

POSSIBLE FUTURE CHALLENGE FOR THE ECTHR?: IMPORTANCE OF THE ACT ON EXEMPTION AND THE SANADER CASE FOR TRANSITIONAL JUSTICE JURISPRUDENCE AND THE DEVELOPMENT OF TRANSITIONAL JUSTICE POLICIES

Mr. sc. Sunčana Roksanđić Vidlička *

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The process of transition is a much broader civic enterprise than that which positivist law can alone bring about.¹

Constitutional amendments adopted in Croatia in 2010 that allowed retroactive prosecution of economic crimes related to the process of ownership transformation and privatization committed during the Homeland War and peaceful reintegration, and war profiteering cases (transitional economic crimes) opened a Pandora's box. It should be argued that these Constitutional amendments and the Act on Exemption from the Statute of Limitations belong to the mechanisms of "transitional justice" usually implemented in post-conflict societies with the aim of achieving full realization of the rule of law and the principle of social justice. The one case prosecuted to date in Croatia on the basis of the Act on Exemption, received tremendous media attention: the case against the former prime minister of Croatia, Ivo Sanader.

As the decision in the Sanader case has become final, this article illuminates the transitional justice narrative of the Act on Exemption and raises the questi-

* Sunčana Roksanđić Vidlička, M. Sc., Assistant, Faculty of Law, University of Zagreb, Trg maršala Tita 14, Zagreb

¹ Hamilton, M., *Freedom of Assembly, Consequential Harm and the Rule of Law: Liberty-limiting Principles in the Context of Transition*, Oxford Journal of Legal Studies, vol. 17, no. 1, 2007, p. 81.

on whether this Act as such, through the Sanader case, could be put under the scrutiny of the European Court of Human Rights as a “transitional justice case” that tackles some of the most fundamental provisions of the European Convention of Human Rights. This article therefore explores the narratives of transitional justice discourse, and touches upon the need to protect economic, social and cultural rights in the context of transitional justice mechanisms. Moreover, this article tries to anticipate some of the questions with which the European Court of Human Rights could deal in order to either confirm or reject the Croatian approach towards combating transitional economic crimes. In any case, if this “Croatian model” of transitional justice laws is proven to be legally justified and effective, it could be implemented in the other countries in the region and possibly serve as a model on how to approach long neglected crimes – transitional economic offences that could have grave consequences on the development of the society.

Keywords: transitional justice discourse, the Sanader case, jurisprudence of the ECtHR in “transitional justice” cases, the Croatian Act on Exemption of Statute of Limitations, possible reasoning of the ECtHR regarding the Act on Exemption

1. INTRODUCTION²

Constitutional amendments adopted in Croatia in 2010³ allowed retroactive prosecution of transitional economic crimes and war profiteering cases.⁴ The experience of war and peaceful reintegration combined with a transition

² This article is written in the honour of *professor emeritus* Željko Horvatić. The topic of article was chosen taking into consideration the academic interest and scholarship of prof. emer. Željko Horvatić, e.g. Horvatić, Ž., *Djelovanje međunarodnih organizacija u suzbijanju kriminala*, Zagreb, Pravni fakultet u Zagrebu, 2002; Horvatić, Ž., *Globalno suprotstavljanje kriminalu na prijelomu milenija*, Zbornik Pravnog fakulteta u Zagrebu, vol. 51, no. 2, 2001, pp. 249 – 305; Horvatić, Ž., *Ostvarenje i zaštita vladavine prava u hrvatskom kaznenom pravu*, Zbornik Pravnog Fakulteta u Zagrebu, vol. 51, no. 6, 2001, pp. 1195 – 1223. It also belongs in part to the doctoral research project conducted by the author at the Max Planck Institute for Foreign and International Criminal Law. See more in Roksandić Vidlička, S., *Severe Economic Crimes Committed in Transitional Periods – Crimes under International Criminal Law?*, in: Albrecht, H.-J., Getoš Kalac, A.-M., Kilchling, M. (eds.), *Mapping the Criminological Landscape of the Balkans*, Berlin, Duncker & Humblot, (forthcoming 2014).

³ *The Constitution of the Republic of Croatia*, Official Gazette, No. 76/10, 85/10.

⁴ See more in Novoselec, P., Roksandić Vidlička, S., Maršavelski, A., *Retroactive prosecution of transitional economic crimes in Croatia – testing the legal principles and human rights*, in: van Erp, J., Huisman, W., Vande Walle, G. (eds.), *The Routledge Handbook of White-Collar and Corporate Crime in Europe*, Abingdon, Routledge, (forthcoming 2015).

from one economic system to another also determined two categories of transitional economic crimes in Croatia for which the statute of limitations is now abandoned: (1) *war profiteering crimes*, and (2) *crimes in the process of privatization and ownership transformation*.⁵ It is considered that the perpetrators of these transitional economic crimes abused the vulnerability of both processes.

The *Proposal of the Decision to Amend the Constitution of Croatia*⁶ to allow retroactive prosecution of transitional economic offences specified that ownership transformation and privatization did not produce the expected economic outcomes and had no significant positive impact on the economic development of Croatia: "On the contrary, the implementation of transformation and privatization resulted in an increase of domestic and foreign debt, caused a significant increase in unemployment, disproportionate and fast enrichment of individuals, and unjust impoverishment of many... It is just and in the spirit of international law to deny the perpetrators of such grave crimes the possibility to avoid criminal liability by the application of the statute of limitations. The basis for the statute of limitations is the guarantee of legal certainty to citizens, but it is certain that this institute should not be to the benefit of the perpetrators enabling them to practically legalize the effects of such acts through the statute of limitations."⁷ After the Constitutional amendment, in 2011 the Act on Exemption from the Statute of Limitations for War Profiteering and Crimes Committed in the Process of Ownership Transformation and Privatization⁸ (hereinafter: the Act on Exemption) was passed as was a new Criminal Code.⁹

Therefore, one could point out that the Act on Exemption belongs to the transitional justice mechanisms necessary to be implemented in a particular society in order to reach "transition" to the democracy and the rule of law. Hence, the question that imposes itself here is whether the country in question follows or breaches the principle of legality and the rule of law by making transitional policies and, therefore, whether it breaks or creates (new) circles of injustice.

⁵ Both categories of crimes are referred to later in this article as transitional economic crimes.

⁶ See the explanation attached to the *Croatian Government Proposal of the Decision to amend the Constitution of the Republic of Croatia, from September 2009*, available at: www.pravo.hr/_download/repository/prijedlog_izmjena_Ustava_2009.pdf (last visited 11.11.2014). See also Official Gazette, No. 89/2010.

⁷ *Ibid.*, p. 8.

⁸ Official Gazette, No. 57/11.

⁹ Official Gazette, No. 125/11, 144/12.

One case prosecuted so far in Croatia on the basis of the Act on Exemption, received tremendous media attention: the case against the former prime minister of Croatia Ivo Sanader. At the end of the process, Sanader was sentenced to 8.5 years imprisonment.¹⁰

As the *Sanader* case has become final, this article explores the transitional justice narrative of the Act on Exemption and the question whether this Act, as such, through the *Sanader* case, could be put under the scrutiny of the European Court of Human Rights (hereinafter: ECtHR) as one of its “transitional justice cases” that tackle some of the most fundamental provisions of the European Convention of Human Rights (hereinafter: the Convention). In order to analyze possible breaches, a short overview of the *Sanader* case and the narrative of transitional justice will be presented, as will as some approaches that ECtHR uses when putting under scrutiny “transitional” cases.

2. THE SANADER CASE: AN OVERVIEW¹¹

In August 2011, the prosecution indicted former Croatian Prime Minister Ivo Sanader for bribery. While negotiating the terms of a loan to be granted by the Austrian bank Hypo-Alpe-Adria International AG to the Government of the Republic of Croatia, in the capacity of Deputy Minister of foreign affairs, Sanader made a deal to be paid a commission in cash in the amount of seven million Austrian schillings in return for that bank’s entry into the Croatian market, which the bank indeed paid in the course of 1995. The crime was classified as a war profiteering crime and abuse of office and authority.¹² In addition to these charges, in September 2011, the prosecution charged¹³ Sanader with receiving a €10 million bribe while serving as the Prime Minister of Croatia, from Zsolt Hernadi, chairman of the management board of the Hungarian oil company MOL for transferring the controlling rights in the Croatian oil company INA to MOL.

As the judges pointed out in the first instance judgment against Sanader¹⁴, as the former Prime Minister of the country, he abused his position for its

¹⁰ Croatian Supreme Court Judgment 2014. Case I Kž-US 94/13-10.

