stop the delivery of offensive weapons to Cuba. Aiming "to defend the security of the United States," the Proclamation reads *inter alia* that:

The forces under the President's command were ordered, beginning at 2 p.m.Greenwich time October 24, 1962, to interdict the delivery of offensive weapons and associated materiel to Cuba. To enforce this order, the Secretary of Defense was ordered to take appropriate measures to prevent the delivery of the prohibited materiel to Cuba, "employing the land, sea, and air forces of the United States in cooperation with any forces that may be made available by other American States."[75]

Speaking of the action, Professor Myres S. McDougal commented that "[t]he use by the United States of the military instrument was as limited as could have been fashioned, extending only to the selective interdiction of certain types of weapons. The United States acted openly, after advance warning that the establishment of an offensive military base in Cuba would be regarded as a threat to its security. The United States immediately reported its action to the United Nations Security Council, asking for appropriate measures from that body."[76] In response to Professor Quincy Wright's comments that "[u]nder general principles of international law and several treaties, the United States was in principle bound to respect the sovereignty of Cuba in its airspace,"[77] and that, "[i]t is difficult to find that the Soviet Union

[74] 4 WHITEMAN, DIGEST OF INT'L LAW 523 - 24.

[75] Proclamation No. 3504 of Oct. 23, 1962, at 717, 27 Fed. Reg. 10, 401 (1962).

[76] Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963). He further noted that, "[i]n a better organized world, mankind might be able to dispense with a conception of self-defense which confers upon a claimant target state as much initial discretion as does the conception so long honored in customary international law. Until that better organization is more nearly achieved, the task which confronts free peoples is, however, that of clarifying and applying a conception of self-defense which will serve their common interests in minimum order without imposing upon them paralysis in the face of attacks from community members who do not genuinely accept the principles of minimum order. The importance of the Soviet-Cuban quarantine is in its indication that such a clarification and application can effectively be made and that free peoples do not, as some have insisted, have to choose between the rhetoric restraints of international law and their own survival." *Id.*

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violated any obligation of international law in shipping missiles to, and installing them in Cuba at the request of the Castro government,"[78] Professor McDougal stated: "[t]he position taken by Professor Wright that Article 51 of the United Nations Charter must be construed to limit the customary right of self-defense by states to reactions against 'actual armed attack' would not appear to be supported by any of the commonly accepted principles for the interpretation of international agreements."[79] He recalled that the appropriate goal in interpreting great constitutional agreements, such as the United Nations Charter, is that of ascertaining the genuine expectations, created by the framers and by successive appliers of the agreement, in contemporary community members about what future decisions should be; the words and behavior in the past are relevant only as they affect contemporary expectations about the requirements of future decision.[80] Further, Professor McDougal notes that, there is not the slightest evidence that the framers of the United Nations Charter, by inserting one provision which expressly reserves a right of self-defense, had the intent of imposing by this provision new limitations upon the traditional right of states.[81] If Webster and Ashburton would be alive, they could well agree that the *Caroline* test is met in the *Cuban Quarantine*.[82]

In another event in early 1999, after the massacre of tourists, including Americans in Uganda by Hutu guerrillas, who operated from the Democratic Republic of the Congo, there appears to have been no protest over Ugandan

[78]*Id.*

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[81]*Id.* In addition to McDougal's views, the late Professor Abram Chayes, the then-State Department Legal Advisor presenting the views of President Kennedy's Administration, has stated that the law of the use of force is not "[a] set of fixed, self-defining categories of permissible and prohibited conduct," arguing that the quarantine against Cuba was a justified response to the threat posed by the Soviet missiles that had been placed there. He described the approach taken at that time as a "common-lawyer" approach where law is open to a broad range of interpretation and emphasis. Abram Chayes, *The Legal Case for U.S. Action on Cuba*, U.S. Dep't St. Bull. 763 (1962). *See* also ABRAM CHAYES, THE CUBAN MISSILE CRISIS 101 (1974); Abram Chayes, *Law and the Quarantine of Cuba*, 41 FOREIGN AFF. 550 (Apr. 1963).

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President Musaveni's decision to pursue the guerrillas into Congolese territory and to kill them.

The US attacks against paramilitary training camps in Afghanistan in 1998, after the Embassy bombings in Kenya and Tanzania, have also received a degree of support by the international community. Australia, France, Germany, Japan, Spain, and the United Kingdom all responded to a certain extent in positive manner. In addition, the League of Arab States, which condemned as a violation of international the attacks against a pharmaceutical plant in Sudan that the US identified as a chemical weapons facility having ties with Osama bin Laden, did not react against the attacks on Afghanistan. President Clinton explained the attacks in the following manner:

I ordered this action for four reasons: First, because we have convincing evidence these groups played the key role on the Embassy bombings in Kenya and Tanzania; second, because these groups have executed terrorist attacks against Americans in the past; third, because we have compelling information that they were planning additional terrorist attacks against our citizens and others with the inevitable collateral casualties we saw so tragically in Africa; and fourth, because they are seeking to acquire chemical weapons and other dangerous weapons.[83]

Ambassador Bill Richardson, the then-Permanent Representative of the United States to the United Nations notified the Security Council President of the missile attacks in Afghanistan and Sudan, using a mixed argument combining the *Caroline* doctrine and Article 51 of the Charter:

In response to these terrorist attacks, and to prevent and deter their continuation, United States armed forces ... struck at a series of camps and installations used by the Bin Laden organization to support terrorist actions against the United States and other countries. In particular, the United States forces struck a facility being used to produce chemical weapons in the Sudan and terrorist training and basing camps in Afghanistan.

These attacks were carried out after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Laden organization. The organization has issued a series of blatant warnings that "strikes will continue from everywhere" against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing. In doing so, the United States has acted pursuant to the right to self-defense confirmed by Article 51 of the Charter of the United Nations.

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The targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality.[84]

The anticipatory self-defense as discussed above under the *Caroline* case implies the following situation: if you are not attacked, but there is an imminent attack, then a state can act in self-defense as a means of last resort. The *Caroline* doctrine, as agreed by Webster and Ashburton, would allow a target state to act unilaterally against a planned terrorist act emanating from the territory of another state. The *Caroline* doctrine has been used as a justification by Clinton administration in attacks against Afghanistan and Sudan in 1998. In any case, according to Lord Ashburton, any unilateral action that was otherwise lawful would still have to be conducted in ways that minimized the damage suffered by the state in whose territory it was conducted.

The doctrine seems to actually have longer historical roots. The rule clarified in *Caroline* has been used in a number of other previous cases. The roots are sometimes traced to a 1587 case, where England's Queen Elizabeth I sent a fleet under the command of Sir Francis Drake aiming to attack Spanish and Portuguese harbors, especially Cadiz, with the sole aim to preventing or winning time by delaying the arrival of the "Invincible Armada."[85] A quite similar action was taken by Frederick the Great in a 1756 anticipatory enterprise on Saxony and Bohemia against what he saw as an impeding attack by Russia, France, and Austria.[86] In a similar fashion, Britain acted in preemptive self-defense attacking Danish navy as a means of assurance that "these 'assets' did not fall into French hands during the Napoleonic Wars."[87]

Within the more established and legally sound parameters of the right to act in anticipatory self-defense and the more debatable resort to force under the broader preemptive category, the underlying principles that govern any use of force, preventive or reactive, primarily necessity, proportionality and discrimination, form an inherent part of the modern canon on the use of force and ought to be observed. There is an additional obligation flowing from Article 51 of the UN Charter to

[84] Bill Richardson, Letter Dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (Aug. 20, 1998), U.N. Doc. S/1998/780 (1998), *available at* http://www.jb.law.uu.nl/jb-vol/US-SC.pdf.

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[86]*See* Max Boot, Who Says We Never Strike First? N.Y. TIMES 27 (Oct. 4, 2002).

[87]Rivkin et al. *supra* note 42, at 470. Rivkin et al. note that "[I]n 1939, Britain and France exercised their anticipatory self-defense right in warning Hitler that they would consider an attack on Poland to be a *casus belli*, and acted accordingly once their warnings were disregarded. Germany's armed forces were not, of course, at that time menacing either Britain or France, and the only legal right either state would have had to issue an ultimatum to Germany -- since Poland was not British or French territory -- was rooted in their right to anticipate future attacks." *Id.* at 470.

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[85] *See* David B. Rivkin, Jr., Lee A. Casey, and Mark Wendell DeLaquil, *War,International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Preemption and Law in the Twenty-First Century*, 5 CHI. J. INT'L L. 467, 469 - 470 (2005).

[86] *See* Max Boot, Who Says We Never Strike First? N.Y. TIMES 27 (Oct. 4, 2002).

[87] Rivkin et al. *supra* note 42, at 470. Rivkin et al. note that "[I]n 1939, Britain and France exercised their anticipatory self-defense right in warning Hitler that they would consider an attack on Poland to be a *casus belli*, and acted accordingly once their warnings were disregarded. Germany's armed forces were not, of course, at that time menacing either Britain or France, and the only legal right either state would have had to issue an ultimatum to Germany -- since Poland was not British or French territory -- was rooted in their right to anticipate future attacks." *Id.* at 470.

immediately inform the Security Council of the measures undertaken in self-defense.

As with any other discipline of law or even broader knowledge, context furnishes the arsenal of argumentation with specific nuances and differing features that form the ultimate judgment. In all claims to self-defense, thus "the international legal review of the action will be based upon a prudential contextual assessment of factors such as the degree of the threat presented, the availability of a meaningful organized international response, the urgency of unilateral action to prevent or deflect the attack, and the proportionality of the means chosen to the necessity presented by the threat."[88]

2. The justification of the use of force after an attack has occurred by a non-state actor

2.1. The Case of Afghanistan

Following the attacks of September 11 carried out in the territory of the United States, the US initiated the use of force against Afghanistan. The two resolutions adopted by the UN Security Council in the aftermath of September 11, resolutions 1368 and 1373, respectively, affirmed the "[I]nherent right of self-defense as recognized by the Charter of the United Nations,"[89] and recognized that the terrorist attacks against the United States constitute a threat to international peace and security. Therefore, the Security Council acknowledged that the situation implicated the right to self-defense, as set forth in Article 51 of the UN Charter.

Article 51 of the Charter, which provides for the individual and collective right of self-defense to be exercised by States, reads as follows:

"[N]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."[90]

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[88] W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, *supra* note 29, at 88.
[89] S.C. Res. 1368, U.N. Doc. S/Res/1368 (September 12, 2001). S.C. Res. 1373, U.N. Doc. S/Res/1373 (September 28, 2001).
[90] U.N. CHARTER, art 51.

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After the September 11 attacks, this right of self-defense was expressly affirmed in the UN Security Council resolutions 1368 and 1373. In it its Resolution 1368, the Security Council also authorized "[*t]o take all necessary steps* to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism,"[91] (emphasis added) once it stressed "[t]hat those responsible for aiding, supporting, or harboring the perpetrators, organizers and sponsors of these acts will be held accountable."[92] The expressions to "use all necessary means," "take all necessary measures," or "take all necessary steps" were consistently used by the Security Council to authorize the use of force. Among others, this was the language of Resolution 678, which authorized the use of force in the Gulf War in 1990,[93] Resolution 794 on Somalia[94]—which is considered to be the purest UN-authorized humanitarian intervention so far, Resolution 940 on Haiti, which "[a]uthorized Member States to form a multinational force under unified command and control and, in this framework, *to use all necessary means* to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti,"[95] and Resolution 1973 (2011) on Libya, authorizing "all necessary measures" in order "to protect civilians and civilian populated areas under threat or attacks in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory."[96]

The basis for the foregoing authorizations of the use of force is Article 39 of the UN Charter, providing that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[97]

On October 2, 2001, the North Atlantic Council of NATO determined that the United States had been subjected to an armed attack. This determination permitted NATO to invoke its right of individual and collective self-defense agreed to under Article 5 of the NATO Treaty and expressly provided for under Article 51 of the UN Charter. Article 5 of the NATO Treaty states:

The parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by

[91] S.C. Res. 1368, *supra* note 46, 5.
[92]*Id.* 3.
[93]*See* S.C. Res. 678, 2, U.N. Doc. S/Res/678 (November 29, 1990).
[94] S.C. Res. 794, U.N. Doc. S/Res/794 (1992).
[95] S.C Res. 940, U.N. Doc. S/Res/940 (1994).
[96] S.C. Res. 1973, U.N. Doc. S/Res/1973 (2011).
[97]U.N. CHARTER, art. 39.

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Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.[98]

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council.

The US Ambassador to the United Nations, John D. Negroponte notified the President of the Security Council through a letter sent on October 7, 2001 that the United States is exercising its right of self-defense in accordance with Article 51 of the UN Charter. The letter reads:

"[I]n accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defense following armed attacks that were carried out against the United States on September 11, 2001.

On September 11, 2001, the United States was the victim of massive and brutal attacks in the states of New York, Pennsylvania, and Virginia. These attacks were specifically designed to maximize the loss of life; they resulted in the death of more than five thousand persons, including nationals of 81 countries, as well as the destruction of four civilian aircraft, the World Trade Center towers and a section of the Pentagon. Since September 11, my Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks…

In response to these attacks, and in accordance with the inherent right of individual and collective self-defense, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan…"

The Security Council's President at that time, Irish Ambassador Richard Ryan, said Council members were broadly supportive of the military action. He read a statement to the press summarizing the Council's position:

"[T]he members of the Security Council took note of the letters of the representatives of the United States and the United Kingdom sent yesterday

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The UN Secretary-General, Kofi Annan in a statement of October 8, 2001 affirmed the US's right to self-defense. Annan stated that immediately after the September 11 terrorist attacks in the states of New York, Pennsylvania, and Virginia, the UN Security Council "[e]xpressed its determination to combat, by all means, threats to international peace and security caused by terrorist acts."[99] He further noted that the Council "[a]lso reaffirmed the inherent right of individual or collective self-defense in accordance with the Charter of the United Nations. The states concerned have set their current military action in Afghanistan in that context."[100]

Although in the *Nicaragua* case it purported to apply a higher threshold on the right of self-defense, limiting it to an armed attack of *significant scale*, hence not applying to "less grave forms,"[101] the International Court of Justice implicitly recognized in its Advisory Opinion on *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[102] that the post-9/11 responses were taken in self-defense. The Court denied Israel's claims of self-defense paralleling with military actions in Afghanistan, since as the Court noted, [I]srael exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory."[103] In this respect, the outside attacks against the United States on September 11, 2001 could be justified. The Court also recalls the UN Security Council resolutions 1368 and 1373. In this connection, it stated that the circumstances in Israel do not fall under a situation as described by the Security Council resolutions 1368 and 1373.[104] The Court further notes that "[A]rticle 51 of

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The question of imputability of Al Qaeda's actions against the United States to the Taliban regime in Afghanistan will be discussed next.

