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POJAM ZNANJA KAO SUBJEKTIVNOG ELEMENTA KOD KRIVIČNOG DELA ZLOČIN PROTIV ČOVEČNOSTI**

SAŽETAK: Predmet rada je analiza znanja kao subjektivnog elementa kod krivičnog dela zločin protiv čovečnosti u međunarodnom krivičnom pravu. Polazeći od činjenice da je činjenje dela u okviru šireg ili sistematskog napada protiv civilnog stanovništva okolnost koja „obično" krivično delo pretvara u zločin protiv čovečnosti, u radu se nastoji odgovoriti na pitanje da li je znanje o činjenju dela u okviru takvog napada u međunarodnom krivičnom pravu samostalan subjektivni element i da li postoji jedinstven stav u pogledu neophodnog sadržaja znanja u međunarodnom krivičnom pravu. Rad je zasnovan na jezičkoj, normativnoj, sistematskoj i uporednopravnoj analizi relevantnih odredbi izvora međunarodnog krivičnog prava, dokumentacionoj analiza uzoraka presuda tri najznačajnija međunarodna suda, kao i studiji slučaja koja za predmet ima analizu ovog subjektivnog elementa u zakonodavstvu i sudskoj praksi Bosne i Hercegovine. Rezultati istraživanja pokazuju da u pogledu samostalnosti znanja kao subjektivnog elementa kod zločina protiv čovečnosti postoji relativno saglasan stav u međunarodnom krivičnom pravu, dok u pogledu sadržaja znanja takve saglasnosti nema.

Ključne reči: znanje, subjektivni element, zločin protiv čovečnosti, konstruktivno znanje, *willful blindness*, međunarodni krivični sudovi

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UVOD

Zločin protiv čovečnosti je međunarodno krivično delo koje se sastoji od jednog opšteg elementa i niza alternativno određenih radnji izvršenja.[1] Sledom toga, radnje poput ubistva, silovanja i sl., prerastaju u zločin protiv čovečnosti onda kada su počinjene u okviru šireg ili sistematskog napada usmerenog protiv bilo kojeg civilnog stanovništva.

Ovo istraživanje je započelo pitanjem da li učinilac treba da zna da čini delo u okviru takvog napada i ako treba, kakvog kvaliteta treba da bude njegovo znanje? Činjenica da kontekst u kojem učinilac preduzima radnju izvršenja pretvara obično krivično delo u zločin protiv čovečnosti, čini izuzetno važnim odgovor na pitanje neophodnosti postojanja i kvaliteta subjektivnog odnosa učinioca prema tom kontekstu. Upravo to ističe i Robinson koji smatra da je neophodna subjektivna veza između učinioca i konteksta kod ovog krivičnog dela.[2]

Mnogi autori poput Ambosa[3], Pigarofa (Pigaroffa) i Robinsona,[4] Munivrane Vajde[5] obrađuju ovo pitanje prilikom razmatranja subjektivnog elementa u Rimskom statutu, dok se druga grupa autora posvećuje ovom pitanju prilikom razmatranja zločina protiv čovečnosti.[6] U prvom slučaju obično je reč o primeričnom navođenju ovog krivičnog dela prilikom razmatranja znanja kao subjektivnog elementa uopšte, dok je u drugom slučaju ovom subjektivnom elementu uglavnom posvećena nesrazmerno mala pažnja u odnosu na ostale elemente zločina protiv čovečnosti. Ni u pogledu sadržaja znanja nema temeljnije analize. Iz tog proizlazi da nema temeljnog istraživanja o tome da li, uzevši u obzir postojeće norme i sudsku praksu u međunarodnom krivičnom pravu, postoji jedinstven stav u pogledu određenja pravne prirode znanja, kao ni temeljne analize njegovog sadržaja. Imajući u vidu da je reč o jednom od

[1] Škulić, M. (2005). *Međunarodni krivični sud – nadležnost i postupak*. Beograd: Centar za publikacije Pravnog fakulteta u Beogradu, 251.

[2] Robinson, D. (1999). Defining „Crimes Against Humanity" at the Rome Conference. *The American Journal of International Law*, Vol. 93, No. 1, 51–52.

[3] Ambos, K. (2013). *Treatise on International Criminal Law – Volume I: Foundations and General Part*. Oxford: Oxford University Press, 280–283.

[4] Pigaroff, D., Robinson D. (2016). Article 30. Mental Element. *The Rome Statute of the International Criminal Court – A Commentary* (eds. Otto Triffterer, Kai Ambos). München – Oxford, 1114–1119.