¹¹ For details of the case see Roksanđić Vidlička S., *Recent Changes in the Regulation of the Statute of Limitations in Croatia for Transitional Economic Crimes*, Justice Actualités Report, vol. 29, no. 2, 2014, pp. 25 – 27.

¹² Indictment No. K-US-48/11, IS-US-6/11, August 31, 2011.

¹³ For details visit the official prosecutor’s web page: <http://www.dorh.hr/PodignutaOptuznicaProtivIveSanadera01> (last visited: 11.11. 2014.).

¹⁴ Zagreb County Court Judgment 2012. Case K-US-26/11.

own enrichment and not for the common good. According to the first instance judges, “this judgment sends a message to people in power, current and future, that holding a public office must be performed for the common good and in the interest of the society!” Furthermore, according to the judgment. Sanader’s behavior “contributed to the apathy and disillusionment of people in the system, created a belief among young people that honest labor does not pay, but the violation of the law and social morality does.” This judgment reiterates the point of the *Venice Commission Report on the relationship between political and criminal ministerial responsibility*: “An area of criminal law that may be of particular relevance for ministers is that of corruption, embezzlement and other forms of economic crime. It is of particular importance that such rules be strictly and effectively enforced against ministers and other publically appointed officials, since such offences are not only to be seen as criminal, but may also easily undermine public trust and the legitimacy and authority of the democratic system.”¹⁵

Moreover, the second instance judgment in the *Sanader* case made one important step in order to clarify provision of the Act on Exemption. The Supreme Court¹⁶ defined what conduct should be considered as “war profiteering” especially relating to the conduct of public officials:¹⁷

“Although war involves armed conflict, it is, however, not just about conflict. The war is a broader and more complex phenomenon because it involves other forms of struggle (political, economic, information), which have great importance for the preparation and conduct of war. Having this in mind, a notorious fact is that preparation of war and other forms of struggle that do not involve the use of weapons are carried out in an area that is not directly affected by the war... The fact that the war should be won on a political level, on which Croatia should prove its integrity, maturity, democracy and reliability, creates the context in which criminalized behavior has the characteristics of war profiteering. Specifically, in this atmosphere the defendant used his official powers for illicit purposes, as it is rightly concluded by the trial court. ...The defendant was entrusted with particular tasks, which at that time were extremely important for Croatia, and he abused that fact... by putting his personal interests above the interests of Croatian citizens. In this way, the

¹⁵ European Commission on Democracy Through Law [Venice Commission] (2013): Report on the relationship between political and criminal ministerial responsibility. 94th Plenary Session. Study No. 682/2012. CDL-AD(2013)001, para. 97.

¹⁶ The Supreme Court Judgment and Decision 2014, *op. cit.* in fn. 11, pp. 6 – 7.

¹⁷ *Ibid.*

defendant... degraded the sacrifice of soldiers in the war and endangered the core values of the society. The proper conclusion of the trial court is that [by doing so] the defendant violated the public order. In view of this fact, it was justifiably established by the trial court that war profiteering does not only refer to previously known forms and phenomena such as raising the price of goods due to shortages, selling weapons to defend a country at disproportionately high prices, but also the behavior of which the defendant is found guilty....”

As it could be seen from this excerpt from the judgment, the Croatian Supreme Court gave a very extensive interpretation of the term war profiteering. An analysis of this discourse would extend beyond the scope of this article, but is a worthy endeavor to be undertaken in the future.

Hence, one should be aware that the charges against Sanader involving INA cannot be addressed as “privatization and ownership transformation profiteering” for which there is no statute of limitation as this privatization cycle for INA did not occur during: (1) the ‘Homeland War’, (2) peaceful reintegration, (3) warfare, or (4) a direct threat to the independence and territorial integrity of the State. It is only in those situations that the Act on Exemption can be applied. The period in question, therefore, belongs to the Croatian “transitional period”.

3. THE TRANSITIONAL JUSTICE DISCOURSE

In order to get to the reasons why the Croatian *Act on Exemption* should be considered as part of the transitional justice mechanism applied in Croatia, one should first look at the narratives of the transitional justice discourse itself.

Transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.¹⁸ Furthermore, for specific clarifications of the notion one should turn to one of the most cited definitions of transitional justice, given by Ruti Teitel. Teitel defines transitional justice as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”¹⁹ Te-

¹⁸ *What is transitional justice? Factsheet*, International Center for Transitional Justice, 2009, <http://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> (last visited 11.11.2014).

¹⁹ Teitel, R. G., *Transitional Justice Genealogy*, Harvard Human Rights Journal, vol. 16, 2003, p. 69.

itel further defines three phases of modern transitional justice. The first phase (Phase I) goes back to World War II²⁰, as well as to post-World War I period, and was “extraordinary in its internationalism”. As Brems illuminates, the creation of “supranational human rights protection mechanisms after Second World War in itself can be considered as a transitional justice effort”²¹, with the Convention as one of the most successful examples of implementation of transitional justice mechanisms. Phase II, the post-Cold War phase, was associated with the post-1989 “wave of democratization, modernization and nation-building”²² mainly in response to the political changes in Latin America and Eastern Europe. Lastly, Phase III, according to Teitel, is associated with contemporary conditions of persistent conflict which lay the basis for the generalization and normalization of a law of violence.²³ Hence, the narratives of global transitional justice, furthermore, “impl[y] an expanded legalism, while at the same time reflecting its trends of juridicization and decentralization in terms of jurisdictional sites – local and transnational – as well as new legitimacies based on a paradigm shift from state to human-centered discourse in foreign affairs.”²⁴ Therefore, one could state that the development of international human rights law has an impact on the development of transitional justice mechanisms and *vice versa*.

Moreover, broadly speaking, one could articulate that transitional justice relates to a set of legal, political and moral dilemmas about how to deal with past violence in societies undergoing some form of political transition.²⁵ Influential articles by Guillermo O’Donnell and Samuel Huntington, canonized in Neil Kritz’s salient three-volume encyclopedia of transitional justice, viewed the parameters of justice in times of transition to democracy as a function of

²⁰ See also Winter, J., Cassin, R., *State Sovereignty and Transitional Justice in the period of the Second World War*, in: Brants, C., Hol, A., Siegel, D. (eds.), *Transitional Justice, Images and Memories*, Farnham, Ashgate, 2013, pp. 51 – 70.

²¹ Brems, E., *Transitional Justice in the Case Law of the European Court of Human Rights*, *The International Journal of Transitional Justice*, vol. 5, 2011, pp. 282 – 303.

²² Teitel, R., *The Law and Politics of Contemporary Transitional Justice*, *Cornell International Law Journal*, vol. 38, 2005, pp. 837 – 862, p. 839.

²³ Teitel, *op. cit.* in fn. 19, p. 71.

²⁴ Teitel, *op. cit.* in fn. 22, p. 841.

²⁵ Sharp, D. N., *Introduction: Addressing Economic Violence in Times of Transition*, in: Sharp, D. N. (ed.), *Justice and Economic Violence in Transition*, New York, Springer Science+Business Media, 2014, pp. 1 – 26, p. 6, citing Nagy, R., *Transitional Justice as Global Project: Critical Reflections*, *Third World Quarterly*, vol. 29, no. 2, 2008, pp. 275 – 289.

a series of bargains between elite groups, with more or less justice available depending on the extent to which elite perpetrator groups were able to dictate the terms of transition.²⁶ In any case, as Kemp illuminated²⁷, the origins of transitional justice within the political science field meant that it was born with an explicitly political prism through which it examined law and particularly human rights remedies. That reasoning also has implications for ECtHR's point of view on transitional justice policies and respect of human rights in particular cases, as will be presented further in this article.

In the UN Report on the "*Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*"²⁸ the notion of transitional justice "*comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation*". Justice, according to the Report, is viewed as "*an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interest of victims and for the well-being of society at large.*"²⁹ Transitional justice measures are considered as ones brought to "*comprise the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.*"³⁰

In any case, in order to grasp what is embraced with the transitional justice discourse, one must bear in mind the following: the approach toward (re)building the transitional and post-conflict societies based solely on the improvement of civil and political rights was proven to be counterproductive.³¹ As

²⁶ Sharp, *ibid.* See Huntington, S. P., *The Third Wave: Democratization in the Late Twentieth Century*, in: Kritz, N. (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol. 1, General Considerations, Washington, United States Institute of Peace, 1995, pp. 65 – 81, and O'Donnell, G., Schmitter, P., *Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies*, in: Kritz, N. (ed.), *ibid.*, pp. 57 – 64.

²⁷ Kemp, S., *Alternative Justice Mechanisms, Compliance and Fragmentation of international Law*, in: Van Den Herik, L., Stahn, C. (eds.), *The Diversification and Fragmentation of International Criminal Law*, Leiden Studies on the Frontiers of International Law, Vol. 1, Leiden, Martinus Nijhoff Publishers, 2012, p. 253.