2.2. State Responsibility

To address the question of imputability, the state responsibility for actions of non-state entities within its territory will be examined. A State has a dual responsibility, both within its territory and outside it, for actions with regard to other states. Or, as Max Huber, the sole arbitrator in *Island of Palmas* case stated:

"Territorial sovereignty ...involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war."[107]

The question here remains the responsibility that a state may have with regard to the actions of a non-state entity, and the extent to which the state needs to be involved in order to be held accountable. The test sets forth by the International Court of Justice in the Nicaragua case *Nicaragua* case requires "an effective control" of the state over the actions of non-state actors.[108]

The post-9/11 practice would shed further light to the debate. After the September 11, 2001 terrorist attacks on the United States, President George W. Bush announced that, in responding to those responsible, "[w]e will make no distinction between the terrorists who committed those acts and those who harbor them."[109] President Bush's claims that there should be no exception of liability for those who *harbor or support* terrorists, as Professor Wiessner notes, would appear to require an even lower standard of control of

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the "host" state over the terrorists in its midst. "Still, it is a rule broadly acquiesced in, if not welcomed in the global community of state."[110]

Both the United Nations Security and Council and the General Assembly have used the *harbor and support* language in their respective resolutions. Resolution 1368 (2001) of the Security Council states "[t]hat those responsible for ***aiding, supporting, or harboring*** the perpetrators, organizers and sponsors of these acts ***will be held accountable.***"[111] Similarly, the UN General Assembly in its September 12 resolution calls "[f]or international cooperation to prevent and eradicate acts of terrorism," and "stresses that those responsible for ***aiding, supporting, or harboring*** the perpetrators, organizers and sponsors of such acts ***will be held accountable***"[112] (emphasis added).

2.3. Harbor and Support: A new rule of customary international law

In light of the aforementioned UN resolutions and their relevant content, the next question to be addressed is whether a specific norm of customary international law has emerged. The classic legal definition of international custom is provided by Article 38 of the ICJ Statute and is conceived as "[e]vidence of a general practice accepted as law."[113] In turn, this means two elements: (1) *usage*, or state practice, and (2) *opiniojuris*, a subjective element that validates the the acceptance of that practice as law.[114]

Traditionally, the development of new rules of customary international law has been equated to a very slow and/or long process.[115] A new, more dynamic concept of the development of new customary international rules has been, however, advanced by the ICJ in its decision in the *North Sea Continental Shelf Cases*. As noted elsewhere, "[n]ational legislation, parliamentary and administrative practice, and the case-law of municipal tribunals" is no more the only valid source of reference in confirming the emergence of a new customary rule; additionally, the views or statements of state representatives should also serve as a source of confirmation.[116] For example, in the *Nicaragua*case, the ICJ relied on the

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[112] G.A. Res. 56/1, 4, U.N. GAOR, 56th Sess., U.N. Doc. A/56/L.1 (September 12, 2001).
[113] Statute of the International Court of Justice, art. 38, 1 (b).
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[115] *Id.*

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statements made by states at diplomatic conferences for confirmation of the customary rule.[117]

The Court's decision in the *North Sea Continental Shelf Cases* thus marks a radical shift in the understanding of the process of customary international law formation, deviating from the traditional understanding or requirement for an extensive period of time and a specific evidence of *opiniojuris* in forming new rules of customary law.[118] The Court held that:

Although ***the passage of only a short period of time is not necessarily … a bar to the formation of a new rule of customary international law*** *on the basis of what was originally a purely conventional rule,* ***an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected,*** *should have been both extensive and virtually uniform in the sense of the provision invoked; -- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.*[119]*(Emphasis added)*

Thus, no matter how short the period from September 11, 2001 may be considered, in the Court's view, it is not a bar to the formation of a new customary international rule. It is significant to note that both the UN General Assembly and Security Council agreed and adopted the same language in their resolutions, following September 11. President George W. Bush, seeking to attribute the acts to the Taliban regime of Afghanistan, in his address to the nation on the evening of September 11, declared that "[n]o distinction between the terrorists who committed these acts and those who harbor them" will be made.[120] Both the General Assembly and the Security Council in their resolutions adopted one day after the attacks stated that, "[t]hose responsible for aiding, supporting, or harboring the perpetrators, organizers and sponsors of such acts will be held accountable."[121] Furthermore, tens of declarations of support were received in the immediate days after the attack by the government of the United States from a very diverse body of states.[122] Many states offered finances, intelligence, law enforcement, military support, and humanitarian aid. Other states joined the

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[117]*SeeMilitary and Paramilitary Activities in and Against Nicaragua* (Nicar. V. U.S.), I.C.J. Rep. 1986

[118] Katherine N. Guernsey, *supra* note 71, at 153.

[119]*North Sea Continental Shelf* (F.R.G. v. Den & Neth.), 1969 I.C.J. 3, 74 (Feb. 28).

[120]STATEMENT BY THE PRESIDENT, *supra* note 66.

[121] S.C. Res. 1368, *supra* note 46; G.A. Res. 56/1, *supra* note 69.

[122] White House Website, News Releases for September 2001, *available at* http://www.whitehouse.gov/news/releases/2001/09.

statements made by states at diplomatic conferences for confirmation of the customary rule.[117]

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United States in its military operations in Afghanistan, while the others, including Saudi Arabia and the United Arab Emirates condemned Taliban's regime failure "[t]o stop harboring criminals and terrorists."[123] For the foregoing reasons, it can be argued that the *harbor and support* by the state of a non-state group or entity is sufficient to attribute the actions of the non-state actor to the state for purposes of international responsibility.

III. FUTURE TRENDS AND CONCLUSIONS

As most recent cases of the use of military instrument, such as in Syria, Libya, and the various instances referred to in the article reveal the constant employment of coercive measures in the context of state interaction in international life.

States have resorted to the use of force both with and without the approval of the UN Security Council. This practice is likely to continue in the future framed both within the confines of anticipatory and preemptive self-defense. The probability is perhaps even higher given the modern state of world affairs and the risks posed by nuclear weapons and transnational criminal groups.

Article 51 of the UN Charter mandates the use of force in self-defense. Its phrasing has been understood to even allow for resort to force prior to the comments of the attacks by the other party, for it provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense ***if an armed attack occurs*** against a member of the United Nations, until the Security Council has taken measures to maintain international peace and security." In a number of cases, as discussed in this article, states have resorted to the use of military instrument prior to the occurrence of any attacks and received wide degree of support by the international community. The more complex question here relates to the circumstances under which one can support the use of force in pre-emptive self-defense, if at all. Or, in other words, the determination of what situations pose or constitute an *imminent* or *underway* threat or attack of the level that could justify anticipatory self-defense. The existence practice of the ICJ, including the *Nicaragua*, *Oil Platform*, and *Wall* cases would appear to demand some form of actual attack, be it, as the Court put it in the Oil Platform case, "the mining of a single military vessel," which in its view, "might be sufficient to bring into play the 'inherent right of self-defense'."

In any event, the UN panel has proposed five basic criteria, which have been adopted in the Secretary-General's Report, which however still remain to be made operational in the arena of use of force:

(a) seriousness of threat (is the threat serious enough to justify prima facie the use of force?);

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[123] *SeeSaudis Criticize the taliban and Halt Diplomatic Ties*, N.Y. TIMES, Sept. 26, 2001, at B5; *Kingdom Cuts Ties with Taliban; Militia Harbors Terrorists Who Cause Harm to Islam and Tarnish the Names of Muslims*, MIDDLE EAST NEWSFILE, Sept. 26, 2001, available at LEXIS, News Group File.

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(b) proper purpose (is the primary purpose of the proposed use of force to halt or avert the threat in question?);
(c) last resort (has every non-military option been explored and exhausted?);
(d) proportional means (is the force proposed the minimum necessary to meet the threat?);
(e) balance of consequences (is it clear that the consequences of action will not be worse than the consequences of inaction?).[124]

Beyond preemptive self-defense and other use of force without the UN Security Council authorization, the international community is more willing to accept the use of force in self-defense in response to actual attacks, even though the attacks have not been *directly* taken by states, but are attributable to them. Considering Afghanistan, the world community agreed with the military actions taken against that state, albeit the source of attack was the terrorist network of *Al Qaeda*, a non-state actor. The previous military actions against Afghanistan in 1998 by Clinton administration, after the bombings of Embassies in Kenya and Tanzania by *Al Qaeda*, although of a lesser gravity, received solid support from the international community. For instance, the League of Arab States that condemned the attack on Sudan as a violation of international law did not react in the case of military attacks against al Qaeda's suspected camps inside Afghanistan. In another event in early 1999, after the massacre of tourists, including Americans in Uganda by Hutu guerrillas, who operated from the Democratic Republic of the Congo, there would appear to have been no protest over Ugandan President Musaveni's decision to pursue the guerrillas into Congolese territory.

The International Court of Justice has had occasion to deal with cases involving or invoking the inherent right to self-defense. The latest of these cases has been the *Wall* Advisory Opinion, in which it recognized the existence of an inherent right of self-defense in the case of armed attack by one State against another State. This right, in the case of use of force against Afghanistan, has been recognized by Security Council resolutions 1368 (2001) and 1373 (2001) and, therefore, implicitly, also by the ICJ in the *Wall* case by way of attribution of state responsibility for acts of non-state actors. As a result, it can be argued that a new customary rule of international law, known as the *harbor and support*, came into existence.

[124]REPORT OF THE SECRETARY-GENERAL, *supra* note 4, 207.

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SOME BASIC FEATURES OF MAJOR PENALTIES UNDER THE CRIMINAL CODE OF THE REPUBLIC OF KOSOVO 1

Prof. Dr. Ali Bajgora

European Collage of Kosovo

Abstract

Criminality in any society is a negative social and individual phenomenon with consequences for the individual in particular and society in general.Considering the severity and consequences of crime, any organized society takes measures to prevent and fight it. Such measures are of preventive and repressive character.
In this plan Kosovo too, with its criminal legislation, takes measures to prevent and fight crime by defining criminal sanctions and other criminal-legal measures.The provision of these criminal sanctions is made by the Criminal Code of the Republic of Kosovo.
A special type of criminal sanction that provides the new Criminal Code of Republic of Kosovo, which entered into force on 1 January 2013, are also major penalties, which are subject to be treated in this paper.

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Introduction

The protection of individual and social values in an organized society, respectively in a state of law, could never have been imagined without the existence and implementation of the Criminal Code. [125]

The Criminal Code as the legal act for regulating the basic issues from criminal fields, namely the provision of criminal acts, liability and criminal sanctions, has an important and dominant role in not only protecting social values but also individual values in society.

The Criminal Code foresees that those figures of offenses that we encounter more in practice, are more stable and recognized in the historical development of society and new figures which are dictated by life. [126]

The development of criminal law in Kosovo has its own way of historical development. Without any claim to treat this historical development of the criminal law in Kosovo, and criminal law institutes comprising the Criminal Code of the Republic of Kosovo, in this paper we will discuss some basic aspects of the main penalties under the Criminal Code of the Republic of Kosovo, which entered into force on 1 January 2013.

The discussion will be based on changes and amendments to the new Criminal Code of the Republic of Kosovo by applying the comparative method as well as other study methods for the concrete topic. The purpose of defining the topic consists in the treatment, in a unique manner, of the innovations that have to do with major penalties under the new Criminal Code of the Republic of Kosovo.

The entry into force of this Criminal Code in the Republic of Kosovo has a great importance in terms of institutional development as well as in terms of reforming the criminal legislation in the Republic of Kosovo, based on European legal norms and principles that have to do with the criminal field.

1. The importance of criminal sanctions and measures of mandatory treatment under the new Criminal Code of the Republic of Kosovo.

The presence of crime itself in society calls for finding and identifying measures to prevent and fight it.

The period of public reaction to crime is long and in its own way has had major transformation[127]. Besides preventive measures as basic measures of society reaction against crime, there are also repressive measures.

[125] I. Elezi, Criminal Law, Special Part, Tirana, 2005, p.8*and*

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Repressive measures are general measures to be taken against the perpetrator after the commission of offense, by state bodies specialized by law, with the aim of combating crime. These measures have repressive character, as opposed to preventive measures and are manifested by the imposition of criminal sanctions to the perpetrators of criminal acts. [128]

To prevent and combat crime in general and criminal offenses in particular, penal sanctions are of great importance and irreplaceable.

The main issues of the criminal law of each country are penal sanctions. These are at the epicenter of attention of the criminal law and criminal policy. Penal sanctions are the main concern of the criminal law by the fact that in all cases where a certain person has committed a dangerous act which is illegal and defined by law as a criminal offense, it is necessary that society against the perpetrator of such to take any measure which aims to prevent the commission of the offense in the future.

In criminal law, the measures which are applied to offenders are called penal sanctions. In general, measures that are foreseen in criminal law and taken by criminal jurisprudence against the perpetrator should have the sole purpose of protecting the individual and the society in general from crime as a dangerous and harmful phenomenon[129].

According to an opinion of an author a sanction in the criminal-legal sense means the implementation of compulsory measures against violators of the norms because of the committed violations of penal-legal norms[130].

According to another opinion, criminal sanctions in general and specifically "punishment" is not a goal in itself, but there are certain objectives; it serves the protection of human rights and freedoms, the protection and strengthening of social order, as well as rehabilitation of the offender and education of other citizens with the spirit of respect for legitimacy "[131].

From the thoughts of these authors a conclusion can be drawn about the notion and the nature of legal penal sanctions based on punitive policy as part of the criminal policy which is realized by the application of penal sanctions.

Even with the new Criminal Code of the Republic of Kosovo in the function of fighting crime, types of penal sanctions are foreseen. According to Article 4 of the Criminal Code of the Republic of Kosovo, these penal sanctions are:

a. Principal punishments;

b. alternative Punishments;

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[128] A. Bajgora, Some Features of Crime and Punitive Policy in Kosovo, Pristina, 2001, p.23.

[129] I.Salihu, Criminal Law, General Part, Pristina, 2005, p.423.

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c. additional Punishments; and
d. A judicial admonition.

In Article 4 of the Criminal Code of the Republic of Kosovo, compulsory treatment measures are also foreseen which may be imposed on a perpetrator who is not criminally responsible or is addicted to drugs or alcohol. These measures are:
a. Mandatory psychiatric treatment and custody in a health care institution;
b. Mandatory psychiatric treatment in freedom; and
c. Treatment with mandatory rehabilitation of persons addicted to drugs or alcohol.

The new Criminal Code of the Republic of Kosovo defines the conditions under which penal sanctions or compulsory treatment measures against the perpetrator could be imposed. Given that, the object of treatment in this paper are some basic legal penal matters dealing with main punishments, we will not stop treating conditions under which penal sanctions or compulsory treatment measures against the perpetrator of penal act may be imposed.

2. Purpose and types of main punishments under the new penal Code of the Republic of Kosovo.

In the criminal law of any state that claims to create an efficient system of penal sanctions against offenders, a special importance, except types of penal sanctions, is also devoted to the purpose of criminal sanctions in general and main punishments in particular.