[5] Munivrana Vajda, M. (2011). Oblici krivnje i Stalni međunarodni kazneni sud. *Hrvatski ljetopis za kazneno pravo i praksu*, 1/2011, 21–22.

[6] Npr.: Hall, C., Ambos, K. (2016). Article 7. Crime against Humanity. *The Rome Statute of the International Criminal Court – A Commentary* (eds. Otto Triffterer, Kai Ambos). München – Oxford, 175–177; Ambos, K. (2014). *Treatise on International Criminal Law – Volume II: The Crimes and Sentencing*. Oxford: Oxford University Press, 77–78; Škulić, M. (2005). *Op. cit.*, 253.

najtežih krivičnih dela, da su za njega zaprećene najstrože kazne, smatramo da je potrebno pristupiti temeljnoj analizi znanja kao subjektivnog elementa i ustanoviti da li postoji jedinstven stav o samostalnosti ovog subjektivnog elementa, kao i njegovom sadržaju.

ODREĐENJE POJMA ZNANJA[7] KOD ZLOČINA PROTIV ČOVEČNOSTI U LITERATURI

Kako znanje ili svest nije nepoznat pojam u krivičnom pravu dva velika pravna sistema, kontinentalnom[8] i anglosaksonskom[9], većina autora svoje izlaganje započinje određivanjem ovog pojma u njima i naglašavanjem potrebe jedinstvenog i samostalnog pristupa ovom subjektivnom elementu u međunarodnom krivičnom pravu. Munivrana Vajda ističe da ne bi trebalo ove pojmove tumačiti kroz ono što oni znače u postojećim pravnim sistemima, već da ih treba posmatrati autonomno.[10] Finin (Finnin)[11], Badar, Poro (Porro)[12] i Ambos[13]

[7] U radu se u koristi termin „znanje“, a ne termin „svest“. Autorka se opredelila za upotrebu ovog termina smatrajući da terminu „knowledge“ odgovara termin „znanje“ u srpskom jeziku, ali i da bi se napravila distinkcija između ovog subjektivnog elementa kod zločina protiv čovečnosti i svesti kao komponente umišljaja u kontinentalnom pravu.

[8] Znanje je u kontinentalnom pravu povezano sa oblicima krivice. V.: Stojanović, Z. (2020). *Krivično pravo – opšti dio*. Beograd: Pravni fakultet Univerziteta u Beogradu, 170–180; Babić, M., Marković, I. (2019*). Krivično pravo – opšti dio*. Banja Luka: Pravni fakultet, 245–246. Ono u njemu egzistira kao kognitivna komponetna umišljaja ili svesnog nehata i ne izdvaja se kao samostalni i zasebni oblik krivice. V.: Đokić, I. (2016). *Opšti pojam krivičnog dela u anglo-američkom pravu*. Beograd: Pravni fakultet Univerziteta u Beogradu, 96. U kontinentalnom pravu u opšti pojam krivičnog dela ulaze određenost u zakonu, protivpravnost i krivica (Đokić, I., *Op. cit.*, 37) i subjektivni element se utvrđuje u odnosu na ukupnost elemenata.

[9] U anglo-američkom pravu u opšti pojam krivičnog dela ulaze *actus reus*, koji čine radnja, posledica i okolnosti dela i on predstavlja objektivnu stranu krivičnog dela i *mens rea* koja predstavlja subjektivnu stranu krivičnog dela. Za ovaj rad je posebno važno da se okolnosti dela mogu označiti kao „preostala obeležja krivičnog dela“ (Đokić, I., *Op. cit.*, 40), odnosno „ona obeležja koja ne predstavljaju radnju ili posledicu“ (Đokić, I., *Op. cit.*, 42). Za svaki od navedenih delova *actus reus*-a subjektivni element, odnosno *mens rea* se dokazuje zasebno (Đokić, I., *Op. cit.*, 96).

[10] Munivrana Vajda, M. (2011). Oblici krivnje i Stalni međunarodni kazneni sud. *Hrvatski ljetopis za kazneno pravo i praksu*, 1/2011, 11.

[11] Finnin, S. (2012). Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis. *International and Comparative Law Quarterly*, 2/2012, 338–340.

[12] Badar, M. E., Porro, S. (2015) Rethinking the Mental Elements in the Jurisprudence of the ICC. *The Law and Practice of International Criminal Court* (eds. Carsten Stahn). Oxford, 652, 664–665.