²⁸ UN Secretary General; *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc S/2004/616 (August, 23, 2004), para. 9.

²⁹ *Ibid.*, para. 7.

³⁰ UN Secretary General, *op. cit.* in fn. 28, para. 8.

³¹ Carranza, R., *Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?*, *International Journal of Transitional Justice*, vol. 2, no. 3, 2008,

Schmid also pointed out, the constantly expanding literature on international criminal law and continuing efforts to redress the legacies of massive human rights abuses more broadly (sometimes referred to as transitional justice, post-conflict justice or “dealing with the past”) have remained detached from the human rights literature on economic, social and cultural rights.³² But lately³³ it is argued more and more often within relevant institutions, such as the UN, and among scholars, that neglecting to prosecute transitional economic crimes only enhances the impunity gap and social conflict by focusing almost exclusively on civil and political human rights violations, while leaving accountability for economic crimes behind: “literature, institutions and international enterprises of transitional justice historically have failed to recognize the full importance of structural violence, inequality and economic (re)distribution to conflict, its resolution, transition itself and processes of truth or justice-seeking and reconciliation.”³⁴ One must add that other scholars have also criticized international law’s failure to address structural issues, “serenely treating the everyday divisions of wealth and poverty, the background norms for trade in arms and military conflicts as part of global *donnée*”.³⁵ As Carranza³⁶ argues, while transitional justice promotes accountability by what it chooses to con-

p. 329. For newest transitional justice discourse and violations of economic, social and cultural rights see United Nations, United Nations Human Rights Office of the High Commissioner, *Transitional Justice and Economic, Social and Cultural Rights*, United Nations Publication 2014, and Schmid, E., Nolan, A., ‘Do No Harm’? *Exploring the Scope of Economic and Social Rights in Transitional Justice*, International Journal of Transitional Justice, vol. 8, no. 3, 2014, pp. 362 – 382.

³² Schmid, E., *Violations of Economic, Social and Cultural Rights in International and Transnational Criminal Law*, Graduate institute of International and Development Studies Geneva – Doctoral Thesis No. 960, 2012, p. 6.

³³ It must also be noted that the number of international instruments for the protection of economic and social rights has significantly increased in the last few decades. Also, after May 2013 an individual complaint mechanism for protecting those rights is available as well (Optional Protocol to ICESCR).

³⁴ Miller, Z., *Effects on Indivisibility: In Search of the ‘Economic’ in Transitional Justice*, International Journal of Transitional Justice, vol. 2, no. 3, 2008, p. 266; see also Parmientier, S., Weitekamp, E., *Political crimes and serious violations of human rights*, in: Parmientier, S., Weitekamp, E., Deflem, M. (eds.), *Crime and Human Rights*, Bingley, Emerald Group Publishing Limited, 2007, pp. 110 – 111.

³⁵ Starr, S., *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, Northwestern University Law Review, vol. 101, no. 3, 2007, p. 1261. Furthermore see Pogge, T., *World Poverty and Human Rights*. Ethics & International Affairs, vol. 19, no. 1, 2005, pp. 1 – 7.

³⁶ Carranza, *op. cit.* in fn. 31, p. 310.

front, it may reinforce impunity by what it chooses to ignore. Therefore, the strengthening of the protection of economic and social rights in transitional states, which also includes adequately regulating economic crimes, could be considered a *condicio sine qua non*, especially in states that shifted from the socialist economic system to free market economy or are in one of the phases of the transitional period.³⁷

As transitional justice has the ambition to assist “the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future”³⁸, it calls for, as Alexander Boraine pointed out, a “holistic interpretation”. The holistic approach to transitional justice should include the protection and strengthening of all rights in order to avoid new injustices. In any case, the harms caused by such economic crimes to individuals and society can be seen as just as serious as those caused by other crimes.³⁹

To conclude, there are many phases and shapes of transition. Each country has its particularities. The Croatian particularity is that the process of privatization occurred almost simultaneously with the Homeland war. Therefore, addressing crimes committed in the privatization process was not articulated as a priority for the Croatian society until rather recently. If the *Sanader* case appears before the ECtHR, the Court should bear in mind the above, and address the Act on Exemption as a transitional justice measure and treat the *Sanader* case as a “transitional justice” case.

4. TRANSITIONAL CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: GENERAL REMARKS AND GUIDING NARRATIVES OF THE ECtHR

According to the Preamble of the Convention, the protection of fundamental freedoms expressed in the UN Universal Declaration⁴⁰ as the foundation of justice and peace, is best maintained by an effective political democracy and by a common understanding and observance of the human rights upon which they depend. Hence, the role of regional human rights mechanism, such as the

³⁷ Teitel, *op. cit.* in fn. 22, p. 69.

³⁸ Arbour, L., *Economic and Social Justice for Societies in Transition*, Journal of International Law and Politics, vol. 40, no. 1, 2007, p. 2.

³⁹ Carranza, *op. cit.* in fn. 39.

⁴⁰ See particularly Arts. 22-27, in which economic, social and cultural rights are enshrined. UN(1948): General Assembly Resolution 217A (III), *Universal Declaration of Human Rights.*, UN Document no. A/810.

ECtHR, which “observes human rights”, is particularly relevant for the preservation of the needed balance between different human rights and freedoms and to imposing limitations to the states in addressing those rights, especially in transitional periods. As Hamilton and Buyse point out, “it is precisely in historical cases that the traditional justifications for deferring to the national courts are less persuasive”⁴¹ and the role of a regional court could be indispensable.

In any case, human rights treaties are not forced upon states but entered into voluntarily “with a view to limiting the free display of forces and establishing obligations to take certain measures for the protection of human rights”.⁴² Therefore, Sweeney goes so far as to suggest that the ECtHR should become in transitional justice cases an “embodiment of an international form of transitional justice: the human rights counterpart to international criminal responses”.⁴³ As pointed out by Sweeney, “by joining the Council of Europe, and signing and ratifying the ECtHR, it may be that states have thereby disbarred themselves from employing some transitional policies, in favor of a human rights based approach to transition.”⁴⁴

In 1990s, and after the fall of the Berlin Wall, the Council of Europe, as the ECtHR itself, had to deal with a wave of “transitional justice” cases arising mainly from Eastern European states that had undergone an economic system shift, while some of them were going through war at the same time. The Council of Europe directly tackled transitional justice narratives, due also to the large number of potential cases, in its Resolution 1096 (1996) on *Measures to dismantle the heritage of former communist totalitarian systems*, which was also reiterated a decade later in Resolution 1481 (2006) on the *Need for interna-*

⁴¹ Hamilton, M., Buyse, A., *Introduction*, in: Hamilton, M., Buyse, A. (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights*, Cambridge, Cambridge University Press, 2011, p. 18, citing Bárd, K., *The Difficulties of Writing the Past through Law – Historical Trials Revisited at The European Court of Human Rights*, *International Review of Penal Law*, vol. 81, 2010, p. 34.

⁴² Koch, I. E., *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights*, Leiden, Boston, Martinus Nijhoff Publishers, 2009, p. 271.

⁴³ Sweeney, J. A., *The European Court Of Human Rights in Post-Cold War Era*, Abingdon, Routledge, 2013, p. 244.

⁴⁴ See particularly the ECtHR case *Sejdić and Finci v. Bosnia and Herzegovina*, 22 December 2009 (Appl. Nos 27996/06 and 34836/06). See more about the case in Sweeney, J. A., *Freedom of religion and democratic transition*, in: Hamilton, Buyse (eds), *op. cit.* in fn. 41, pp. 103 – 130.

tional condemnation of crimes of totalitarian communist regime.⁴⁵ In Resolution 1096 it was stated that the key to peaceful coexistence and a successful transition process lies in striking the delicate balance of providing justice without seeking revenge, that the criminal acts committed by individuals during the communist totalitarian regime should be prosecuted and punished under the standard criminal code⁴⁶, and that unlawfully expropriated property should be restituted (or compensation should be provided).⁴⁷ Moreover, the Resolution also articulated that a democratic state must, instead of seeking revenge, respect human rights and fundamental freedoms, such as the right to due process and the right to be heard, and it must apply them even to people who, when they were in power, did not apply them themselves. These Resolutions were to serve as guiding narratives to newly accepted member states of the Council of Europe in passing “transitional” legislation.