In this regard, the Criminal Code of the Republic of Kosovo except foreseeing the types of penal sanctions and measures of mandatory treatment, it gives a particular importance to their purpose in general and the purpose of the main punishment in particular.

2.1. The purpose of punishment in the Criminal Code of the Republic of Kosovo.

The general purpose of penal sanctions is the protection of freedoms and human rights as well as other rights and social values guaranteed and protected by the Constitution of the Republic of Kosovo and international law (Article 1 CCRK).

c. additional Punishments; and
d. A judicial admonition.

In Article 4 of the Criminal Code of the Republic of Kosovo, compulsory treatment measures are also foreseen which may be imposed on a perpetrator who is not criminally responsible or is addicted to drugs or alcohol. These measures are:
a. Mandatory psychiatric treatment and custody in a health care institution;
b. Mandatory psychiatric treatment in freedom; and
c. Treatment with mandatory rehabilitation of persons addicted to drugs or alcohol.

The new Criminal Code of the Republic of Kosovo defines the conditions under which penal sanctions or compulsory treatment measures against the perpetrator could be imposed. Given that, the object of treatment in this paper are some basic legal penal matters dealing with main punishments, we will not stop treating conditions under which penal sanctions or compulsory treatment measures against the perpetrator of penal act may be imposed.

2. Purpose and types of main punishments under the new penal Code of the Republic of Kosovo.

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Viewed from criminal legal aspect, our criminal law appropriates mixed theories about the purpose of punishment. This conclusion emerges from the provisions which refer to the purpose of punishment.

The specific purpose of punishment under the Criminal Code of the Republic of Kosovo is defined in Article 41.

Under the Criminal Code of the Republic of Kosovo, Article 41, the purposes of punishment are:

a) To prevent the perpetrator from committing penal offenses in the future and make his rehabilitation.
b) To prevent other persons from committing offenses;
c) To compensate the victims or the community for losses or damages caused by the offense; and
d). To express social judgment for the offense, edification and strengthening obligation to respect the law.

From the provisions of Article 41 of the Criminal Code of the Republic of Kosovo, it is clear that our right adopts special preventives, and general preventives as aims of punishment.

The special preventive is expressed in point a) of article 41 in which as the aim of the punishment is foreseen "to prevent the perpetrator from committing criminal offenses in the future and make his rehabilitation". While the general preventive is defined in paragraph b) of article 41 which states "to prevent other persons from committing offenses".

Besides the special and the general preventives, punishment should fulfill the social purpose to the victim or community which is expressed in point c) of Article 41 where it is stated that the aim of punishment is also "to compensate the victims or the community for losses or damages caused by the offense ".

Also punishment should fulfill the aim of justice as prescribed in Article 41 in point d) in which regarding the aim of punishment it is stated "to express social judgment for the offense, edification and strengthening of the obligation to respect the law."

From the provisions of Article 41 of the Criminal Code of Kosovo clear tendency results in the criminal law of Kosovo that the primary purpose of the punishment to be special preventive against perpetrators of the criminal

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act as well as general preventive against others based on contemporary system of criminal sanctions.

2.2. The main types of punishments

Viewed from criminal legal aspect the state determines criminal policy, with which it intends to effectively fight crime. According to this criminal policy the punishment system is defined.

In order to be the punishment system successful in a country, it must rely on criminological sciences achievements, especially those belonging to delinquent personality, manner of execution of sentence and efficiency of execution of sentences[132].

The main punishments are imposed on adult persons who are criminally responsible to the offense committed. In order to impose a sentence as a type of criminal sanction, the person must be mentally healthy, must have realized the importance of its actions and have had the ability to control his own behavior, and to have committed the offense with his fault intentionally or negligently[133].

According to Article 43 of the Criminal Code of the Republic of Kosovo, the types of main punishments are:

1. sentence of life imprisonment;
2. sentence of imprisonment
3. fine sentence.

1. Life imprisonment.

Sentence with life imprisonment is an innovation in the new Criminal Code of the Republic of Kosovo for the fact that this punishment was not foreseen by the Provisional Criminal Code of Kosovo which had entered into force in 2004.

The maximum long-term punishment prescribed by the Provisional Criminal Code of Kosovo in 2004 for serious criminal offenses was up to 40 years in prison.

According to Article 44, paragraph 1 of the new Criminal Code of the Republic of Kosovo that entered into force on 1 January 2013 "The law may provide a sentence of life imprisonment for the most serious criminal

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offenses committed in aggravating circumstances or offenses which have caused very serious consequences."

This comparative plan shows that this punishment is foreseen for some criminal acts against the constitutional order and security of the Republic of Kosovo /Chap.XIV/, eg. the offense Acceptance of capitulation of the occupation, Article 123; offense Betrayal to the country, article 124; offenses killing of the high representatives of the Republic of Kosovo, Article 126; Committing the offense of terrorist offense, Article 136; etc[134].

Sentence of life imprisonment can be imposed, as well as to some of the offenses foreseen in the group of criminal offenses against humanity and values protected in the international law such as: Genocide, Article 148; Crimes against humanity, Article 149; Migrant Smuggling, Article 170; Human trafficking, Article 171; Hostage Taking, Article 175, etc[135].

According to the new Criminal Code of the Republic of Kosovo, life imprisonment is also prescribed for the offense against life and body: serious murder, as provided in Article 179 of the Criminal Code.

Lawmakers with the new Criminal Code provides the possibility of imposing a sentence of life imprisonment, even for a considerable number of criminal offenses when they are committed in aggravating circumstances or result in serious consequences; the death of the victim, as is the case with the following offenses: Kidnapping, Article 194; Rape, Article 230; sexual services of a trafficking victim, Article 231; Participation or organization of organized criminal groups, Article 283; predatory theft, Article 328; Robbery, Article 329; Revenge, Article 396, etc[136].

Viewed from the criminal justice point of view, in order to exist a legal basis for the possibility of sentencing to life imprisonment, in these offenses it is required in peremptory manner the existence of special aggravating circumstances of committing the offense or serious consequences of the offense which is the death of one or more persons as a result of the commission of the specific criminal offense.

Given the nature and duration of the sentence of life imprisonment under paragraph 2 of Article 44 "The law cannot provide sentence of life imprisonment as the only main punishment for a particular offense."

It is characteristic that the lawmaker foresees the possibility of alternative sentencing to life imprisonment or a sentence of imprisonment,

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defining minimum sentence of imprisonment, depending on the offense, not less than 10 or 15 years imprisonment or life imprisonment.

We think that foreseeing alternative possibility of imposing a sentence of life imprisonment for serious offenses committed under aggravating circumstances or serious consequences has a great practical importance for the proper implementation of the new Criminal Code of the Republic of Kosovo.

The practical importance of this consist in the fact that the circumstances of the commission of criminal offenses, motives for commission, the consequences of actions, personal aspects of the perpetrators as well as other characteristics of any criminal offense, are different.

The possibility of taking into account these circumstances of any criminal offense committed, as well as the foreseeing of alternative imposing of sentence imprisonment or long term imprisonment, creates the court opportunity for measuring and individualizing the sentence as appropriate for the perpetrator. We also think that the foreseeing of life imprisonment sentence in practical terms will contribute to the general and the special preventives against committing serious crimes in Kosovo and beyond.

Criminal Code of the Republic of Kosovo in Article 44, paragraph 3 foresees that "life imprisonment sentence cannot be imposed on a person who at the time of the offense has not reached twenty-one (21) years or a person who at the time of the offense has had substantially diminished mental capacity "

We think that this legal – penal solution is in accordance with the European standards of the contemporary criminal law as well as the purpose of punishment, considering the age of the perpetrator, or his essentially mental reduced skills during the commission of the offense. This creates the possibility for the court for an appropriate measuring and individualization of the sentence for the perpetrator, based on legal possibilities and the circumstances under which the crime was committed.

Having in mind the legal basis for the imposition of a life imprisonment sentence and its purpose, the Criminal Code of the Republic of Kosovo in Article 94, paragraph 3, provides that "a person sentenced to life imprisonment may be released on parole after having held forty (40) years from the sentence of imprisonment imposed. The minimum period of supervision by the probation service shall be at least five (5) years ". We think that this legal solution is adequate and based on the high degree of risk of criminal offense, the serious circumstances of the perpetration of the offense and the very serious consequences of the criminal act committed.

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2. Imprisonment

The punishment of imprisonment is the type of the main punishment, with the deprivation of liberty, which the court imposes under legally defined conditions on the perpetrators of criminal offenses. The purpose of the punishment of imprisonment is determined in a taxative manner with the Criminal Code of the Republic of Kosovo in Article 41. Criminal offenses for which the punishment of imprisonment may be foreseen are numerous and different, depending on the object of their protection. Unlike the punishment of life imprisonment, imprisonment is foreseen for the largest number of criminal offenses.

The imposing of imprisonment sentence is foreseen in an alternative way when the punishment of life imprisonment was foreseen. In some cases, in relation to fine sentences, the punishment of imprisonment is either alternately or cumulatively foreseen.

According to Article 45, paragraph 1 of the Criminal Code of the Republic of Kosovo, the imprisonment sentence "cannot be imposed for a period of less than thirty (30) days or more than twenty five (25) years". The lawmaker in this case determines the minimum and maximum of the punishment of imprisonment.

According to paragraph 2 of Article 44 "the punishment of imprisonment shall be imposed in full years and months and in cases when the sentence is up to six (6) months, the punishment shall be imposed on full days". Compared to the life imprisonment sentence, this is the easiest punishment for deprivation of liberty.

Viewed from the criminal justice aspect and in accordance with the contemporary developments of the criminal law, the lawmaker in the Criminal Code of Kosovo has foreseen the opportunity that instead of a short-term imprisonment sentence to impose alternative punishments or fines, with which the perpetrator of the offense is not deprived of liberty.

According to Article 47 of the Criminal Code of Kosovo, which foresees the replacement of a sentence of imprisonment with a fine sentence "when the court imposes a sentence of imprisonment of up to six (6) months, the court may at the same time decide that the punishment of imprisonment be replaced by a fine, with the consent of the convicted person ".

Article 48 (paragraph 1) of the Criminal Code of Kosovo provides the possibility of replacing the punishment of imprisonment with an order for a work of general good, stating that "The court, with the consent of the

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Article 48 (paragraph 1) of the Criminal Code of Kosovo provides the possibility of replacing the punishment of imprisonment with an order for a work of general good, stating that "The court, with the consent of the

convicted person, may replace the sentence of imprisonment of up to six (6) months with the order for general benefits work "[137].

Pursuant to paragraph 2 of Article 44 of the Criminal Code of Kosovo, "if it issues an order for work of general benefits, the court orders the convicted person to perform general free work for a period of thirty (30) to two hundred and forty (240) working hours. The Probation Service decides on the type of community service to be carried out by the convicted person, specifies the particular organization for which the convicted person will perform the work of general benefit, decides on the days of the week during which the work for the general benefits needs to be performed and supervises the performance of general-benefit work ".

Paragraph 3 of Article 48 of the Criminal Code of Kosovo defines that "the work of general benefit must be performed within the time determined by the court and this time may not be longer than one (1) year".

According to the Criminal Code of Kosovo, paragraph 4 of Article 44 foresees that "if after the appointed term of time the convicted person has not done the work of general benefit or has performed only partially such work of general benefit, the court orders the punishment with imprisonment. One day of imprisonment will be ordered for every eight (8) working hours of general benefit non-performance.[138] "

Such a legal possibility as foreseen in the new Criminal Code of Kosovo, we think is in full agreement with the criminal policy and with the purpose of criminal punishments in contemporary criminal law.

3. Fine punishment

Viewed from the criminal justice aspect fine punishment is part of the types of property punishment. The perpetrator of the criminal offense is obliged to pay a sum of money for the benefit of the state within the deadline. Fine or money punishments are recognized by all criminal legislation of contemporary states. Among the main punishments, by weight, the punishment of fines in our penal system is the easiest kind of punishment[139].

Fine punishment is especially convenient in cases of mild criminal offenses. It is a perpetration of this type of punishment that is often an

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adequate remedy for not executing a sentence of short-term imprisonment. With this punishment, contemporary criminal law aspires that the perpetrators of mild, even middle-level offenses, not to be imprinted as an imprisoned, should not be stigmatized without any need. Also as the priority of fine punishment, it is stated that it is separated and can easily fulfill the postulates of punishment individuality and that for its execution the state does not need to allocate material means as is the case with imprisonment.[140]

Considering the advantages of fines, the contemporary criminal law is oriented that in all cases of criminal offenses, where it is not necessary to punish jail sentence, to impose a fine. The purpose of the fine punishment is to let the perpetrator of the criminal offense become seriously aware that he has committed an offense and at the same time for some time to hit his standard of living. In this case, the perpetrator's standard of living is very important, who is being imposed a sentence[141].

The Criminal Code of Kosovo in Article 46 foresees the fine punishment. According to paragraph 1 of this Article "the fine punishment may not be less than one hundred (100) European Euros. The punishment may not exceed twenty-five thousand (25,000) Euros, while for offenses related to terrorism, human trafficking, organized crime or criminal offenses committed for the purpose of obtaining material benefit, it may not exceed five hundred thousand (500,000) Euro ".

According to paragraph 2 of Article 46 "in the judgment shall be set the time limit for payment of a fine. The deadline may not be shorter than fifteen (15) days or even longer than three (3) months, but in reasonable circumstances the court may allow a fine to be paid in installments for a period not exceeding two (2) years. The judgment must also specify when the installments are to be paid and it should note the possibility that installment payments will be revoked if the convicted person does not pay the installment on time.

The Kosovo Criminal Code foresees cases even when a convicted person does not want or cannot pay the fine. Paragraph 3 of Article 46 foresees "if the convicted person does not want nor cannot pay the fine, the court may replace the fine by a punishment of imprisonment. When the prison sentence is replaced by a fine, one day of imprisonment is calculated with twenty (20) Euro fines. The punishment of imprisonment may not exceed three (3) years".

According to paragraph 4 of this Article, "if the convicted person does not want or cannot pay the fine as a whole, the court shall replace the remaining of the fine by imprisonment as provided for in paragraph 3 of this

[140] 16. I. Salihu, Ibid
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Article. If the convicted person pays the remainder of the fine, the execution of the sentence is terminated ".

Paragraph 5 of Article 46 of the Criminal Code of Kosovo provides that "if the convicted person does not want or cannot pay the fine, the court may instead of imposing the punishment of imprisonment replace the fine with an order for work of general benefit, with the consent of the convicted person. The order for general benefit work is calculated so that eight (8) hours of work of general benefit are calculated with a fine of twenty (20) Euros. The duration of the work of general benefits cannot exceed two hundred and forty (240) hours ". Paragraph 6 of this article provides that "a fine shall not be executed after the death of the convicted person" [142].

As stated above for the main sentences foreseen under the Criminal Code of the Republic of Kosovo it can be concluded that the positive tendencies of criminal penalties in general and the main punishments in particular have evolved.