[13] Ambos, K. (2013). *Treatise on International Criminal Law – Vol. I: Foundations and General Part*. Oxford: Oxford University Press, 267, 271.

ističu razliku između *offence based* i *element based* pristupa prilikom utvrđivanja subjektivnog elementa, napominjući da se u međunarodnom krivičnom pravu prihvata ovaj drugi. Oni znanje određuju kao subjektivni element „rezervisan" za okolnosti dela kao deo njegovog objektivnog elementa. Ipak, treba naglasiti da su svi autori fokusirani na ovo pitanje u Rimskom statutu, samo sporadično navodeći da statuti *ad hoc* tribunala nisu regulisali ovo pitanje.[14]

Kada je reč o zločinu protiv čovečnosti, činjenje dela u okviru šireg ili sistematskog napada usmerenog protiv bilo kojeg civilnog stanovništva (kontekstualni element) se kao element bića krivičnog dela u literaturi posmatra na više načina što dovodi i do razlike u pogledu shvatanja subjektivnog elementa u odnosu na tu okolnost. Ambos smatra da je moguće da se ovde radi o elementu koji delu daje kvalitet međunarodnog i za koji se ne zahteva neki od subjektivnih elemenata iz čl. 30. Rimskog statuta,[15] dok Hal (Hall) i Ambos ističu u Komentaru Rimskog statuta da je reč o „dodatnom subjektivnom elementu" koji je različit od znanja.[16] Identičan stav Ambos navodi i u drugom tomu svoje knjige.[17] U istom komentaru, Pigarof i Robinson ističu potpuno suprotan stav da je reč o okolnostima, ali da se zahteva niži stepen znanja.[18] Robinson smatra da je pristup koji ovaj element određuje kao jurisdikcioni uslov prevaziđen i da lice mora biti svesno „osnovnog i centralnog elementa".[19] Kaseze (Cassese)[20] i Munivrana Vajda[21] takođe smatraju da je reč o okolnostima u odnosu na koje se zahteva znanje.

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[14] V.: Munivrana Vajda, M. (2011). Oblici krivnje i Stalni međunarodni kazneni sud. *Hrvatski ljetopis za kazneno pravo i praksu*, 1/2011, 5.

[15] Ambos, K. (2013). *Treatise on International Criminal Law – Vol. I: Foundations and General Part*. Oxford: Oxford University Press, 267, 278.

[16] Hall, C., Ambos, K. (2016). Article 7. Crime against Humanity. *The Rome Statute of the International Criminal Court – A Commentary* (eds. Otto Triffterer, Kai Ambos). München – Oxford, 176.

[17] Ambos, K. (2014). *Treatise on International Criminal Law – Vol. II: The Crimes and Sentencing*. Oxford: Oxford University Press, 267, 77.

[18] Pigaroff, D., Robinson D. (2016). Article 30. Mental Element. *The Rome Statute of the International Criminal Court – A Commentary* (eds. Otto Triffterer, Kai Ambos). München – Oxford, 1116.

[19] Robinson, D. (1999). Defining „Crimes Against Humanity" at the Rome Conference. *The American Journal of International Law*, Vol. 93, No. 1, 51–52. Klark (Clark) takođe navodi da su mnogi prilikom usvajanja Rimskog statuta smatrali da unošenje znanja u inkriminaciju omogućava prevazilaženje stava da je reč samo o jurisdikcionom uslovu. V.: Clark, R. S. (2008). The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the elements of offences. *Criminal Law Forum,* 12/2001, 316.

[20] Cassese, A. (2008). *The Oxford Companion to International Criminal Justice*, 482. Oxford New York: Oxford University Press.

[21] Munivrana Vajda, M. (2011). *Op. cit.*, 22.

Škulić[22] i Kaseze[23] smatraju da se u odnosu na ovaj deo bića krivičnog dela ne zahteva namera, već samo znanje. Badar i Poro[24] tvrde da je to posledica činjenice da okolnosti ne mogu biti nameravane i željene već samo saznate, sa čim je saglasna i Munivrana Vajda[25]. Ristivojević[26], iako usamljen u tom stavu, smatra da lice mora hteti ili barem pristati na to da njegovo delo bude deo tog napada, što ukazuje na neophodnost postojanja umišljaja.

Vidljivo je da u literaturi ne samo da ne postoji jednoglasan stav u pogledu pravne prirode ovog subjektivnog elementa, već i da autori nisu pristupali temeljnije komparativnoj analizi ovog pitanja u dva ključna segmenta – normativnom i u segmentu sudske prakse postojećih međunarodnih sudova, a u cilju iznalaženja određenja ovog subjektivnog elementa u međunarodnom krivičnom pravu. Normativna analiza se, iako je postojala, svodila na poređenje Rimskog statuta sa nekim od statuta *ad hoc* tribunala dok se analiza sudske prakse zaustavlja na navođenju nekoliko predmeta iz prakse Haškog tribunala.