As is often underlined, in its scrutiny of transitional justice cases the ECtHR focuses on the responsibility of the main institutional transitional factor - the state and its various branches - in exploring to what extent the legal boundaries were transgressed in implementing transitional justice measures. Teitel emphasized that one of the key questions is whether (and if so, how) the “evolutive jurisprudence” of regional mechanisms can remain true to the rule of law while also meaningfully recognizing the acute social, economic and political exigencies which characterize periods of transition.⁴⁸ Furthermore, according to Teitel, in regional case law and in transitional jurisprudence, the conception of law is partial, contextual and situated between at least two legal and political orders. Legal norms are necessarily multiple, the idea of justice always a compromise. Therefore, the task of the ECtHR in transitional justice cases could be very complex as a particularly delicate balance needs to be achieved.

However, some authors have expressed different opinions. Posner and Vermeule doubt that transition is really a distinctive topic presenting a distinctive

⁴⁵ Council of Europe (2006): *Resolution 1481 on the Need for international condemnation of crimes of totalitarian communist regime*.

⁴⁶ See the full application of that narrative in the case ECtHR, *Streletz, Kessler and Krenz v Germany*, 22 March 2001 (Appl. Nos. 34044/96, 35532/97 and 44801/98).

⁴⁷ But see the decision of the ECtHR in *Jahn v Germany*, 30 June 2005 (Appl. Nos. 46720/99, 72203/01 and 72552/01): German reunification constituted an exceptional circumstance justifying the lack of compensation in case of expropriation.

⁴⁸ For instance see, *Ždanoka v. Latvia*, 16 March 2006 (Appl. No. 58278/00) and *Kononov v. Latvia*, 17 May 2010 (Appl. No. 36376/04), *Streletz, Kessler and Krenz v. Germany*, *op. cit.* in fn. 46.

set of moral and jurisprudential dilemmas⁴⁹, suggesting instead that that the problems are at most overblown versions of ordinary legal problems.⁵⁰ On the other hand, “the line between transitional and non-transitional settings is evanescent... indeed the invocation of arguments from transition may even serve courts well by providing a constitutive fiction which enables seeming fidelity to rule of law ideals whilst deferring to transitional pressure.”⁵¹

In any case, one could state that the processes of transition are not only about political or economic change. “They touch the core of societies’ identities” and “open discussion with a plurality of voices [what] is [deemed] necessary but without losing crucial social cohesion.”⁵² For instance, many countries – particularly in Central and Eastern Europe – experienced economic liberalization alongside political democratization. And in this regard, the ECtHR has recognized that transition from centrally planned to market oriented economies is “fraught with difficulties”.⁵³

Furthermore, one could claim that one of the most important standpoints of ECtHR in transitional justice cases for developing democracies was the ECtHR’s reasoning that democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.⁵⁴ Therefore, it could also be stated that the role of the ECtHR is “simply to hold the new Council member states to their human rights commitments”.⁵⁵ While acknowledging the economic and political hurdles faced by transitional states, the ECtHR argued that “these difficulties and the enormity of the tasks

⁴⁹ See Posner, E., Vermeule A., *Transitional justice as ordinary justice*, Harvard Law Review, Vol. 117, 2003/2004, pp. 762 – 825.

⁵⁰ *Ibid.*, p. 765.

⁵¹ Hamilton, Buyse (eds.), *op. cit.* in fn. 41, p. 8 (citing Priban, J., *Dissidents of Law: On the 1989 Velvet Revolutions, Legitimations, Fictions of Legality and Contemporary Version of the Social Contract*, Aldershot, Ashgate, 2002, pp. 4 – 5).

⁵² Buyse, A., *The truth, the past and the present: Article 10 ECHR and situations of transitions*, in: Hamilton, Buyse (eds.), *op. cit.* in fn. 41, pp. 131 – 150. See also *Kenedi v. Hungary*, 26 May 2009 (Appl. No. 31475/05), *Orban and others v. France*, 15 January 2009 (Appl. No. 20985/05).

⁵³ *Schirmer v. Poland*, 21 September 2004 (Appl. No. 68880/01), para. 38. Cited in Hamilton and Buyse in Hamilton, Buyse, *op. cit.* fn. 41, p. 12.

⁵⁴ *Sørensen and Rasmussen v. Denmark*, 11 January 2006 (Appl. Nos. 52562/99 and 52620/99), para. 58, with reference to previous case law. Emphasized also in Palmer, E., *Judicial review, socio-economic rights and the Human Rights Act*, Oxford and Portland, Hart Publishing, 2007, p. 271, fn. 36.

⁵⁵ Hamilton, Buyse, *op. cit.* in fn. 41, p. 16.

facing legislators having to deal with all the complex issues involved in such transition do not exempt the Member States from the obligations stemming from the Convention or its Protocols.”⁵⁶ Examination of equality in transition cases emphasized that while transitional priorities can relegate enduring inequalities to the political backburner, substantive (rather than procedural) equality is needed to challenge previously accepted distinctions and deepen commitment to democratic values.⁵⁷

Central principles which recur in judicial review of transitional justice cases by the ECtHR, namely the margin of appreciation (a principle of judicial deference) and proportionality (implicating a closer look at means-end analysis) and how they are used in transitional jurisprudence, were put under scrutiny by Antoine Buyse, Michael Hamilton *et al.* in 2011.⁵⁸ One could conclude from their research that balancing of principles and finding the “yardstick” is one of the most difficult tasks of the ECtHR, especially when applied to transitional cases.

ECtHR case law related to transitional justice has included “hundreds of judgments...dealing with... mainly compensation and restitution, but also prosecution, lustration, memory and truth.”⁵⁹ In its “transitional justice” jurisprudence, the ECtHR has pointed out that the mere context of transition is not sufficient as such to justify the need to interfere with human rights⁶⁰, but on the other hand, that transitional relativism also has an impact on the universality of human rights. In any case⁶¹, the ECtHR has recognized that the states have a margin of appreciation.⁶² That margin though was not given

⁵⁶ *Ibid.*

⁵⁷ More about discrimination cases see in Smith, A., O’Connel, R., *Transition, equality and non-discrimination*, in: Hamilton, Buyse (eds.), *op. cit.* in fn. 41, pp. 185 – 208.

⁵⁸ Hamilton, Buyse, *op. cit.* in fn. 41. To note, the new edition of the book was published in 2013.

⁵⁹ Brems, E., *Transitional Justice in the Case Law of the European Court of Human Rights*, *The International Journal of Transitional Justice*, vol. 5, 2011, pp. 282 – 303, p. 282.

⁶⁰ See e.g. *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, 3. February 2005. Application no. 46626/99.

⁶¹ Varju, M., *Transition as a Concept of European Human Rights Law*, *European Human Rights Law Review*, no. 2, 2009, pp. 170 – 189, p. 180. See, *inter alia*, *Tryer v. UK*, judgment of 15 April 1987, Series A no. 26, para. 36; *Cossey v. UK*, judgment of 27 September 1990, Series A, no. 184, para. 35; *Goodwin v. UK* judgment of 11 July 2002, ECHR 2002-IV para. 75. *I v. UK*, judgment of 11 July 2002, ECHR 2002-VI, para. 75, *Vo v. France*, judgment of 8 July 2004, ECHR 2004-VIII; para. 82.

⁶² For exceptions concerning the margin of appreciation see e.g. Schabas, W., *Synergy or Fragmentation? International Criminal Law and the European Convention of Human Rights*, *Journal of International Criminal Justice*, vol. 9, 2011, pp. 609 – 632, p. 622.

in *Sejdić and Finci v Bosnia and Herzegovina*⁶³ where the ECtHR held that a constitutional arrangement excluding Roma and Jewish individuals from standing for election to parliament or the presidency in Bosnia and Herzegovina was discriminatory. Yet, as Brems points out⁶⁴, and what clearly shows the complexity of “transitional justice” cases, this “decision invalidated a crucial part of the 1995 Dayton Peace Agreement, which led to a power-sharing agreement among Bosniaks, Croats and Serbs in Bosnia”. One dissenter within the Court even condemned the judgment as “an exercise in star-struck mirage-building which neglects to factor in the rivers of blood that fertilized the Dayton Constitution.”⁶⁵ On the other hand, in *Ždanoka v. Latvia*⁶⁶, the ECtHR upheld a measure “that might be justifiable in Latvia that may scarcely be considered acceptable in the context of (another) political system, for example in a country which has an established framework of democratic institutions going back many decades or centuries.”⁶⁷

Moreover, one could conclude that the passage of time since the change of regime is very relevant in overall jurisprudence in transitional justice cases: whereas in the immediate aftermath of a change of regime, broad and sweeping measures may be allowed, the more time elapses, the more individualized the assessment of interference with people rights should be. But, as pointed out by Varju⁶⁸, there are exceptions to the rule: the attitude of the ECtHR did not appear to change when sufficient time had passed for new democracies to mature. Instead, the weight of the circumstance of transition in the balancing exercise was determined on the basis of the general circumstances of the interference with the fundamental right to property. Most importantly, one might also add here that in those cases, as the *Velikovi* judgment showed, the ECtHR’s analysis concentrated on “whether the interferences had clearly fallen within the scope of the legitimate aim of transition and whether the hardships suffered by the applicants has surpassed a certain ‘threshold of hardship’ that must be crossed in the condition of transition to find a breach of the right to property.”⁶⁹

⁶³ *Sejdić and Finci v. Bosnia and Herzegovina*, App. Nos. 27996/06 and 34836/06, ECtHR (Grand Chamber) (22 December 2009).