There is a tendency to approximate with European criminal law and European punitive policy[143], although this is a long and difficult road that requires permanent reformation of the punitive politics in Kosovo based on scientific achievements and economical-social, cultural, educational conditions and other influencing factors and circumstances.

Some conclusions

The prevention and fighting of crime in an organized society is impossible without the application of criminal sanctions in general and the main punishments in particular.

The criminal code as a legal act for regulating basic issues in the criminal field, namely the defining of criminal offenses, criminal responsibility and penal sanctions has a dominant role and importance in protecting not only social values but also individual values in society.

In this plan, the Criminal Code of the Republic of Kosovo, which entered into force on 1 January 2013, has as well a special importance in terms of protecting social and individual goods, not only in Kosovo but also in the broader sense. From the study of the new Kosovo Criminal Code it is seen that the role and significance of the main punishments, as a type of criminal sanction, are great and irreplaceable.

The providing of the punishment of life imprisonment, as an alternative punishment for imprisonment punishment, for specific categories of criminal

[142] Code no. 04 / L-082, Criminal Code of the Republic of Kosovo, see more extensively Article 46.

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Paragraph 5 of Article 46 of the Criminal Code of Kosovo provides that "if the convicted person does not want or cannot pay the fine, the court may instead of imposing the punishment of imprisonment replace the fine with an order for work of general benefit, with the consent of the convicted person. The order for general benefit work is calculated so that eight (8) hours of work of general benefit are calculated with a fine of twenty (20) Euros. The duration of the work of general benefits cannot exceed two hundred and forty (240) hours ". Paragraph 6 of this article provides that "a fine shall not be executed after the death of the convicted person" [142].

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There is a tendency to approximate with European criminal law and European punitive policy[143], although this is a long and difficult road that requires permanent reformation of the punitive politics in Kosovo based on scientific achievements and economical-social, cultural, educational conditions and other influencing factors and circumstances.

Some conclusions

The prevention and fighting of crime in an organized society is impossible without the application of criminal sanctions in general and the main punishments in particular.

The criminal code as a legal act for regulating basic issues in the criminal field, namely the defining of criminal offenses, criminal responsibility and penal sanctions has a dominant role and importance in protecting not only social values but also individual values in society.

In this plan, the Criminal Code of the Republic of Kosovo, which entered into force on 1 January 2013, has as well a special importance in terms of protecting social and individual goods, not only in Kosovo but also in the broader sense. From the study of the new Kosovo Criminal Code it is seen that the role and significance of the main punishments, as a type of criminal sanction, are great and irreplaceable.

The providing of the punishment of life imprisonment, as an alternative punishment for imprisonment punishment, for specific categories of criminal

[142] Code no. 04 / L-082, Criminal Code of the Republic of Kosovo, see more extensively Article 46.

[143] I. Elezi, V. Hysi, Criminal Policy, Tirana, 2006, pp.136-155, see more extensively

offenses committed under aggravated circumstances or when they have resulted in grave consequences, is an innovation in the new Kosovo Criminal Code. This punishment is foreseen instead of a long-term imprisonment sentence of up to 40 years that was prior to the Kosovo CCK of the year 2004.

We think that the providing of the imprisonment sentence as the main punishment is in accordance with the socio-economic circumstances, the dynamics and types of some serious criminal offenses that continue to be committed in the Republic of Kosovo and the very high degree of danger of some perpetrators of these offenses.

We think that the other main punishment as well, such as punishment of imprisonment, as the most commonly imposed punishment, defining its minimum and maximum of up to 25 years of imprisonment for criminal offenses and conditions defined by the new Criminal Code, is in accordance with Kosovo's punitive policy and the need to achieve general and special preventive measures against perpetrators and potential persons to commit criminal offenses.

Fine sentence according to the new Criminal Code of Kosovo, as a property offense, has been designated for a considerable number of criminal offenses. We think this is positive and in accordance with the developments in contemporary European criminal law.

With the adequate provision of criminal sanctions in general and the main punishments in particular in the new Criminal Code of Kosovo, we think that the possibility of a more adequate individualization of the criminal offense for the prevention and fighting of crime in the Republic of Kosovo and beyond is created.

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Prof. Msc. FatlumGogiqi
European Collage of Kosovo

Abstract

Small and medium enterprises in Kosovo continue to be the main pillar of development in Kosovo and despite carrying the burden of the development of the country they face many challenges and problems in exercising economic activity they have chosen and of course these challenges are affected by various factors identified as internal and external factors of the functioning method of small and medium enterprises in Kosovo. In this study we tried to identify the challenges of the small and medium enterprises in Kosovo and to present an actual survey of this significant economic activity. We have developed this study based on three following methods: the method of collecting analysis and information of professional character, the comparative method and the quantitative method. Also the aim of this analysis of challenges that refer to small and medium enterprises in general, strengths and weaknesses, the opportunities and risks that can occur during the process of development of small and medium enterprises will be analyzed, the role of the government will be analyzed in relation to the stimulation of small and medium enterprises; recommendations on strategic plans will be made and long-term aspirations and goals for the development of small and medium enterprises etc.

Key words: Challenges of SMEs, the business environment, political environment, development of SMEs, market economy, employment, macroeconomic factors.

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Introduction

Regarding the course of economic and social problems in Kosovo it was reasonable to conduct a research or a special collection in the view of the small and medium enterprises as the main incentive of the modern economy development.

Kosovo as a new country and in the transitional stage, the free market economy faces many obstacles in building their capacities in constructing a sustainable business environment. The small and medium enterprises play a significant role in the economic development of Kosovo. They are the main source of creating new jobs and increasing incomes and also to rapidly revive the economy. Employment in private enterprises is increasing and structural changes can be observed in enterprises which are expressed through the decreasing number of trade enterprises and increasing of production enterprises.

In this study the capabilities of SMEs are explained, their collection, their treatment, science based capacity building of entrepreneurs and several short surveys about the problems the SMEs face with actual politics. We have included several statistics of the actual situation in Kosovo and at the end several recommendations of the world experts of this field with the purpose of raising awareness among the entrepreneurs in preventing taking wrong steps in starting a business.

The aim of the active politics of the labor market is to improve the efforts for labor and to create conditions for necessary adjustment between the laborers and the labor market.

The future of this sector will not aim only to confirm the development role but also to continue to preserve the values, to share skills, innovations and systems oriented towards results and efficient sharing of services offered.

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The future of this sector will not aim only to confirm the development role but also to continue to preserve the values, to share skills, innovations and systems oriented towards results and efficient sharing of services offered.

General concepts of small and medium enterprises

Small and medium enterprises are considered as the economic instruments that have a great impact on the economic development of the country, the role of small and medium enterprises is especially very important in countries with transitional economy such as in the case of Kosovo and of other countries at this stage. By development of small and medium enterprises in one way or another helps the country by decreasing the employment rate, by increasing the country budget with financial means from taxes, etc.
The enterprise is the capacity of creating and constructing a vision from nothing. Basically, it is a humane and creative act. It is the application of the energy in order to start or construct an enterprise or organization, just to better observe or survey it. This vision requires willingness to accept the risks – personal and financial – and then to do everything possible to decrease the chances of failure. The enterprise also includes capacities to build up a team of entrepreneurs as well as the capacity to recognize an opportunity when all the others see chaos, contradictions and confusion. [144]
In small and medium enterprises a considerable amount of permanent means is collected, even turnover means, though they change time after time, they are always present. Besides joining the capital, within the economic entity the labor of individuals is also joined, as an element of production and as a creative force, with a special role in the field of organization. [145]
The claim that the SMEs are the main pillar of the economy was held forth a lot in newspapers, presentations and articles related to the private sector development. [146]

Entrepreneurship and SMEs in Kosovo

Entrepreneurship is the ability to create and build a vision out of nothing. In its finesse it is a humane and creative act. This vision requires willingness for accepting personal and financial risks and also minimizing the risk of failure of that vision. Development of SMEs is one of the crucial mechanisms in continues stimulation of economic development of Kosovo. The SMEs sector represents the greatest promotional capacity of the employment rate growth.
Efficiency and success of SMEs is decisive in the strong support of the Kosovo economy. If we take the statistics of SMEs then:

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[144] Small Businesses Management, Universum College, Prishtina 2012, p. 11
[145] Enterprise organization – Prof. dr. Dhori Kule, Tiranë, 2013, p. 47
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- 99.9% of enterprises in Kosovo are microenterprises and small businesses,

- micro and small enterprises represent 79.59% of the total employees in the private sector and 62.24% of the total employees in Kosovo.

The departmental structure of business is concentrated in the following departments:

- 16% - production
- 33% - services
- 51% - trade

As far as the business ownership is concerned the individual ownerships prevails including 81% of the businesses, 11% with two owners and 8% with three or more owners. The gender structure of the founders is: 92.10% Males, 7.90% Females.

Small and medium enterprises and the informal sector

Informal economy hinders the proper competition, increases the cost of the survival of enterprises operating in the informal sector. Informal work contracts and systematic evasion of social security contributions weakens the protection of employees and reduces social profits for them. [147] This has a negative impact on the budget and on the entire infrastructure of the society due to the decreasing income and consequent reductions on offering necessary public services.

There is an updated operation plan to address the informal economy and to remove the administrative obstacles for investments. Funds to guarantee the export are established. However, further improvements are required for the treatment of informal economy and the improvement of the business environment.

Based on the report on the Government's Program on Preventing Informal Economy in Kosovo 2010-2012, it is estimated that the size of the informal economy is from 39 to 50% of the Gross Domestic Product.[148]

Including more small and medium enterprises in the formal sector is one of the main challenges within the implementation of the Development Strategy of small and medium enterprises.

Informality weakens the confidence between the small and medium enterprises and the financial institutions and reduces access of small and

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[147] Ministry of Trade and Industry – Development strategy of small am medium enterprises in Kosovo 2010 – 2014, p. 32

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medium enterprises to loans and the capacity to utilize the formal mechanisms in solving disputes. It also discourages foreign investments.
Based on what was discussed above I consider that it is important to analyze the application and encouragement of including the informal sector into the formal economy, as well as to address the factors that discourage the small and medium enterprises from complete registration of employees, activities, turnover and profits with the respective authorities.
With the support of the European Union's project for small and medium enterprises the Agency for supporting small and medium enterprises has compiled an implementing plan of Development Strategy for small and medium enterprises.

How do the Small Businesses contribute to the growth of economy of Kosovo?

Small and medium enterprises in Kosovo are playing a significant role in the economic development of Kosovo. They are the main source of creating new jobs and of generating incomes and have shown a rapid revitalization in the postwar period. [149]
It is already known that the SMEs sector employs over 200.000 employees and represents a significant contributor in creating and growth of GDP rate. As in all transition countries this sector represents a solution for many social – economic problems. Consequently the tendencies for growth and development and the plans of the entrepreneurs for the future are important for the policy makers of Kosovo. Small businesses contribute to the Kosovo economy and society more than any other sector, from an entirety that can be calculated only from expenses and profits that they can generate.
This type of businesses has a greater economic innovative tendency than the big companies, they are more efficient to respond to the change of consumers' demand, and are more stimulating in creating more opportunities for women, minorities and activities in economic difficulty zones. The economic theory and empiric studies as well show that innovation is a key promoter of productivity and economic growth. [150] Every large business starts as a small business. [151] The very new ideas of the small business were the ones that brought the "McDonald's "hamburger", the "Apple" company, the "Ford" cars, etc.

[149] Financing and development of SMEs – records of RIINVEST – 2005, p. 45
[150] Private Sector Development, Evaluation of Innovative System of Kosovo, 2013, p.15
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Small businesses can't make it alone. Creating a proper business environment is a necessity of SMEs for an estimable market competition. For this strategy the competition belongs to the government institutions where by legislation they can strongly contribute to the development and progress of SMEs. The Kosovo Government did not take necessary steps regarding the development of entrepreneurship. Even though legislation has a positive basis along with the development of SMEs, the banks of Kosovo have higher than normal norms that hinder the development of efficient entrepreneurship.
Investment sources of small and medium businesses in Kosovo

- own means 67%
- domestic loans 21%
- foreign loans 1.1.%
- nonreturnable funds from foreign donors (NGOs) 0.08%
- family loans for from friends 9.6%
- through direct foreign investments 0.5%

From these statistics the needs for creating a business environment are clearly observed so that the entrepreneurs can have greater space and support in realizing of the ideas and creativity and a solid and financial support. A sound environment of small businesses generates workplaces in the community and become a factor for installing a successful neighboring pillar between the employer and the employee.

Strategy of economic growth of Kosovo through state "incentives"
The main responsibility for economic incitement and the welfare of the people is of the state. The state also provides economic stability, regulates the legal system, protection of property, provides safety and incentives and disincentives for a faster economic and social development. [152]
Small and medium businesses but for the successful operation are in need of an incentive of the business nationality by purchasing the products of one another and by exchanging innovations between each other to generate the growth of economy. This initiative would be crowned with an impact and awareness of citizens in promoting the domestic products. These kinds of initiatives would lower the market deficit of Kosovo and thus the result would be economic growth. Regarding this problem we could take the best examples from the European developed countries.
Creating new models in the most developed countries of local economic development can be an important element for exercising activities in business development and increase the employment rate in our conditions. [153]

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[152]Prof. Dr. Isa Mustafa: Creating and developing a business, Prishtina 2000, p. 48
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In Italy 90% of industrial firms are small businesses absorbing 84% of the total employment. In Denmark 92% of manufacturing firms are small businesses employing 43% of the workforce. In Albania about 60.000 private entities exercise their activities in market economy conditions employing 241.000 people.
It is a generally known fact that following the collapse of centralized economies, the private sector appears with an impressive speed in all transition economies, corresponding to this approach the number of small businesses is growing.
Increase of entrepreneur activity in Kosovo is concentrated more in the field of trade than in the field of industry. Kosovo is one of the transition countries where transition into the market economy is closely related to the development of the private sector and particularly with the small and medium businesses that will play a key role in the reform process. It should be noted that creating an appropriate economic and political environment that gives the opportunity of creating and developing small businesses, is one of the significant duties of the Kosovo government. Assistance for developing a Small Business is an integral part of the entire economic reform together with the restructuring of enterprises and the ownership reform, encouraging investments and financial reforms.

Where do Kosovars work?

Most of businesses in Kosovo are micro and small businesses. This year, the category of the number of employees from 1-9 (employed)(micro) comprises 96.6% of new enterprises. As far as the geographical expansion of registered enterprises is concerned, on the municipal level, as in every trimester, Prishtina leads with 24.9%.
Production along with education and construction comprised almost half of employed people in the year 2015.

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Figure 1. Employment in production

Source: Ministry of Trade and Industry, ANNUAL REPORT OF INDUSTRIAL DEVELOPMENT IN KOSOVO FOR THE YEAR 2014, volume 3, 2015

Out of 21 economic activities that comprise a total of 325,700 employees, 44,900 employees are engaged in production. This indicator emphasizes more the significance of production as far as production level is concerned. According to gender, out of 325, 700 of the total number of gender-based employees, 250,100 are male and 75,600 are female employees. These statistical data also include the activity of production of undifferentiated goods and services of the private family economies for their own use.
As far as employment in relation to various productions sectors is concerned, the data show that the sector of food processing products has employed about 21% of the workforce. This sector is identified as a strategic sector together with 5 other sectors, which has a further development potential in future. The second largest sector by the number of employees is the sector of production of nonmetal minerals with 16.8% of the workforce.

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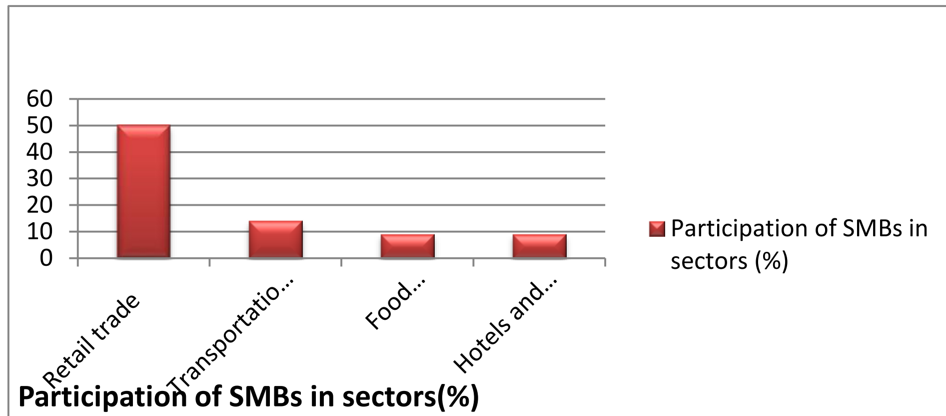
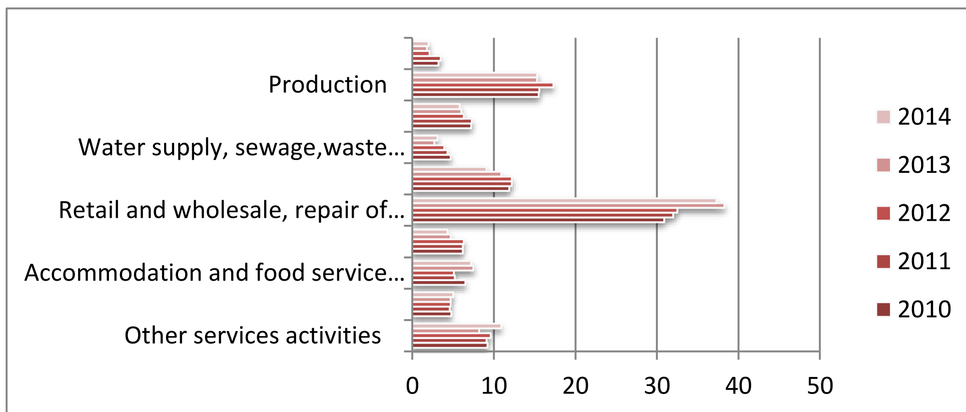


Graph 1. Employment by activities 2012 -2015

Source: Kosovo Agency of Statistics: http://ask.rks-gov.net/

The data suggest that the sector of food processing continues to be the leader even with the concentration of enterprises with 1286 of them. Then follow the sector of production of metal fabricated products with 668 active enterprises,

Figure 2. Participation of SMBs in sectors



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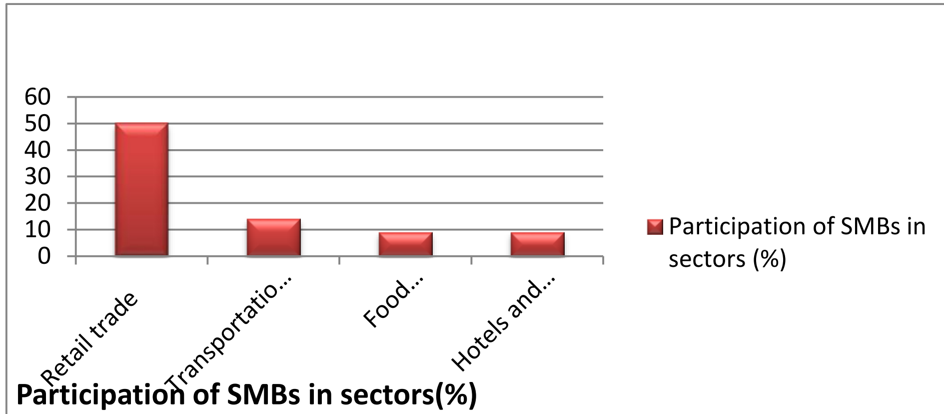
continuing with enterprises of wood production and wood products, production of nonmetal minerals, etc. While the enterprises producing tobacco products, motor devices, and repair and installation of machinery, continue to be sectors with the lowest number of concentrated enterprises.

In the sense of breakdown of sectors, SMEs are primarily concentrated in: retail trade (about 50%); transportation, storage and distribution (14%); food products, beverages and tobacco (9%); and hotels and restaurants (9%).



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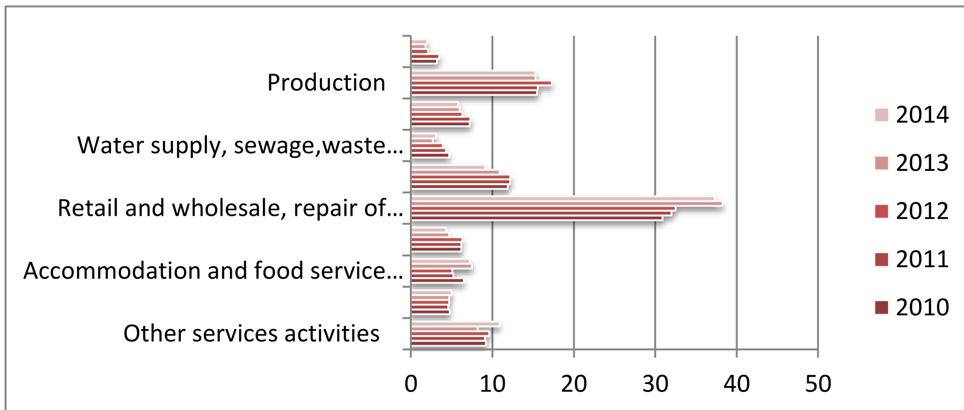

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Main development barriers of small and medium enterprises
There are several important conditions to be met for development of small and medium enterprises in order to go further. In fact it is right to say that the greatest part of the private sector development will be possible after addressing the following issues:

- Legal framework
- Rule of law
- Electric power supply
- Political uncertainty
- Access to finances
- High interest rates
- Taxes and customs
- Standards

Legal framework - In order for the small and medium enterprises to bloom the existence of adequate legal framework for business is essential. This requires not only the existence of the commercial law but also of the legal system that ensures the solution of disputes in an efficient and timely manner. Critical issues within the legal framework include protection of intellectual rights and industrial property, clarity regarding land ownership and minimum bureaucratic burden for small businesses.

Beside this, the planning regime that facilitates investments in the prior sectors without compromising the environment and the rights of citizens, it would accelerate the growth and would offer Kosovo ‘a comparable advantage’. Despite the distinguished progress that has been achieved in this field, especially regarding land ownership, the commercial law remains uncompleted and the capacity of courts insufficient. This remains a significant challenge for Kosovo.
Rule of law - Rule of law is also a significant component having great influence in the stability of the work of small and medium enterprises and in drawing up legal frameworks based on which they should operate. Using courts for solving ownership disputes in general remains underdeveloped; insufficient rule of law is hindering economic development. Kosovo legal system is a complicated insecure system keeping investors away from Kosovo.[154]
Electric power supply – Barriers and obstacles the businesses face while exercising their daily activity comprise of various aspects and are manifold. Among the most frequent difficulties businesses face in their operational

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daily activities is the electric power, poor infrastructure, disloyal competition, lack of rule of law and the high tax rate.
The current situation of electric power supply would improve if small and medium enterprises are to become the leader of economic growth in Kosovo. Even though currently the power supply has improved but it remains unstable therefore it still remains a challenge and a barrier in the economic development of the country.
Political stability – Lack of clarity about the political future of Kosovo creates a level of danger for the potential investors. The prize of related danger can be observed in the behavior of the financial institutions and investors, and if not resolved, it can have a negative impact on the availability of finances for the businesses in the country and will hold back the foreign investors. Also the situation in Mitrovica continues to be tense even after the Independence of Kosovo and all these elements create a challenge and a barrier to the business development and this challenge is hard to meet.
Access to finances – If small and medium enterprises want to efficiently and sustainably grow, they need access to acceptable and flexible finances that can be accessed relatively fast based on the requirements of individual enterprises. This normal financing is structured and offered through a series of financial instruments including non-returnable grants, a series of loan schemes, external equity injections and profits from reinvestments.
High interest rates – It can be estimated that the high interest rates are one of the barriers that lead to great difficulties and that can be a contributing factor of bankruptcy or of creating difficulties to many enterprises, be they medium, small or large.

The banking sector in the Republic of Kosovo is in the function of the country's economic development, these high interest rates being the highest in the region can bring a satisfactory economic development. The activity of loans continued to grow in the last years though slower than in the past years.
Taxes and customs – Currently a great part of taxes in Kosovo are collected at the border. If the production industries are going to be developed then converting to internal, corporate and personal taxes is essential in order to encourage import of capital goods and of raw materials for production purposes. Unless not improved this issue might discourage local and foreign investors in production.
Standards – Currently there is no consistent use or application of standards in Kosovo and until measuring standards are not maintained there will not be any standardization and there will only be a limited metrological infrastructure. Development of a consistent package of internationally approved standards would facilitate in improving quality and completion of

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products and material within the local market and would facilitate the export market and replace the import. The current lack of every standard is the primary barrier for the development of the export market.

The role of government in encouraging small businesses

Since the ancient times the entrepreneurs were leaders and developers of creativities and innovations. Current advances are surely the result of several individuals or of a small team who had the idea and determination of a vision until realization.

This topic is a subject studied by various experts of the social economy field. Results of their studies can be very useful for a faster development of small and medium enterprises and the growth of employment.[155]

Most of the businesses in the world are oriented by “small” entrepreneurs; the government can turn it into a favorable economic environment through implementation of policies that encourage the growth of small businesses.

In this research we have chosen several “policies” for encouragement of SMBs by enabling the keeping of business stability within the state. The five forms in which the government can have the most positive effect are: creating a capital available to SMBs, training programs for entrepreneurs, promotion of entrepreneurs, giving award to the best SMBs, reducing SMBs liabilities and protection of intellectual property.

These government policies can have a great impact in improving the business environment and expansion of the SMBs sector in Kosovo. In a world surrounded by insufficient needs, the small business is a mechanism with a proven capacity not only for the flexibility in solving economic problems but also contributes in creating an average strong society to generate a certain basis of taxes, and care for social stability.

Previously, many research studies have shown that due to the market concentration in the banking sector in Kosovo, the loan interest norms currently are the highest in the region, and in fact these norms contribute negatively to the SMBs development due to the small potential to face the interest norms.

In course of banking policies the government should draw up a strategy in the spirit of terms based on the question: which policies should be used to promote small businesses through encouragement and to increase that number of SMBs?

For this case we have drawn up five main fields that the suitable government policies can have a great impact on the increase of the number of small and medium business.

[155] Prof. Dr. Ali Sylqa – Productivity in the economic theory and practice, Pejë, 2001, p 87.

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Creating of a capital available to the SMBs

"The entrepreneur is an individual who takes a risk with money to make money" [156] this example best describes the definition of the entrepreneur, also from research we have established that entrepreneurs start with a small capital, a calculated risk. So if the government wants to promote SMBs, it should improve through policies that can enable decreasing of the common risk for the new entrepreneurs. In that direction, people will be prepared to leave the commodity of the ordinary work and start opening new businesses. So the first policy needed to be applied by the government to encourage development of small businesses is stimulation and aspiration of entrepreneurs to find the necessary money to open a new business. The banks are likely to give risk loans for new businesses only when BRAK or the Government of Kosovo guarantees the return of the money if the borrowers are not able to pay back in time. Therefore the initiative of this strategy should consist in creating state guaranteed loans. An easy approach toward the established capital creates a foundation for a healthy SMBs sector.

Entrepreneurs training programs

There are many factors that have an impact in the orientation of the state toward a developed economy through SMBs, but of course, a group of entrepreneurs prepared for a new business is one of the significant mechanisms of an economy in expansion.[157] To reach this level, citizens should be able to study or train in business skills. There are several ways when the government can support them in achieving their aims:

To offer "attraction" in order to open SMBs and getting by the initial stages

Such a program provides and offers businesses a favorable start and a market where it can expand. Usually, encouragement for businesses is linked to universities, professors and experts who spend their time and special knowledge to train entrepreneurs with necessary sale and marketing skills up to laws and taxes. Later the same owners of SMBs will be the ones that will lecture on their experiences, the others will go forward and start their businesses, and the young entrepreneurs will come and take their places. The government should offer financial incentives to universities to create campuses and programs to attract students to open businesses.

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[156]Little, Ian M.D. (1987). "Small Manufacturing Enterprises in Developing Countries." World Bank Economic Review 1, p. 203-235.

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Promotion of entrepreneurs

Only trainings and learning necessary skills by the entrepreneurs are not sufficient to succeed, but it is also necessary that the active entrepreneurs are promoted to the level that more people are encouraged to start small businesses. In Costa Rika and Uruguay expositions and exhibitions of small businesses are applied in order to create relations between small businesses and entrepreneurs. Uruguay also awards a prize for small businesses which contributed to the society. Really, there is a lot governments can do in promoting small businesses. E.g. awarding prizes to the most successful SMBs, an annual amount, on two levels, local and state levels, if it were published and well applied, it can do a lot in creating of an entrepreneurship spirit.

Using the experience of business leaders

A country concentrated on the progress and development of SMBs should draw up policies of a society which is oriented by a framework of entrepreneurs. One way for the government to carry out this strategy is to utilize the expertise of business leaders to contribute in the solution of various issues and problems. The governmental panel should gain from the successful expertise of entrepreneurs.

Reducing taxes for SMBs

The tax code is one of the most significant instruments in encouraging the growth of small businesses. We have presented an example of policies of the state of Canada regarding SMBs: about 98% of all businesses in Canada are small businesses. All the certified management accountants in Canada recently recommended to the Canadian Parliament that the best way to encourage more growth of small businesses is by changing the tax policy in Canada such as:

- decrease corporate tax;
- offer tax loans for investments in training and education;
- increase capital investments.