⁶⁴ Brems, *op. cit.* in fn. 59.

⁶⁵ Here she refers to the dissenting opinion of judge Giovanni Bonello, para. 54.

⁶⁶ *Ždanoka v. Latvia*, App. No. 58278/00, ECtHR (GC), 16 March 2006.

⁶⁷ *Ibid.*, para. 133.

⁶⁸ Varju, *op. cit.* in fn. 61.

⁶⁹ *Ibid.* See *Velikovi and Others v. Bulgaria*, App. Nos. 43278/98, 45437/99, 48014/99, 48380/99, 51362/99, 53367/99, 60036/00, 73465/01 and 194/02, ECtHR (15 March 2007), para. 179.

Hence, the transitional measure can only gain the approval of the ECtHR when the general need to carry through social, political or economic transition entails a proportionate restriction of fundamental rights.⁷⁰ In considering whether a transitional justice measure has infringed on the rights guaranteed by the Convention, the ECtHR will also, like in other cases, apply the three-step test and scrutinize whether an interference with the rights in question was legal (accessible and foreseeable⁷¹), served a legitimate aim (whether the goal of the interference as brought forward by the state can be subsumed by one of the enumerated legitimate aims), and was necessary in democratic society (proportionality assessment).⁷²

Therefore, as *Hamilton* illuminates⁷³, the passage of time is but one crucial variable among others, including clarity of the impugned legislation, a state's integration into regional or international organizations, the presence of alternative democratic safeguards such as Constitutional Court Review, constitutional protections, privacy guarantees, mechanisms of redress, or other reparative assurances.

Moreover, the ability of the ECtHR to recognize differences between transitions is hugely significant for scrutiny of the Croatian Act on Exemption. As Oomen has argued, transitional measures gain legitimacy from their "endogeneity: the extent to which they are rooted in local values of right and wrong, as well as local laws."⁷⁴

According to Sweeney, and based on his research of the ECtHR transitional jurisprudence, the first stage in any of the transitional cases that comes before the ECtHR is to ensure compliance with the formal rule of law. The second

⁷⁰ Compare with Brems, *op. cit.* in fn. 59, p. 289.

⁷¹ E.g. see *Adamsons v. Latvia*, App. No. 3669/03, 24 June 2008, para. 116.

⁷² See *Silvenko v. Latvia*, App. No. 48321/99, 9. October 2003, where there was found a legitimate aim to ensure the consolidation and maintenance of the newly formed democratic order, or *Ždanoka* (GC 2006) where securing the process and achievements of transition to democracy were characterized as necessary. In *Jahn v. Germany* (GC 2005) exceptional circumstances appeared that justified the lack of compensation in case of expropriation due to the switch from a state-controlled to a market economy.

⁷³ Hamilton, M., *Transition, political loyalties and the order of state*, in: Hamilton, Buyse (eds.), *op. cit.* in fn. 41, pp. 151 – 184, p. 181.

⁷⁴ Oomen, B., *Transitional justice and its legitimacy: the case of local perspective*, *Netherlands Quarterly of Human Rights*, vol. 25, no. 1, 2007, pp. 141 – 148. Also cited in Sweeney, *op. cit.* in fn. 43, p. 246.

stage is legitimacy: “it is vital not to give the impression that the only reason a measure is held to be “legitimate” is that it was imposed in the transitional context. Instead, the national transitional policy should be shown to correspond clearly to the Convention’s legitimate aim, leaving the impact of the transitional context as a factor to be considered when assessing the means chosen to achieve the aim.” The third and most important stage is necessity:⁷⁵ “...whether a purportedly transitional measure is widely recognized as pursuing a necessary task in the transitional process. If not, then there is no reason to treat it differently to any other rights-restrictive measure when it comes to the basis or width of the margin of appreciation.”⁷⁶ A point of principle for transitional justice cases, as Sweeney underscores, can be extracted from the judgment in *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*:⁷⁷ “transitional societies’ common need to remedy unlawful acts of the past cannot, in a democratic society, justify disproportionate state action and further unlawful acts. Likewise, in relation to restitution, the Court has stressed that although such policies may be legitimate, states should ensure that they do not create “disproportionate new wrongs.”⁷⁸ Therefore, the width of the margin in particular cases will be tied to some combination of various factors, including the right at stake, the way that it is invoked, and the legitimate aim the restriction pursues.”⁷⁹

That reasoning could be also seen in the case *Velikovi and Others v. Bulgaria*: “persons who have taken advantage of their privileged position or have otherwise acted unlawfully to acquire property in a totalitarian regime⁸⁰, as well as their heirs, cannot expect to keep their gain in a society governed democratically through the rule of law. The underlying public interest in such cases is to restore justice and respect for the rule of law.”⁸¹ Furthermore, the ECtHR in this case highlighted: “in a complex cases as the present one, which involve difficult questions in the conditions of transition from a totalitarian regime

⁷⁵ Also in Hamilton, Buyse, *op. cit.*, in fn. 41, p. 29.

⁷⁶ Sweeney, *op. cit.*, in fn. 43, p. 248.

⁷⁷ *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, 22 January 2009, Applications nos. 412/03 and 35677/04, para. 142.

⁷⁸ *Velikovi and others v. Bulgaria*, *op. cit.* in fn. 69.

⁷⁹ Sweeney, *op. cit.* in fn. 44, p. 119.

⁸⁰ From the discussion on the punitive elements of the 1992 Bulgarian Law on the Restitution of Ownership of nationalized Real Property.

⁸¹ Cited also in Sweeney, *op. cit.* in fn. 43, p. 241.

to democracy and rule of law, a certain “threshold of hardship” must have been crossed for the Court to find a breach of the applicants’ Art 1 Protocol 1 rights.”⁸²

In any circumstance, as Hamilton pointed out, in transitional justice cases, the ECtHR finds itself faced with cases burdened with a political, historical and factual complexity flowing from problems that should have been resolved by all parties assuming full responsibility for finding a solution on a political level. This reality, as well as the passage of time and the continuing evolution of the broader political dispute, must inform the ECtHR’s interpretation and application of the Convention which cannot, if it is to be coherent and meaningful, be either static or blind to concrete factual circumstances.⁸³

There is a particular category of cases that require implementation of the positive obligation of states to conduct investigations. As stated in the UN Publication on Transitional justice and economic, social and cultural rights⁸⁴, it should be noted that the “respect, protect and fulfill framework applies equally to civil and political rights, which also entail both positive and negative obligations, for example, the positive obligation to conduct investigations into the circumstances surrounding enforced disappearances.”

Therefore, one could state that transition is recognized by the ECtHR as a valid consideration in determining the proportionality of a particular restriction or the scope of the margin of appreciation, but it may not be the only or decisive factor. In some cases, as Marton Varju has highlighted, “the inappropriateness of the impugned measure is simply more relevant than the uniqueness of the transition”.⁸⁵

⁸² *Velikovi and Others v. Bulgaria*, *op. cit.* in fn. 69, paras. 192 and 235, finding no violation of Article 1 of Protocol 1 on this basis.

⁸³ *Demopoulos and Other v. Turkey*, 5 March 2010, Application nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04 see para. 87- 90. Also see *Tanese v. Moldova* (GC) 27 April 2010, Appl. No. 7/08., spec. para. 159 and 174. Also see *Republican Party of Russia v. Russia*, Appl. No. 12976/07 12 April 2011, at paras. 127-8. For more judgments see Hamilton, *op.cit.* in fn. 41, p. 180.

⁸⁴ United Nations, United Nations Human Rights Office of the High Commissioner, *Transitional Justice and Economic, Social and Cultural Rights*, United Nations Publication, 2014, p. 12.

⁸⁵ This especially refers to property cases. Varju, *op. cit.* in fn. 61. For instance, decision *Oršuš v. Croatia*, 16 March 2010, Appl. No. 15766/03 did not emphasize only the vulnerability of the Roma but also the consequent positive obligation of special protection.

5. THE SANADER CASE AS THE NEW ECtHR TRANSITIONAL JUSTICE CRIME CASE: WILL ECtHR HAVE A SAY? – VIOLATIONS OF RIGHTS OR CONFIRMATION OF TRANSITIONAL JUSTICE POLICY

Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also most objectionable in terms of morality, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice.