Change of relations of these incomes by creating a stronger capacity of collecting more taxes in within the country compared to those at the border will have a stronger impact in consolidating the budget and in its long-term sustainability.[158]

Besides lowering of the taxes in order to encourage starting a business, it is very important to reduce and eventually eliminate those government

[158]Riinvest – Economic sustainability, challenges and problems – 2010, p. 17

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regulations that hinder the growth of businesses. Simply and by accelerating the regulatory process the possibility of small business expansion will be greater.[159]

Protection of intellectual property

Every government whose aim is economic growth and is oriented in developing and improving small businesses should compile laws that protect ideas and innovations of entrepreneurs. Innovation is in the essence of every improvement of a small business, but if innovations are not protected legally, entrepreneurs will be dissatisfied and are prepared to take some necessary risks in order to operate and to solve the problems of the society. Therefore, the patent protection policies, author's rights and trademarks are crucial mechanism in the development of SMBs.

Finally, every government who wants to promote small businesses should implement policies which will help entrepreneurs to take the smallest risk and to generate more income. If these methods are applied the success of the small business will not be a problem to the government anymore.

Conclusion

Two types of factors play a role in development t of small and medium enterprises, the external and internal factors, so both of these factors have an impact in the development of small and medium enterprises in two fields, in the field of microeconomics and in the field of macroeconomics, so these are those two essential factors that affect the development of small and medium enterprises. The effect of microeconomic factor primarily has to do with the internal factor of functioning of small and medium enterprises, such as rule of law, fighting corruption, creating conditions for investments, etc.

The effect of the macroeconomic factor which is considered an internal factor and the enterprise and the state don't have much influence in international economic policies such as economic crises which affects the overall development of regional and global economy.

Both of these factors are linked to one another because the external factor has a direct impact on the affairs of the internal factor and as a result of this they create an unfavorable environment for small and medium enterprises and insecurity to invest in them.

The case of Kosovo is extremely difficult because based on the factors, be they external or internal, don't guarantee a proper climate for the Kosovar

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Probability between the success and the risk of doing business in Kosovo is much greater than having a risk in the business functioning.
As we also mentioned above Kosovo besides having many risks and challenges for a business to exercise its business activity here, some positive effects that enable doing business can also be observed and one of those is the workforce, young population, etc.
Kosovo continues to have challenges that at the same time can be considered big problems for the functioning of small and medium enterprises in Kosovo and below we will present some of them.
Small and medium enterprises have a very positive impact in very country if we have created the conditions, because through small and medium enterprises we have regulated many economic indicators of the country by reducing unemployment, by increasing the domestic gross production and by enabling growth of internal consumption in the country, in one word the complete positive process is created from the development of small and medium enterprises that are many in number in places like Kosovo.
Small and medium enterprises are the backbone of the national economy. They are the basis of the economic system of the free enterprise. However many people hesitate to make this life dream come true due to prejudices that they might have in achieving successes because of lack of education, experience and money or they simply fear that they might fail. Some others don't get familiarized with the idea that they can change their life, that they belong to the people who could have their own business.

Recommendations

In order to face the political and economic crises in the country, initially the enterprise has to meet some of the conditions of the respective authorities and hereafter we will present an action list, how the small and medium enterprises in Kosovo should be treated:

- Creating conditions for the growth of the capital base for small and medium enterprises
- Improving loan conditions that are currently unfavorable for the small and medium enterprises which hurt businesses instead of supporting them.
- Creating stimulating policies be they fiscal or customs policies.
- Creating work spaces with accompanying infrastructure such as the climate of doing business, etc.
- Creating a proper legislation for small and medium enterprises and auditing for law application.

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- Creating better infrastructure conditions – electric power supply, water supply, roads, etc., even though improvements are obvious.
- Creating the spatial plan and its application mechanisms.
- To make efforts in raising the quality level and of the advising and training capacity levels for small and medium enterprises.
- To establish a collaboration dialog between all institutional sectors and representatives of small and medium enterprises, since only in this way respective institutions can be closer to the needs of small and medium enterprises.
- To review all the laws that are not in favor of small and medium enterprises because there are cases when laws sometimes instead of supporting the activity in the sector of small and medium enterprises, they harm it.
- Creating an advising organ for the small and medium enterprises within institutions.
- Creating exclusive strategies for development of small and medium enterprises and the action plan.
- To support small and medium enterprises with database.
- To create occasional schemes for supporting small and medium enterprises.
- Environment physical adjustments for small and medium enterprises.
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- The Business Association and Government should work together to create a friendly business environment for SMEs with the purpose of increasing the level of export.
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CRIME ANALYSIS ORGANIZED CRIME, HUMAN TRAFFICKING AND MIGRANT SMUGGLING

Dr.sc. BesimKelmendi
EuropeanCollege of Kosovo

Abstract

In view of the visa liberalization and Euro Atlantic membership aspirations, Republic of Kosovo is seeking to meet the requirements of these organizations governing liberalisation and membership. One of the requirements is prevention and fighting organized crime as well as human trafficking and migrant smuggling, as part of the organized crime.

The elements of the organized crime, human trafficking and migrant smuggling as crimes are often difficult to discern due to the structure of the underlying crime, especially those involving human trafficking, where many distinct separate crimes are subsumed under the overriding human trafficking crime.

This paper seeks to provide an analysis of these crimes, in both objective and subjective respects, similarities and dissimilarities, as well as root causes underlying these acts, either due to their elements or the place they occupy in the fabric of the criminal code.

Key words*:* *Crime, organized, trafficking, smuggling, migrants*

1. Introduction

The Western Balkans countries, including Kosovo, have been plagued by two dangerous scourges: the organized crime and corruption, which are manifested as two inhibiting forces to any attempt at societal development and nurturing of democratic values.

Human trafficking and prostitution, trafficking of dangerous narcotics and other psychotropic substances, informal economy, corruption and money laundering are the most aggressive forms of organized crime, which affect the society at large and jeopardize the future of the country, therefore any

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success in preventing and fighting organized crime hinges on the success in preventing these particular crimes.

In the immediate aftermath of the war in Kosovo in 1999, the state's response to organize crime was openly disproportionate to capacities of relevant institutions to fight the organized crime due to insufficient grasp over the subject matter of the organized crime and the many forms of psychological violence, made conducive by the post-war situation and scarce resources.

Today, the response of the state is under growing positive pressure, both national and international. Organized crime often finds support by senior representatives of state institutions. The opinion of W. Reckless, which he shared in the 50s may be pertinent here: "organized crime is well protected by the organized society"[160], a view corroborated by the events surrounding the organized crime today, which leads to conclusion that members of criminal groups, as part of the organized crime, will seek to ensnare people in power in order to enjoy their protection, if faced with justice.

In recent times, organized crime represents a serious threat, not only to the internal security of the country but also externally as it relates to Kosovo's aspirations to join EU and NATO. Organized and structure criminal group's persistently corrupt official persons in the areas of economy, construction, industry, tourism or tenders involving significant financial means in pursuit of their nefarious goals.

The need to prevent and fight the organized crime as well as the willingness of international institutions to provide assistance in this regard, including human trafficking and migrant smuggling, taking into account that in most cases, these criminal acts are part of the organized crime or are perpetrated by organized and structured criminal groups.

In order to understand the relationship between the organized crime and human trafficking and migrant smuggling, the following section will provide an overview on the organized crime, in order to determine when the human trafficking may constitute part of the organized crime.

[160]Milutinovic, Milan, Kriminologjia, botimiikatërt, UniversitetiiKosovës– FakultetitJuridik, Prishtinë, 1981, p.278

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2. Analysis of the organized crime

Organized crime shall mean the serious crime perpetrated by a structured group in order to generate, directly or indirectly, material or financial gain[161].

This definition will therefore render several key elements: "organized criminal group", "serious crime" and "structured group".

The term "organized criminal group" according to Article 120, paragraph 13 of the Criminal Code of the Republic of Kosovo shall mean a structured association, established over a period of time, of three or more persons for the commission of a certain criminal offense that acts in concert with the aim of committing one or more serious criminal offenses in order to obtain, directly or indirectly, a financial or other material benefit[162], while according to United Nations Convention Against the Transnational Organized Crime, Article 2, paragraph 1, item (a), the expression shall mean: a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit[163].

The term "severe crime" or "serious crime" has not been defined under the Criminale Code of the Republic of Kosovo of 2012, as was previously defined under the Criminal Code of the Republic of Kosovo of 2004, in its Article 274, which stated that a serious crime shall be a crime carrying a prison sentence of at least four years[164], however, Article 283, paragraph 1 of the Criminal Code of the Republic of Kosovo specifies the criminal acts punishable by imprisonment of at least four (4) years, which is also set out under the United Nations Convention Against Transnational Organized Crime, whereby a serious crime shall be an offence punishable with a maximum imprisonment of at least four years or more. [165]

Although the term "structured group" was better regulated under Article 274 of the former Criminal Code of the Republic of Kosovo of 2004, as under this code, the term implied a group of three or more persons, which has not

[161] The Criminal Code of Kosovo, dated 6.04.2004, Article 274, paragraph 7, item 1.
[162] The Criminal Code of the Republic of Kosovo, 2012, article 120, paragraph 13.
[163] The United Nations Convention Against Transnational Organized Crime of year 2000, Article 2, paragraph 1, item (a), p. 2
[164] The Criminal Code of Kosovo, dated 6.04.2004, Article 274, paragraph 7, item 3.
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been randomly established for imminent commission of a crime and formally defined roles for its membership, continued membership or structure[166], the new Criminale Code of the Republic of Kosovo, in its Article 120, paragraph 14 assigns meaning to the term “structured union” which shall mean deliberately established union with the view of immediate commission of a crime, however, it precludes requirement of the formally defined roles for the group members, continued membership or organized structure. This term, under Article 2 of the United Nations Convention Against Transnational Crime, shall mean a group acting in concert for imminent commission of an offence, without the need for formally defined roles for its members, continued membership or developed structure[167].

This meaning of the organized crime, as set out under the Criminal Code of the Republic of Kosovo, as apparently, it is almost entirely taken over from the United Nations Convention Against Transnational Organized Crime of the year 200, however, unlike the Convention, which treats the transnational organized crime, the Criminal Code of Kosovo treats the organized crime in general, including both national and transnational.

Criminal Code of the Republic of Kosovo of the year 2012 (CCRK) designated the organized crime as participation in, or organization of, organized criminal group, as provided for in Article 283. According to paragraph 1 of this Article, whenever anyone willingly and knowingly engages with the view of committing an activity akin to organized crime or joins in the shared goal of the group to commit multiple criminal offences punishable by imprisonment of at least four years, such activity shall be deemed to be a group criminal activity, knowing that such participation will contributed to accomplishing group’s criminal intent, and shall therefore be fined up to two hundred and fifty thousand (250,000) EUR and a prison sentence of at least seven years.

Paragraph one of Article 283 represents merely basic form of this criminal offence, while paragraph two represents the qualified form of the offence, as any person found to organize, establish, supervise, manage or run activities of the organized criminal group shall be fined up to five hundred thousand (500,000) EUR and face prison sentence of at least ten years. Paragraph three, on the other hand, provides for sanctioning of consequences of this criminal offence, as when activities of organized group of the paragraphs 1 and 2 hereunder result in death, the perpetrator will be cited a fine of up to

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Article 283 of the CCRK also allows the courts to mitigate a sentence to a member of a criminal group, if such a person, reports to police or prosecution the existence and set up of the group as well as provides information on the organized criminal group in sufficient detail so as to allow arrest or prosecution of the said group, before the group shall have committed the criminal offence.

Paragraph five of Article 283 of CCRK elaborates on the meaning behind "actively participates", explaining that this shall include, but not be limited to providing information and material means, recruitment of new members and all forms of financing the group activities. The explanation is welcome as it prohibits any differing interpretation by actors engaged in enforcing the criminal code and avoids situation likely to result in unequal treatment of persons suspected of this criminal offence.

The description of this particular criminal offence will also render the object and subject of the crime, which will analyzed below.

2.1 Object of the criminal offence of organized crime

Legal object of this criminal act shall be serious crimes, which are punishable by prison sentence of at least four years or by more severe punishment.

Material object of the organized crime, in addition to action or inaction, which constitute the elements of the criminal office, which are qualified as serious crimes, shall also be organization, establishment, supervision, management and running of organized criminal group activity.

Objectively, organized crime as a criminal offence is committed through unlawful action or inaction, through various ways and means, through active participation in activities of the organized and structured criminal group or through organization, establishment, supervision, management or running of the organized criminal group activity. In order to assume the properties of a criminal offence, it is enough to consume one of the ways of means indicated above, even if it precludes any consequence. This means that the form of the criminal offence, described by Article 283 of CCRK shall be deemed to have been committed and therefore punishable if one of the circumstances mentioned in the article are met, irrespective of existence or otherwise of the

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resulting consequence. Therefore, the fact that a person has, willingly and knowingly committed any of the actions cited in the provision shall be deemed sufficient.

To be deemed criminally liable, it is enough that perpetrators engage in action or inaction to commit serious crimes even in the absence of consequence; the qualification of attempted crime may then be considered, provided that action has been willingly undertaken to commit the crime, however, it fell short of commission, or elements of the criminal offence have been met. In this case, the action shall be deemed an attempted crime and criminal liability is thus established, which carries a prison sentence of at least three or more years for person/s involvedsimilar to actual commission, however, the sentence may be mitigated[168].

2.2 Subject of the criminal offence of organized crime

As this is the criminal offence of the organized crime, according to Article 17 of the Criminal Code of the Republic of Kosovo, active subject of this criminal offence may be any person of the age 14, who is criminally liable, if mentally capable, and provided that such person committed the offence willingly or through negligence, unless specifically provided for by the law [169], while according to Article 2 of the Criminal Code of the Republic of Albania, a person is criminally liable if, at the time of commission of the crime, they are of 14 years of age, while the is liable if at the time of commission of the criminal offence they are of sixten years of age[170]. Passive subject may be both natural and legal persons.

Criminal Code of the Republic of Kosovo fails to mention criminal liability for stateless persons, however, the Code does not preclude criminal liability of stateless persons. On the other hand, the Criminal Code of the Republic of Kosovo regulated this issue under Article 8, according to which criminal liability of the stateless person is equated to foreign citizens, as provided for by Article 7 and 7 of the Code.

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[168] The Criminal Code of the Republic of Kosovo, 2012, article 17, paragraph 1 and 2, p. 9
[169] Ibid, Article 17, paragraph 3, p.6.
[170] The Criminal Code of the Republic of Kosovo, adopted through Law No. 7895, dated 27.01.1995, as amended through Law No. 144/2013, dated 02.05.2013 (amended by the Law No. 9275, dated 16.09.2004, Article 2; repealing paragraph two of item 2, amending item 2 by Law No. 9686, dated 26.02.2007, Article 4, Article 12, p.12

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From subjective perspective, organized crime is committed willingly and through direct or indirect knowledge, which means: the perpetrator of the organized crime is aware of the act and is intent on its commission or he/she is aware that a forbidden consequence may occur as a result of action or inaction and agrees to commit it.

2.3 Similarities and differences of the organized crime and human trafficking

When it comes to the organized crime and human trafficking as two distinct criminal offences, it is worth noting that the organized crime cannot exist as a criminal offence on its own, without the existence of a serious crime, which is human trafficking. Therefore, in order for the criminal offence of the organized crime to exist, the criminal offence of human trafficking should have occurred, in the form defined as the organized crime.

To simplify further the connection of these two criminal acts, it is worth noting that the criminal offence of human trafficking shall be deemed part of organized crime offce, if the trafficking has been conducted by a group made of three or more persons, which should be structured and exist over a specific time, acting in concert, with the view of conducting human trafficking in order to gain, directly or indirectly, financial or other material benefit.

In conclusion, the criminal offence of organized crime, unlike the crime of human trafficking, cannot exist as a separate crime, whereas the human trafficking may exist even outside the umbrella of the organized crime, i.e., as a separate crime. However, in both cases, perpetrators of these crimes share the same goal, material or financial gain.

2.4 Instigating and mitigating factors of the organized crime

Taking into account the time frame of emergence of human trafficking as a crime in Western Balkans in general and in Kosovo in particular, the criminogenic factors behind this act, we may conclude that criminogenic factors of the organized crime as persisting today are very similar to those of human trafficking, as major upheavals to legal and political system of these countries, the post-war situation of 90s, especially the economic situation, a condition devoid of geuine and democratic power, lack of infrastructure of professional and adequate institutions to prevent and combat organized crime, the lack of adequate legal infrastructure, corruption at all levels, as

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well as prevalence of a Balkan mentality to gain millions overnight, have been the main cause behind the organized crime.

If we look at the underlying causes of the organized crime in the Western Balkans, the finding of prof. Dr. VasilikaHysi regarding the organized crime in Western Balkans is sound, whereby she concludes that the following factors have contributed to rise of group criminal activities in the Western Balkans: transition from socialist system, incomplete reforms, quality of law enforcement agencies and changes to economic policies[171].

As stated above, in terms of causes behind emergence of human trafficking and organized crime in Western Balkans, the war in former Yugoslavia played a particular role, along with the immediate post-war period. According to prof. Dr. VasilikaHysi, the war in Yugoslavia brought about a rise in demand for internal sexual exploitation by international peace-keepers, therefore to meet this growing market demand of Western European countries, the Balkans was used as a transit country to traffic women of former Soviet republics[172].

3. Analysis of the criminal offence of the human trafficking

This section of the paper will engage in analysis of the human trafficking crime, by considering the objective and subjective elements of this crime.

The elements of the criminal offence of the human trafficking, especially as it relate to “ways and means” quite often are vague in judicial practice, as incriminatory actions and circumstances surrounding these actions may appear as migrant smuggling, prostitution, facilitating prostitution, forced marriage or abandoning of children, but in reality are part of human trafficking, as the purpose of the perpetrator is to exploit the victim of trafficking and this represents the main element of the human trafficking.

Criminal Code of the Republic of Kosovo (2012), (hereafter CCRK) sets out the criminal offence of the human trafficking in its Article 171. The first paragraph of this article sets out basic form of this criminal offence,

[171]Hysi, Vasilika, Kriminologjia, botim i dytë, Universiteti i Tiranës – Fakulteti i Drejtësisë, Tiranë, 2010, p.206
[172] Ibid, p.208

well as prevalence of a Balkan mentality to gain millions overnight, have been the main cause behind the organized crime.

If we look at the underlying causes of the organized crime in the Western Balkans, the finding of prof. Dr. VasilikaHysi regarding the organized crime in Western Balkans is sound, whereby she concludes that the following factors have contributed to rise of group criminal activities in the Western Balkans: transition from socialist system, incomplete reforms, quality of law enforcement agencies and changes to economic policies[171].

As stated above, in terms of causes behind emergence of human trafficking and organized crime in Western Balkans, the war in former Yugoslavia played a particular role, along with the immediate post-war period. According to prof. Dr. VasilikaHysi, the war in Yugoslavia brought about a rise in demand for internal sexual exploitation by international peace-keepers, therefore to meet this growing market demand of Western European countries, the Balkans was used as a transit country to traffic women of former Soviet republics[172].

3. Analysis of the criminal offence of the human trafficking

This section of the paper will engage in analysis of the human trafficking crime, by considering the objective and subjective elements of this crime.

The elements of the criminal offence of the human trafficking, especially as it relate to “ways and means” quite often are vague in judicial practice, as incriminatory actions and circumstances surrounding these actions may appear as migrant smuggling, prostitution, facilitating prostitution, forced marriage or abandoning of children, but in reality are part of human trafficking, as the purpose of the perpetrator is to exploit the victim of trafficking and this represents the main element of the human trafficking.

Criminal Code of the Republic of Kosovo (2012), (hereafter CCRK) sets out the criminal offence of the human trafficking in its Article 171. The first paragraph of this article sets out basic form of this criminal offence,

[171]Hysi, Vasilika, Kriminologjia, botim i dytë, Universiteti i Tiranës – Fakulteti i Drejtësisë, Tiranë, 2010, p.206
[172] Ibid, p.208

according to which any person engagred in trafficing of human beings shall be fined and imprisoned from five to 12 years.

The second paragraph of the Article 171 of the CCRK qualifies the most difficult form of the trafficking cases when trafficking is conducted in a perimeter of three hundred and fifty meters (350 m) from school or other environment used by children, or when the act is performed by a person under eighteen. The criminal sanctions for this crime include fines and a prison setence from three to fifteen years.

CCRK also qualifies as serious crimes also cases of a person organizing a group of other persons to commit the crime of trafficking. Criminal punishment for these cases also carries a fine of up to 250,000 EUR as well as a prison sentence ranging from 7 to twenty years[173].

Taking into account that trafficking is often facilititated and made possible by official persons, by abusing their position, Article 171 & 4 of the CCRK also provides for cirminal liability in cases when trafficking is committed by official persons, through abuse of position or authority, by distinguishing the level of publishment in these two cases.
First, the perpetrator shall be cited both a fine and imprisonment ranging from five to fifteen years, for the criminal offence of participation in trafficking. (Basic form) when this act is committed in a zone with a 350 m perimetre from the school and environment hosting children.
Secondly, in the cases of organized crime, the official person shall be fined and punished with a prison sentence of at least ten years, as provided for in paragraph 3. (Organized form).

The punishment for trafficking is restricted not only by the age of the victim or degree of organization, but also by consequences produced by the crime. Thus, CCRK (Article 171, &5) states that in case of death of the victim of trafficking, the punishment is no less than ten years or life sentence.

CCRK not only sets out the rules of trafficking but also helps provides [174] understanding of expressions used by TONI. Thus, the expression “Human trafficking” shall mean recruitment, transport, transfer, harbouring or receipt of persons through threat or use of forms or other from of coercion, abduction, forgery, misleading, abuse of power or abuse of a vulnerable

[173]The Criminal Code of the Republic of Kosovo, 2012, article 171, paragraph 3.

[174] Article 171&6 of the Criminal Code of Kosovo.

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position, or through receiving and awarding payments or other gains in order to secure the consent of the person who has control over the other with the view of exploitation.

The expression "exploitation" according to CCRK shall include, but not be limited to, exploitation for purposes of prostituion, pornography or other forms of sexual exploitation, begging, forced labour, slavery or slavery-like action, captivity or organ or tissue harvesting, while the consent of the victim of human trafficking to engage in exploitation is dismissed when any of the manners of exploitation, detailed above, have been used against such victim, along with recruitment, transport, transfer, harbouring or admitting children with the purpose of exploitation shall be deemed "human trafficking", even if it precludes any of the ways indicated above.

The definition of the human trafficking, as prescribed by the CCRk (2012) was subject to changes and addenda relative to other definitions in the earlier criminal codes of Kosovo, which were superseded on 01 January 2013.

Amendments may be summed up in two key aspects: *First,* criminal sanctions prescribed for this type of criminal offence have been increased, *secondly,* the Criminal Code defines new ways of conducting human trafficking, such as a) when the criminal offence is committed in a perimeter of three hundred and fifty (350) metres away from the school or the environment used by children; b) when the act is committed against the person younger than eighteen years of age; c) when the act is committed by an official person or the act is committed through begging; d) when the act results in the death of the victim.

In addition to CCRK, the phenomenon of human trafficking is also regulated by a separate law, specifically the Law on *"Preventing and combating human trafficking and protecting the victims of trafficking*[175]. Although based on CCRK, it also superseded it by introducing the description and elements of trafficking, which are not explicitly laid out in CCRK.

According to this Law[176], if an act exhibits the elements above, they shall be deemed to fall under the scope of this law, including but not limited to: Forced labour; slavery or use of slavery-like practices, or other forms of containment; coercion to engage in prostitution, participate in pornography

[175] Kosovo Law No. 04/L-218, dated 04.09.2013, "*On preventing and combating human trafficking nad protection of victims of trafficking"*

[176] Ibid, Article 5, paragraph 1 and 2.

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shows, with the view of producing, distributing or otherwise disseminating such shows, receipt, sale or possession of pornographic material, or exercise other forms of sexual exploitation; coercion to be subjected to organ or tissue harvesting for the purposes of transplantion or other body organs; coercing a woman to become a surrogate or other reprdocutive activities; engage in abuse of children's rights in order to effect an illegal adoption; use in armed conflict or in illegal military formations; use in illegal activities; forced begging; sale to another person; coercion to engage in order activities in violation of basic human rights and freedoms; forced marriages; marriage of children and illegal holding or detention of children.

Also, under this law, instigating, assisting to, encouraging or attempting to commit a crime set out by this law is punishable, while when such behaviour involves children, these acts shall be deemed human trafficking even if none of the specified ways, qualified as elements of human trafficking have been applied.

The following section will provide a short description of the causes behind occurrence or commission of human trafficking. This should promote better analysis of other crimes associated with human trafficking.

3.1 The object of criminal offence of human trafficking

Analysis of incriminatory actions of the human trafficking crimes indicates that the objects of this criminal offence are actions, means and exploitation.

Actions include: recruitment, transporting, transfer, harbouring or receipt of persons.

Means of conducting the trafficking include threat to or actual use of violence or other forms of coercion, abduction, forgery, deception or abuse of power or of a vulnerable position, or giving or receiving of payments or gains.

Although exploitation is mostly related to perpetrators of trafficking, in this case, the object of the criminal offence are also exploitation of prostitution and other forms of sexual exploitation, services or forced labour, slavery and slavery-like actions, captivity or organ harvesting.

From objective perspective, the crime of human trafficking is committed through illegal action or inaction. In order to assume the properties of a

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criminal offence, it is enough to consume one of the ways or means indicated above, even if it precludes any consequence.

This means that criminal offence set out under Article 171 of the Criminal Code of the Republic of Kosovo shall be deemed to have been committed and therefore punishable if any of the actions under group one or two have been found to have been undertaken, however, it also implies existence of elements of the third group, i.e., elements indicating the intent to exploit. In the case of children, only the intent of exploitation shall suffice for qualification. The fact of a person knowingly and willingly committing any of the actions under group one or two, but also necessarily one of the actions of the groups three is sufficient.

Willingly and knowingly engaging to conduct the human trafficking is sufficient for criminal liability. If no consequence has been produced, the attempt to commit the criminal offence may be considered, provided that actions to commit the crime have been undertaken willingly and knowingly and with the intent of committing it, however, the offence itself has been committed or elements of the crime have not been realized. In this case, attempt at committing criminal offence shall be considered, which in itself carries criminal liability, as under the Criminal Code of the Republic of Kosovo, offence carrying a prision sentence of three or more years shall be cited as if the offence had actually been committed, however, mitigations apply.[177]

Existence of human trafficking is not incumbent on exploitation; rather, it is only necesary to prove that elements of trafficking with the view of exploitation occur. This position is based on the United Nations Protocol on providing comprehensive protection of victims.[178]

3.2 The subject of criminal offence of human trafficking

When dealing with the criminal offence of human trafficking, active subject may be any person of the age of 14[179], who is deemed responsible, both

[177] The Criminal Code of the Republic of Kosovo, 2012, article 23, paragraphs 1, 2 and 3, p. 9

[178]Galonja, Aleksanda&Jovanovic, Sladjana, 2011, Zaštitažrtavaiprevencijatrgovineljudima u Srbiji, published by UNHCR, UNODC and IOM, Joint Programme for Combating Human Trafficking in Serbia, p.18

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citizen of Kosovo or foreign citizen. Passive subjects may be any person, irrespective of age, gender or ethnicity, social status or religion.

From subjective perspective, human trafficking as offence is committed willingly and through direct or indirect knowledge, which means: the perpetrator of the human trafficking is aware of the act and is intent on its commission or he/she is aware that a forbidden consequence may occur as a result of action or inaction and agrees to commit it.

3.3 Causes behind the criminal offence of human trafficking

The causes underlying occurrence of human trafficking are varied, depending on the location of occurrence, however, in most cases due to historic, geograhpic or legal reasons, a pattern of underlying causes starts to emerge, as is the case with Western Balkans. With the exception of Albania, which was not part of former Yugoslavia, other countries share a legacy of the same legal-political system.
In case of Kosovo and former Yugoslav countries, main factors behind human trafficking include: the wars of the 90s, the ensuing political instability due to introduction of multi-party system, social inequaility, globalisation as well as social transformation process.

In all the countries of the Western Balkans, the fall of socialist/communist system was associated with deep economic crisis, especially in Albania, which inherited a ravaged economy, rampant unemployment and lack of prospects[180]. Similarly, in the case of Bosnia and Herzegovina, Kosovo and Macedonia, another important factor was deployment of a considerable number of international representatives as part of military, police or civil organizations.

Traffickers across Western Balkans countries exploited the situations above, in order to bring women of the former socialist bloc, while in Albania, according to ElizabetaImeraj[181], in addition to using the dire economic and social situation, traffickers also used family circumstances, specifically, domestic violence. Children and women who were subjected to physical, psychological or sexual abuse at home were most susceptible to trafficking.

[180]Imeraj, Elizabeta, 2015, Theoretical and practical aspects of studying the human trafficking p.31, available on http://www.doktoratura.unitir.edu.al/2015/01/doktoratura-elizabeta-imeraj-fakulteti-i-drejtesise-departamenti-i-te-drejtes-penale/, accessed on dt.11.04.2015

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Domestic violence remains a challenging issue, as it transforms into major factor, exploited by the criminal entities to expand their web of victims of trafficking. At the time of massive exodus from Albania, many women left Albania and settled in various European Union countries, mainly in Italy, first as illegal migrants, after which some of subjected to trafficking, mostly for sexual exploitation.

Also, in recent years, due to an increased freedom of movement of people, from a country such as Albania, Kosovo, Montenegro and Serbia, where Kosovo residents could move use ID for travelling, the traffickers see these facilities as conducive to their criminal activity, including for transportation and transfer of victims of trafficking.