Justice required punishment for these men, in spite of the fact that under positive law the act they committed were not punishable at the time, but were made punishable with retroactive force. If two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the Second World War may certainly be considered as more important than to comply with the rather relative rule against ex post facto laws, open to so many exceptions.⁸⁶

Since the judgment of Sanader is now final, one might expect Sanader to claim violations of his rights before the ECtHR. In any case, Sanader now has the possibility to claim that the Act on Exemption in retroactively abolishing the statute of limitations violated the human rights principles enshrined in the Convention and particularly that the Act on Exemption violates the principle of legality proscribed in Art. 7.

Therefore, in deciding Sanader case, the ECtHR could place emphasis on the circumstances of the Croatian transitional period, a possible violation of the principle of legality and the obligations of state when violations of economic and social rights are concerned. Since the Act on Exemption is directly linked to the privatization period as well, the jurisprudence of the ECtHR relating to the protection of the economic well-being of the country could be addressed as well.⁸⁷ Moreover, the ECtHR could go even deeper and recognize some forms of violation of economic, social and cultural rights recognized in the Act on Exemptions as crimes under international law, to which the statute of limitations is not applicable at all.

Nonetheless, one of the most important questions related to abolishing the application of the statute of limitations for transitional economic crimes is

⁸⁶ Kelsen, H., *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, *International Law Quarterly*, vol. 1, 1947, pp. 153 – 165.

⁸⁷ For more on jurisprudence related to economic well-being of the country see Rainey, B., Wicks, E., Ovey, C., *The European Convention on Human Rights*, 6th ed., Oxford, Oxford University Press, 2014, pp. 318 – 319.

whether such *ex post facto* laws are in conformity with the principle of legality. Moreover, the sensitivity of the matter is even more important when we acknowledge the fact that these transitional economic crimes mainly took place during the 'Homeland War' and in the post-conflict period when the state was unable to effectively prosecute those crimes while violent crimes had a priority in addressing. Therefore, the ECtHR would potentially have to answer whether it was in accordance with the principle of legality to allow retroactive abolishment of the statute of limitations for the prosecution of economic offences that occurred in the period of privatization and ownership transformation during, prior and immediately after the war, taking into consideration the particularities of the Croatian transitional period and values of the society.

It is not plausible that the ECtHR will go so far as to find that violations of economic, social and cultural rights committed by Sanader represent crimes against humanity or war crimes, which are part of customary international law and for which there is no statute of limitations anyhow, but it will be interesting to see the reasoning of the ECtHR in justifying or denying the retroactive effect of the Croatian Act on Exemption. Moreover, it should be noted that the interpretation and history of the second paragraph of Art. 7 of the Convention⁸⁸ is closely linked to transitional periods. This paragraph was created to, and intended to⁸⁹, legitimize post-Second World War transitional justice measures proscribing that the principle of legality (*nullum crimen sine lege*) must not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.⁹⁰ Therefore, although also unlikely, the ECtHR could find that Sanader's behavior amounted to other war crimes that violate the right to property, which makes them statute barred but on the basis of non-applicability of the statute of limitations for crimes under international law, not on the basis on the Act on Exemption. One has to mention, though, that this possibility should not be excluded *a priori* for some other perpetrators to whom the Act on Exemption could be applied *pro futuro*.

In any case, the ECtHR's reasoning on the conformity of the retroactive application of criminal legislation with the principle of legality in transitional

⁸⁸ This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

⁸⁹ Brems, *op. cit.* in fn. 59, p. 300.

⁹⁰ E.g. Schabas, *op. cit.* in fn. 83, p. 615. See jurisprudence of the court in cases: *Kolk and Kislyiy v. Estonia* (2006), *Touvier v. France* (1997), *Jorgic v. Germany* (2007), *Kononov v. Latvia* (GC 2010).

context⁹¹ is guided primarily with jurisprudence of transitional justice cases such as *Streletz, Kessler and Krenz v. Germany*.⁹² In this case the ECtHR concluded that Art. 7 had not been violated because, contrary to the applicant's claims, border killings did constitute an offence at the time they were committed, both under domestic law and under international law, even though domestic law was interpreted and applied in a different manner. Moreover, in the mentioned case, the ECtHR adopted the Radbruch's Formula of 'statutory injustice' (*das gesetzliche Unrecht*)⁹³ following the reasoning of the German Constitutional Court.⁹⁴

Furthermore, in the landmark case of *C.R. v. United Kingdom*⁹⁵ dealing with principle of legality, the ECtHR specified that Art. 7 "cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen". As Schabas pointed out:⁹⁶ in its application of Art. 7(1), the ECtHR has often seemed inspired by the same approach adopted by the International Military Tribunal and endorsed by Kelsen (see quote at the beginning of this section).⁹⁷ One result of this is its rejection of pure legal positivism, in favor of the 'reasonably foreseeable' and 'accessible' tests. The point was repeated by Shahabuddeen:⁹⁸ "as was indicated by the ECtHR in *C.R. v the United Kingdom*, the principle of

⁹¹ Gallant, K. S., *The Principle of Legality in International and Comparative Criminal Law*, New York, Cambridge University Press, 2009.

⁹² Moreover, in this case, ECtHR ruled that it is a legitimate for a contracting state to convict people on the basis of the law in force at the material time interpreted in the light of the principles governing a state subject to the rule of law (*Streletz, Kessler and Krenz v. Germany* GC 2001, para. 81). Also see *K-H.W. v. Germany* GC 2001, Application no. 37201/97, para. 83).

⁹³ Radbruch, G., *Gesetzliches Unrecht und übergesetzliches Recht*, *Süddeutsche Juristenzeitung*, vol. 1, 1946, pp. 105 – 108. Translated by Paulson, B. L., Paulson, S. L., as "Statutory Lawlessness and Supra-Statutory law (1946)", *Oxford Journal of Legal Studies*, vol. 26, no.1, 2006.

⁹⁴ For more details about the origin of this case see Roggemann, H., *Systemunrecht und Strafrecht am Beispiel der Mauerschützen in der ehemaligen DDR*, Berlin, Verlag Arno Spitz, 1993.

⁹⁵ *CR v. The United Kingdom*, Series A, No.335-B, para. 41.

⁹⁶ Schabas, *op. cit.* in fn. 62, pg. 615.

⁹⁷ Kelsen, *op. cit.* in fn. 86, p. 153, at 165. For an endorsement of Kelsen's approach, see the reasons of Justice Peter Cory in *R. v. Finta*, (1994) 1 Supreme Court Reports 701, at 874 (all cited in Schabas, *op. cit.* in fn. 62, p. 615).

⁹⁸ Shahabuddeen, M., *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, *Journal of International Criminal Justice*, vol. 2, 2004, pp. 1007 – 1017.

nullum crimen sine lege does not bar development of the law through clarification or interpretation provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.”⁹⁹ So, it is the essence of the offence – or its ‘very essence’ – that governs.

Thus, the ‘foreseeability’ of abolishing the statute of limitations for transitional cases should also be addressed by the ECtHR in the Act on Exemption case in order to justify or deny the legality of retroactive implementation of the Act on Exemption. Moreover, in *C.R. v. United Kingdom*, the ECtHR¹⁰⁰ “was persuaded in its opinion by the fact that the crime in question was offensive to ‘human dignity and human freedom’.”¹⁰¹

It must be underlined that Croatia proscribed retroactive application of the statute of limitations to already regulated offences, but only if certain conditions are met, e.g. if economic offences aimed at achieving disproportionate property gains by raising prices for goods in scarcity, by the sale of state-owned property far below its actual value, or otherwise taking advantage of wartime and a clear and present danger to the independence and territorial integrity of the state. Moreover, the most lenient punishment will be applicable to a particular offender. Furthermore, this “extension” of the statute of limitations could be also said to follow Art. 29 of the United Nations Convention Against Corruption¹⁰², which calls on states to provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice and establish longer statutes of limitations for offences under the Convention.¹⁰³ As stated above, Croatia enacted this law to combat transitional economic crimes. This narrative might justify the interpretation of Art. 7(2) of the Convention in the manner articulated by Schabas. It was only after the State Audit Report was published¹⁰⁴ that Croatia began to seriously address transitional economic crimes and one could hardly state that it was not foreseeable that Croatia would try to find solutions to start to effectively prosecute privatization and ownership transformation crimes that occurred during the Homeland war and peaceful integration.

⁹⁹ *Ibid.*, para. 34.

¹⁰⁰ Schabas, *op. cit.* in fn. 62, p. 615.

¹⁰¹ See also *Streletz, Kessler and Krentz v. Germany*, *op. cit.* in fn. 46, paras. 85 – 87; *Kononov v. Latvia*, *op. cit.* in fn. 23, p. 236.

¹⁰² UN(2000): General Assembly Resolution 55/61. *Convention Against Corruption*. UN Document no. A/RES/55/61.

¹⁰³ *Ibid.*

¹⁰⁴ Croatia: *State Audit Office Report on Revision of Ownership Transformation and Privatisation* (2004) (in Croatian only). Available online: http://www.revizija.hr/izvjesca/2007/revizije-pretvorbe-i-privatizacije/000-izvjesce_o_radu.pdf (last visited on 11.11.2014).

Hence, one could notice that judgments by the ECtHR interpreting *nulla poena sine lege* concerning the retroactive banning of statute of limitation for the offences which became already statute barred are scarce. The infrequency of challenges itself “suggests the entrenchment of the maxim in municipal law and practice, as do the types of challenges among the few that have come before the European Court.”¹⁰⁵ A similar conclusion can be drawn from the *Venice Commission opinion given in the Comments on the Retroactivity of Statutes of Limitations in Georgia*.¹⁰⁶ The Opinion concludes that the case law of the ECtHR establishes that it is permissible to amend a limitation law so as to extend the limitation period with retroactive effect with regard to crimes where the limitation period has not expired at the time of the amendment, if the domestic law of the state regards a limitation law as procedural rather than substantive.¹⁰⁷ Although the ECtHR has not decided yet whether a retroactive extension is permissible in the case of crimes where the prescription period has already run out, the following paragraph from the judgment in *Coëme and others v Belgium*¹⁰⁸ could give some insight in possible future ECtHR’s reasoning: “The Court notes that the applicants, who could not have been unaware that the conduct they were accused of might make them liable to prosecution, were convicted of offences in respect of which prosecution never became subject to limitation. The acts concerned constituted criminal offences at the time when they were committed and the penalties imposed were not heavier than those applicable at the material time. Nor did the applicants suffer ... greater detriment than they would have faced at the time when the offences were committed...”¹⁰⁹

On the other hand, it is undisputed and clear that “criminal procedures against government ministers have to respect Art. 6 of the ECtHR on the right to a fair trial, including the minimum rights set out in Art. 6 (3) for persons charged with a criminal offence. The same goes for the principle of ‘no punishment without law’ in Art. 7. These rules apply regardless of whether the person accused is an ordinary citizen or a government minister, and regardless of

¹⁰⁵ Dana, S., *Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing*, Journal of Criminal Law and Criminology, vol. 99, 2008-2009, pp. 857 – 928, p. 871.

¹⁰⁶ Opinion No. 523/2009, CDL(2009) 048, 4 March 2009.

¹⁰⁷ As it was stated in the Opinion (2009), p. 2 (based on the scholarship of Kok, R. A., *Statutory Limitations in International Law*, the Hague, T.M.C. Asser Press, 2007, especially Chapter VII, Imprescriptibility and Retroactivity).

¹⁰⁸ *Coëme and others v, Belgium* Judgment of 18 October 2000, Applications Nos 32492/96, 32547/96 and 32548/96.

¹⁰⁹ *Ibid.*, para. 106.

whether the minister is charged before the ordinary criminal courts or before a special court of impeachment.” It must be mentioned that in such high-profile trials dealing with transitional economic crimes, one of the most important issues is ensuring fair trials.¹¹⁰ For instance, in *Khodorkovskiy and Lebedev v. Russia*¹¹¹, the ECtHR found, *inter alia*, a violation of Art. 6 of the Convention on account of the breach of lawyer-client confidentiality and unfair taking and examination of evidence by the trial court. If the right to a fair trial in those high-profile cases is infringed, substantive justice might be impossible to achieve.

Therefore, the case of former the Prime Minister of Ukraine, Yulia Tymoshenko¹¹², could also be relevant for the ECtHR if the *Sanader* case were to appear on its agenda. She was sentenced in 2011 to seven years in prison for ‘misuse of powers’ concerning the gas deal and got a three-year prohibition on exercising public functions. The judgment became final in November 2012. In the Tymoshenko case the ECtHR found violations of Article 5¹¹³ and 18¹¹⁴ of the Convention.

¹¹⁰ In the *Sanader* case, the Constitutional Court already had a chance to decide upon his procedural rights (see Constitutional Court Decision, U-III-5141/2011, from December 6, 2011. The Constitutional Court in this Decision ruled that the reasons indicated in the courts’ decisions (from 17th and 25th of October 2008) on the prolongation of the investigative detention of Mr. Sanader are no longer relevant and sufficient to justify his continuing detention according to criteria established by ECtHR and accepted by the Croatian Constitutional Court itself. In this ruling, the Constitutional Court cited many relevant ECtHR’s decisions regarding protection of human rights guaranteed in art. 5 of the Convention, including decisions of *Khodorkovskiy v. Russia* (Application No. 5829/04, 31 May 2011, paras. 182-187), *Wemhoff v. Germany* (App. No. 2122/64, 27 June 1968, § 15), *Neumeister v. Austria* (App. No. 1936/63, 27 June 1968, §14), *Tomasi v. France* (App. No. 12850/87, 27 August 1992, § 98), *Bernobić v. Croatia* (Appl. No., 57180/09, 21 June 2011, § 60), *Kauczor v. Poland* (App. No. 45219/06, 3 May 2009, § 46), *Kudla v. Poland* (App. No. 30210/96, GC, 26 October 2000, § 111), *Stögmüller v. Austria* (App. No. 1602/62, 10 November 1969, § 15). In the para 19.2 of the Decision, the Constitutional court, based on the ECtHR’s reasoning, emphasized the following: “The persistence of reasonable suspicion that the person arrested has committed an offence is *condicio sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. The Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were ‘relevant’ and ‘sufficient’, the Court must also be satisfied that the national authorities displayed ‘special diligence’ in the conduct of the proceedings.”

¹¹¹ *Khodorkovskiy and Lebedev v. Russia*. Application nos. 11082/06 and 13772/05, 25 October 2013.

¹¹² *Tymoshenko v. Ukraine*. Application no. 49872/11, 30 July 2013.

¹¹³ Referring to the right of liberty and security.

¹¹⁴ Limitation on the use of restrictions on rights.

6. CONCLUSION: IMPORTANCE OF THE ACT ON EXEMPTION FOR TRANSITIONAL JUSTICE NARRATIVES

In any circumstance, transitional cases present a double legal legacy: (1) they are read into domestic judicial reasoning and thereby inform and shape political and legal agendas at the national level, and (2) they can fundamentally strengthen the jurisprudence of the ECtHR.¹¹⁵ That is precisely what could happen with the Act on Exemption if the ECtHR were to have a chance to decide on the Act and its validity. The Court will have a chance to respond whether retroactive application of the Act on Exemption was in accordance with the rule of law and transitional justice policy and with the principle of legality.¹¹⁶ Furthermore, and this makes this case somewhat unique, the ECtHR could by its ruling also show how it perceives the necessity to protect economic, social and cultural rights when violations of those rights were committed in a transitional period. Moreover, the ECtHR could with this case make a landmark ruling on the importance of protecting economic, social and cultural rights in general and as to whether it follows new discourses regarding protection of those rights that are visible in international human rights law and in the transitional justice narratives.

As Teitel stated¹¹⁷, in regional case law, and in transitional jurisprudence, the conception of law is partial, contextual and situated between at least two legal and political orders. Legal norms are necessarily multiple (legal pluralism), while the idea of justice is always a compromise. As Sharp illuminated, the field of transitional justice distinguished itself in its attempt to balance twin normative aims: the demands of justice and accountability on the one hand, and the assumed needs of a political transition on the other.¹¹⁸ Thus, formative debates in the field focused on the possible dilemmas and trade-offs associated with justice in times of political transition, including the so-called

¹¹⁵ Hamilton, Buyse, *op. cit.* in fn. 41, pp. 20 – 21.

¹¹⁶ See for more about the principle of legality: Gallant, K. S., *The principle of Legality in International and Comparative Criminal Law*, Cambridge, Cambridge University Press, 2009.

¹¹⁷ Teitel, R. G., *How are the New Democracies of the Southern Cone Dealing with the Legacy of past Human Rights Abuses?*, in: Kritz, N. J. (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol. I, Washington, D.C., United States Institute of Peace, 1995, pp. 146 – 154.

¹¹⁸ Paige, A., *How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice*, *Human Rights Quarterly*, vol. 31, no. 2, 2009, p. 326, cited in Sharp, D. N., *op. cit.* in fn. 25, 2014, p. 7.

peace versus justice debate.¹¹⁹ However, as stated above, the Act on Exemption has its particularities and could add more to the mentioned debate by underlying the importance of addressing economic crimes in transition in order to achieve both justice and positive peace.