As indicated, in the case of Kosovo and other countries of the Western Balkans, in recent times, due to economic crisis, the deepening poverty accelerated, along with poor education, families with economic or marital problems, which are conducive to an environment where women are very susceptible to falling victims of trafficking for the purposes of sexual exploitation and prostitution, as well as forced labour.

Finally, the widening gap among the people of the countries of Western Balkans, into the rich and the poor, represents an additional cause behind human trafficking, as the poor, under the pressure of difficult economic and social conditions, is looking for various forms of sustenance, while the rich make use of their position of power to exploit the poor in various forms and for various purposes, such as sexual exploitation or prostitution, forced labour and services, organ harvesting and placement under conditions similar to slavery.

1. Analysis of the criminal offense of migrants smuggling

Often, human trafficking and smuggling of migrants are put into the same category of offenses, but in practice, it is not always easy for the law enforcements to distinguish these two offenses given the protected object in two cases.

Not infrequently, human trafficking begins with smuggling of migrants, where smugglers and migrants agree that smugglers send migrants illegally from one state to another, and in return receive material or financial benefit.

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Normally, the relationship between smugglers and migrants is voluntary, with a short duration and ends when migrants come to the desired destination. Practice shows that there are times when migrants are forced to continue their relationship with smugglers in order to pay their debts to the smugglers. In such cases, the ultimate goal of the smugglers is clear, which is trafficking of those migrants and creating a forced relationship of debt which is often accompanied by violence, use of force, forced labor, coercion to commit other criminal offenses, such as theft, sale of narcotics etc., and forced prostitution.[182]

The Criminal Code of the Republic of Kosovo has provided the smuggling of migrants (Article 170), where as usual the paragraph 1 provides the base action of smuggling, which sanctions everyone who deals with the smuggling of migrants, and in these cases, the punishment is by a fine and imprisonment of two to ten years, while paragraph 2 provides the subjective and objective element of the offense, according to which, whoever produces, supplies, acquires or possesses fraudulent travel document or identity document in order to gain direct or indirect financial benefit or other material benefit, for the purpose of enabling the smuggling of migrants, shall be punished by a fine and imprisonment of up to five years.

Paragraph 3 provides that whoever enables a person, who is not a citizen of the Republic of Kosovo, to remain in the Republic of Kosovo, or person who is not a citizen or permanent resident to remain in the country in question disregarding the necessary legal requirements for residence, by the means of paragraph 2 of this Article or any other illegal means, shall be punished by fine and imprisonment of up to one year.

The easiest form of committing smuggling is provided in paragraph 4 of Article 170 of CCRK, which is the case when the offense remains in tentative, and under this provision the tentative is punishable, while the most serious forms of committing smuggling of migrants are provided in paragraphs 5, 6 and 7 of this article.

The most serious forms of smuggling of migrants under Article 17 of CCRK are foreseen in cases when it comes to organizing or directing other persons to commit this criminal offense or when this offense is committed by a perpetrator acting as a member of group or in a manner that endangers or is

[182]KancelarijaUjedinjenihNaciajazaborbuprotivdroge I kriminala, RegionalnaKancelarijazaJugoistocnuEvropu, TrgovinaLjudimaiKrijumcarenjeMigranata, Smernicezamedjunarodnusaradnju– UNODC, February 2010, pg.5

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likely to endanger the lives or safety of migrants or entails inhuman or degrading treatment, including exploitation of such migrants, or when commission of this offense results in the death of one or more persons.

Article 170 paragraph 8.1 provides the meaning of expression "smuggling of migrants". Under this provision, the smuggling of migrants presents: every action for direct or indirect financial benefit or any other material benefit from the illegal entry of a person into the Republic of Kosovo, who is not a citizen of the Republic of Kosovo, or a person either a citizen of the Republic of Kosovo or foreign nationals in the country in which such person is not a permanent resident or citizen of that country,

"Illegal entry" under paragraph 8.2. of Article 170 CCRK, means: crossing the border or boundary of the Republic of Kosovo, disregarding the necessary conditions for legal entry to the Republic of Kosovo or crossing the borders of any country disregarding the necessary conditions for legal entry in that country.

The explanation of the term "fraudulent travel documents or identity" that is provided in paragraph 8.3 of Article 170 of CCRK is also interesting, as this provision provides a completely different explanation of this document compared to the forged document. The smuggling of migrants under the provision "false document" is: any travel or identity document, that is falsified or altered in any way by any person except the person or body authorized under the law to produce or issue travel or identity document; that is issued or obtained improperly through misrepresentation, corruption, pressure or in any other unlawful manner or used by a person who is not his real holder. As presented, the misrepresentation, corruption, pressure or any other illegal manner are introduced as incriminating acts, which acts are not found in the description of the forgery document.

The criminal code of the Republic of Kosovo (Article 170, paragraph 9) provides the protection of emigrant-victim when crossing the borders illegally. This person is not criminally responsible if he is a migrant and if it is the object of the offense under this article. This means that if a person has committed the offense of illegal crossing of the border as smuggling migrant, then he is not criminally liable for illegal border crossing, because in this case he is considered as victim of the criminal offense of smuggling of migrants.

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Article 170 paragraph 8.1 provides the meaning of expression "smuggling of migrants". Under this provision, the smuggling of migrants presents: every action for direct or indirect financial benefit or any other material benefit from the illegal entry of a person into the Republic of Kosovo, who is not a citizen of the Republic of Kosovo, or a person either a citizen of the Republic of Kosovo or foreign nationals in the country in which such person is not a permanent resident or citizen of that country,

"Illegal entry" under paragraph 8.2. of Article 170 CCRK, means: crossing the border or boundary of the Republic of Kosovo, disregarding the necessary conditions for legal entry to the Republic of Kosovo or crossing the borders of any country disregarding the necessary conditions for legal entry in that country.

The explanation of the term "fraudulent travel documents or identity" that is provided in paragraph 8.3 of Article 170 of CCRK is also interesting, as this provision provides a completely different explanation of this document compared to the forged document. The smuggling of migrants under the provision "false document" is: any travel or identity document, that is falsified or altered in any way by any person except the person or body authorized under the law to produce or issue travel or identity document; that is issued or obtained improperly through misrepresentation, corruption, pressure or in any other unlawful manner or used by a person who is not his real holder. As presented, the misrepresentation, corruption, pressure or any other illegal manner are introduced as incriminating acts, which acts are not found in the description of the forgery document.

The criminal code of the Republic of Kosovo (Article 170, paragraph 9) provides the protection of emigrant-victim when crossing the borders illegally. This person is not criminally responsible if he is a migrant and if it is the object of the offense under this article. This means that if a person has committed the offense of illegal crossing of the border as smuggling migrant, then he is not criminally liable for illegal border crossing, because in this case he is considered as victim of the criminal offense of smuggling of migrants.

Also an innovation that is brought the criminal code of the Republic of Kosovo of 2012 is paragraph 10, which paragraph provides two forms of committing:
First, a person is criminally liable if he recruits, promotes, organizes, hosts or carry persons in member states of the European Union, or in those of the Schengen Agreement, in order to achieve and gain economic, social or other rights, which are in violation to the European Union law and the rules of the member states of the European Union, the Schengen Agreement and international laws, and in this case he is punishable to at least four years in prison.

Second: if the person was aware that by this transfer the benefits or any other right will be gained, in violation of European Union law and the rules of the Member States of the European Union, the Schengen Agreement and the international law, that person is punishable by up to five years in prison.

The most serious form of paragraph 10 is when the offense is committed for personal benefit, where in this case the perpetrator in the case one, shall be sentenced for the offense with imprisonment of at least eight years, and for the case two will be sentenced to at least four years of imprisonment.

Paragraph 10 of Article 170 of CCRK clearly shows that visa liberalization will not affect the severity of punishment, but rather the punishment for committing this offense will be even higher. With this provision, Kosovo has indicated that it will prevent its citizens from abusing the visa liberalization and prevent the return of visa.
The offense of smuggling of migrants is also provided the criminal responsibility if the offense is committed by a legal person, this responsibility is envisaged in paragraph four and in this case the legal person shall be punished by a fine.

The criminal code of the Republic of Kosovo has regulated the issue of confiscation of equipment and transportation means of migrants. The equipment and means are confiscated if they are used for committing this offense (paragraph 10.5 of Article 170 of CCRK)

Paragraph 10.6. Article 170 of CCRK is a paragraph that is more related to political issues as this paragraph becomes effective when the European Council decides to abolish the visa regime for citizens of Kosovo.

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Based on the analysis of this legal description of the criminal offense of smuggling of migrants, it turns out that the object and the subject of this criminal offense can be described as follows:

4.1 The object of the criminal offense of smuggling of migrants

First: the legal object of the criminal offense of smuggling of migrants and illegal movements of people from one country to another, without being resident or citizen of the country of destination. Material object of this criminal offense is illegal crossing and residence from one country to another or to a country where he is not permanent resident or citizen of the state in question.

Second: by objective side, the criminal offense of smuggling of migrants is committed through illegal actions or inactions, by different forms and ways such as recruitment, promotion, transportation, accommodation or temporary housing, illegal border crossing or illegal stay in the country where he is not a permanent resident as well by production, supply, acquisition or possession of false travel or identification documents for the purpose of enabling the smuggling of migrants to benefit not only the material or social rights, but also the other rights that are inconsistent with European Union law and with the rules of the member states of the European Union, the Schengen Agreement and the international law.

This means that the figure of the criminal offense provided in Article 170 is considered committed and is punishable if one of the circumstances provided in the provision is proved, regardless of whether the residence or crossing of illegal migrants is committed. So, suffice the fact that a person has knowingly and illegally committed any of the actions envisaged in this provision, in order to obtain material or financial benefit

For criminal liability, it is sufficient that the perpetrators of this crime act or not act intentionally and for the purpose of smuggling migrants as envisaged in Section 8 of Article 170 of CCRK and if it has not come to the illegal crossing of the border or illegal residence of migrants in a state where they are not permanent residents, it is considered as attempt for committing the criminal offense. If the actions were intentionally taken for committing the criminal offense but the action is not completed or the elements of the offense have not been realized, then this case is considered as attempt to commit a criminal offense and there is criminal responsibility, because

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paragraph 4 of this Article provides the penalty even in cases where the offense remains as attempted.

4.2 The subject of the criminal offense of smuggling of migrants

While we are dealing with a criminal offense of smuggling of migrants, active subject can be any person who has attained 14 years [183]and who is responsible, either citizen of Kosovo or a foreigner. Passive subjects may be legal or natural persons.

On the subjective side of the criminal offense, smuggling of migrants is committed by a direct or indirect intent, which means that the person who commits this offense is aware of his act and wants to commit it, or he is aware that the prohibited consequence can be caused as a result of the action or inaction and he accepts its occurrence.

4.3 Similarities and differences between human trafficking and smuggling migrant as part of organized crime

Based on the description of the above mentioned criminal offense of smuggling of migrants it is clear that there is no confusion or uncertainty in the difference between the criminal offense of human trafficking and the criminal offense of smuggling of migrants, because the intention of their perpetrator clearly distinguishes these two offenses.

First, a very important distinction between these two offenses lies in the intention of their perpetrators. The purpose of the offense of smuggling of migrants is not exploitation of the prostitution of others or other forms of sexual exploitation, services or forced labor, slavery or similar practices to slavery, servitude or the removal of organs, as it is with the offense of trafficking human beings,

The other difference is the fact that smuggling of migrants can be committed only if the state border is crossed illegally, whether entering or leaving the country, or staying in a state without being a citizen or permanent resident of that country, while trafficking of human beings can be committed only within the territory of a country.

[183] Article 17, paragraph 3, p.6

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In addition, smuggling migrant initiates himself the process of crossing the border, so he desires to migrate illegally and he can waive such action at any time, while victim of trafficking in most cases does not have such solution and therefore cannot take actions willingly.

Also it is worth mentioning another important distinction that has to do with material or financial benefits. In cases of human trafficking, the trafficker realizes exploitation and immediate benefits, which benefit is planned to occur in the future, while in smuggling of migrants, the benefit is immediate and it ends with sending migrants in the destination country. So in both cases, the perpetrators of these two offenses aims to gain material and financial benefits, the protected object are men, but in one case they are trafficked for the purpose of exploitation and in another case they are smuggled from one country to another.

In addition to these differences between these offenses there is a similarity between them. This similarity has to do with the passive subject of these acts, because in both cases the human beings are victims of these crimes. Also with both of these criminal offenses, the ultimate purpose of the perpetrators is gaining material or financial benefits.

4.4 Instigating and mitigating criminogenic factors, causes behind smuggling of migrants

Increasingly difficult economic situation of a growing number of inhabitants of the Western Balkan countries represents the main cause of smuggling of migrants. Desire for a better life, for employment, for education, for a life in a country with political and economic stability as well as in a country where the level of organized crime and corruption is a much lower than in countries of origin of migrants, presents a sufficient reason that people, mostly youth, abandon their countries using all legal illegal means.

Until today, in Western Balkan countries, only Kosovo has failed to have an agreement with the European Union on visa liberalization and this represents the main reason of illegal the movement of its citizens without visas and without legal travel documents. Smugglers use this situation very well for smuggling migrants out of Kosovo in all possible ways, land, sea and air,

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Various authors find that other causes can also be high economic and social difficulties, inability to find housing and employment, discrimination in relation to the rest of the population and, according to some studies, the majority of migrants entering the European Union Countries are victims of trafficking[185]. This clearly shows the relation between the human trafficking and smuggling of migrants, since as shown above, the basis of human trafficking in many cases initially appears smuggling of trafficking victims.

In the case of Kosovo and Albania, especially in the Western part of Kosovo and Northern Albania, where there is still a tradition of blood feuds, based on the Kanun of LekDukagjini, although to a very low extent, as a reason to migrate illegally is also the fact that persons who are in "blood" due to conflicts with other persons or families, wish to migrate to other countries in order to escape the blood feuds, where smugglers exploit these circumstances for their benefits.

Conclusion

Given the importance of preventing and combating the organized crime as a condition for visa liberalization and opening up the process of accession to the European Union structures and other Euro-Atlantic structures, this paper contains an analysis of criminal offenses the organized crime, trafficking of human beings and smuggling of migrants.

Analysis of these offenses may help in better understanding of the elements of these offenses and the causes behind their commission, which should help the work of competent authorities to investigate, prosecute and fight these illegal actions.

Nowadays, when the economic and political crisis in Kosovo is more and more pronounced, organized criminal groups are increasingly using this situation to find people in need that are seeking for a better and safer life, in order to traffic or smuggle people to countries of the European Union. In most of cases, these two offenses are part of organized crime, thus preventing and combating them successfully implies successfully preventing and combating organized crime.

[184] The case of the District Court in Prishtina P.no.244/10 or the Special Prosecutor of the Republic of Kosovo PPS.no.422 / 2009

[185] Vasilika, Hysi 2010, Criminology, cited work, p.358 and 359

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