In any case, protection of economic, social and cultural rights through a confirmation by the ECtHR that retroactive application of Act on Exemption is in accordance with Art 7 of the Convention, as long as criminal offences on account of any act or omission did constitute a criminal offence under national or international law at the time when they were committed, should be received with acclamation if the ECtHR adopts that line of reasoning. That would definitely also be possible if in some transitional war profiteering cases connection could be established with, for example, Art. 8 (2) (b) (ix) of the Rome Statute¹²⁰ or with crimes against humanity, especially with persecution described in the Art. 7 (1) (h)¹²¹ of the Rome Statute. Since the Act on Exemption refers to war conflict, this could be one of the plausible solutions, but it is questionable if it could be applied in the *Sanader* case. In any case, this kind of ruling of the Court could contribute to the development of international criminal law as well.

On the other hand, it is questionable whether the introduction of new legal instruments, like those adopted in Croatia more than 20 years after the privatization had started, or more than 10 years after the Homeland war and peaceful integration had ended, could be considered an adequate and effective approach to combat transitional economic crimes and confiscate illegally obtained assets. Especially it would be problematic to obtain evidence in order to achieve convictions according to fair trial rights respecting all the rights of indicted persons.¹²² Moreover, there is always the danger of selective and

¹¹⁹ In the United Nations Secretary General, *The Rule of Law and Transitional Justice in Post-conflict Societies*, UN Doc. S/2004/616 (August 23, 2004), 1 it is argued that “[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives.” Emphasized by Sharp, D. N., *op. cit.* in fn. 7.

¹²⁰ For violations of economic, social and cultural rights see particularly Schmid, E., PhD study, *Violations of Economic, Social and Cultural Rights in International and Transnational Criminal Law*, soon to be published by Cambridge University Press. For salient examples see also United Nations (2014), United Nations Human Rights Office of the High Commissioner, *Transitional Justice and Economic, Social and Cultural Rights*, United Nations Publication, 2012, pp. 32 – 38.

¹²¹ *Prosecutor v. Kupreškić et al.*, No. IT-95-16-T, Trial Chamber, Judgement of 14 January, 2000. See in particular paras. 610 – 613, 615 (c), 618, 621 and 630 – 631.

¹²² That is why the importance of the Constitutional Court Decision in the *Sanader* case should not be underestimated, especially since the Court ruled out and prevented possible violations of art. 5 of ECtHR in this case, see *supra* fn. 111.

non-systematic prosecutions, which could reflect badly on the “transitional” law that had the intention to invoke the principle of “social justice”. This is, however, possibly not the question of legality of the Act itself, but its practical implication in the Croatian society.

Therefore, in the scrutiny of the Act on Exemption, one could further ask whether *Realpolitik* or *Restoration of Justice and Return of Moral Principles* would win when one is addressing this transitional justice mechanism. One could reach a preliminary conclusion that both could win, at least in the ‘clear cut’ situations where the Act on Exemption will certainly be applicable to cases for which the statute of limitations had not yet expired at the moment of its entry into force. In cases where it had already expired, a more progressive “transitional justice” approach by ECtHR could be taken by allowing retroactivity in those cases as well.¹²³ Especially since the Act on Exemption did not create or retroactively criminalize new criminal offences.

In any case, if this “Croatian model” of transitional justice laws is proven to be effective and legally justified, primarily by the Croatian Constitutional Court itself¹²⁴ and/or the ECtHR, it could be implemented in the other countries in the region and possibly serve as a model on how to approach long neglected crimes – transitional economic offences that have grave consequences on the development of the society itself.¹²⁵

¹²³ Cf. Novoselec, Roksandić Vidlička, Maršavelski, *op. cit.* in fn. 4.

¹²⁴ For more about this topic and possible outcomes of using the statute of limitations in order to achieve social goals taking into account the Croatian situation and the rule of law see also Amicus curi@e, *Nezastarijevanje – Adversus hostem aeterna auctoritas*, Informator, No. 6143, 19. January 2013, pp. 1 - 7. Roksandić Vidlička, *op. cit.* in fn. 2; Munivrana Vajda, M., Roksandić Vidlička, S., *Novije promjene u uređenju zastare u Republici Hrvatskoj – na tragu političke instrumentalizacije ili težnje ka ostvarenju pravednosti?*, Žurnal za kriminalistiku i pravo, vol. XVIII, 2013, pp. 243 – 260; Drenški Lasan, V., *Odnos načela vladavine prava i instituta obvezne primjene blažeg zakona s aspekta zastare u praksi hrvatskih sudova*, Odvjetnik, no. 9–10, 2010, pp. 41 – 45; Novoselec, P., Novosel, D., *Nezastarijevanje kaznenih djela ratnog profiterstva i kaznenih djela iz procesa pretvorbe i privatizacije*, Hrvatski ljetopis za kazneno pravo i praksu, vol. 18, no. 2, 2011, pp. 603 – 620, Novoselec, Roksandić Vidlička, Maršavelski, *op. cit.* in fn. 4.

¹²⁵ See also Roksandić Vidlička, *op. cit.* in fn. 11, p. 27.

Sažetak

Sunčana Roksandić Vidlička*

MOGUĆI BUDUĆI IZAZOVI ZA EUROPSKI SUD ZA
LJUDSKA PRAVA?
VAŽNOST ZAKONA O NEZASTARIJEVANJU I PREDMETA
SANADER ZA JURISPRUDENCIJU EUROPSKOG SUDA ZA
LJUDSKA PRAVA I RAZVOJ MEHANIZAMA TRANZICIJSKE
PRAVDE**

Izmjene i dopune hrvatskoga Ustava 2010. godine, kojima je dopušteno retroaktivno procesuiranje gospodarskih kaznenih djela vezanih uz proces pretvorbe i privatizacije počinjenih za vrijeme Domovinskog rata i mirne reintegracije te kaznenih djela ratnog profiterstva (tranzicijska gospodarska kaznena djela), otvorile su Pandorinu kutiju. Ustavne su izmjene omogućile i donošenje Zakona o nezastarijevanju kaznenih djela ratnog profiterstva i kaznenih djela iz procesa pretvorbe i privatizacije. Valja tvrditi kako te izmjene Ustava i navedeni Zakon pripadaju mehanizmima “tranzicijske pravde” postkonfliktnog društva te da su doneseni sa svrhom ostvarenja pune vladavine prava i ostvarenja načela socijalne pravde u hrvatskom društvu. Slučaj koji je procesuiran na temelju toga Zakona, a nedavno je pravomoćno riješen, odnosi se na postupak protiv bivšeg predsjednika Vlade Republike Hrvatske Ive Sanadera.

U ovome se članku obrađuje sam pojam tranzicijske pravde te se razmatra potreba zaštite ekonomskih, socijalnih i kulturnih prava u okviru mehanizama kojima se tranzicijska pravda služi. Navedena se problematika obrađuje u članku radi analiziranja mogućeg pristupa Europskog suda za ljudska prava prema takvim hrvatskim “tranzicijskim” slučajevima na temelju postojeće jurisprudencije Suda. Naime, može se očekivati kako će se sam Zakon o nezastarijevanju, kao i predmet Sanader, naći u skorij budućnosti pred Europskim sudom za ljudska prava kako bi opravdao ili opovrgnuo legalitet samog donošenja. Ako se to dogodi, rezoniranje Suda u tom predmetu bit će od velike važnosti ne samo za Republiku Hrvatsku, nego i za sve države koje nisu u dovoljnoj mjeri procesuirale tranzicijska gospodarska kaznena djela te su ih općenito zanemarila prilikom implementiranja mehanizama karakterističnih za tranzicijska društva. Jednako tako, predmet nakon završetka pred Sudom može utjecati i na razvoj mehanizama tran-

* Mr. sc. Sunčana Roksandić Vidlička, asistentica Pravnog fakulteta Sveučilišta u Zagrebu, Trg maršala Tita 14, Zagreb

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zicijske pravde općenito. Stoga ovaj članak nastoji predvidjeti neka od pitanja kojima bi se Europski sud za ljudska prava mogao baviti prilikom pravne analize Zakona o nezastarijevanju, počevši od načela zakonitosti.

Ključne riječi: tranzicijska pravda, predmet Sanader, jurisprudencija Europskog suda za ljudska prava u tranzicijskim predmetima, Zakon o nezastarijevanju kaznenih djela ratnog profiterstva i kaznenih djela iz procesa pretvorbe i privatizacije, moguće rezoniranje Suda u pogledu Zakona o nezastarijevanju