SADRŽAJ ZNANJA KOD ZLOČINA PROTIV ČOVEČNOSTI U LITERATURI

Većina autora analizi sadržaja znanja pristupa razmatrajući ovo pitanje u Rimskom statutu. Retka je temeljnija analiza ovog pitanja u izvorima prava i praksi *ad hoc* tribunala.[27]

Ambos i Hal (Hall)[28] ističu da je sadržaj znanja sporan. Autori često navode da postoje tri stepena znanja – aktivno znanje, *willful blindness* i konstruktivno znanje. Aktivno znanje je prvi stepen znanja, to je potpuno znanje.

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[22] Škulić, M. (2005). *Međunarodni krivični sud – nadležnost i postupak*. Beograd: Centar za publikacije Pravnog fakulteta u Beogradu, 253.

[23] Kaseze, A. (2005). *Međunarodno krivično pravo*. Beograd: Beogradski centar za ljudska prava, 193.

[24] Badar, M. E., Porro, S. (2015). Rethinking the Mental Elements in the Jurisprudence of the ICC. *The Law and Practice of International Criminal Court* (eds. Carsten Stahn). Oxford, 664.

[25] Munivrana Vajda, M. (2011). Oblici krivnje i Stalni međunarodni kazneni sud. *Hrvatski ljetopis za kazneno pravo i praksu*, 1/2011, 19.

[26] Ristivojević, B. (2014). *Međunarodna krivična dela – Deo I*. Novi Sad: Pravni fakultet Univerziteta u Novom Sadu, 66.

[27] V.: Ambos, K. (2014). *Treatise on International Criminal Law – Vol. II: The Crimes and Sentencing*. Oxford: Oxford University Press, 77–79.

[28] Ambos, K. (2014). *Op. cit.,* 77; Hall, C., Ambos, K. (2016). Article 7. Crime against Humanity. *The Rome Statute of the International Criminal Court – A Commentary* (eds. Otto Triffterer, Kai Ambos). München – Oxford 176.

Drugi stepen znanja, koji je poznat u angloameričkom pravu, jeste *willful blindness* i treći stepen znanja je konstruktivno znanje.[29] Može se uočiti da nema spora da je aktivno znanje relevantan oblik znanja. Tako Markhuk (Marchuk) i Šobas (Schabas) govore samo o aktivnom znanju.[30] Škulić je na istom stanovištu.[31] Badar ističe da iz jezičkog tumačenja statuta proizlazi da je relevantno samo aktivno znanje, ne i ostala dva oblika.[32] Munivrana Vajda konstatuje da je *willful blindness* odbačen prilikom usvajanja Rimskog statuta, što govori u prilog tome da oba niža stepena znanja (*willful blindness* i konstruktivno znanje) nisu dovoljna.[33] Finin, iako prvo konstatuje isto što i Munivrana Vajda, pravda prihvatanje nižih stepena znanja pragmatičnošću.[34] Kitičaisare (Kittichaisaree) bez pravljenja razlike u odnosu na Haški tribunal i pozivajući se na njegovu praksu smatra da sva tri oblika znanja mogu biti dovoljna.[35] U pogledu *willful blindness*-a, Pigarof i Robinson smatraju da je to pitanje koje se ostavlja sudu na procenu.[36] Ono oko čega postoji saglasnost vodećih autora jeste to da učinilac ne mora precizno poznavati sve karakteristike napada.

Može se primetiti da u literaturi nema jednoglasnog stava u odnosu na ovo pitanje, ali ni temeljne komparativne analize izvora međunarodnog krivičnog prava i sudske prakse u cilju ustanovljavanja da li postoji jedinstven stav u pogledu neophodnog sadržaja znanja u međunarodnom krivičnom pravu.

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[29] O ovim pojmovima v.: Đokić, I. (2016). *Opšti pojam krivičnog dela u anglo-američkom pravu*. Beograd: Pravni fakultet Univerziteta u Beogradu, 98.

[30] Marchuk, I. (2014). *The Fundamental Concept of Crime in International Criminal Law.* Berlin – Heidelberg: Springer, 107–108; Schabas, W. A. (2012). *Unimaginable Atrocities – Justice, Politics, and Rights at the War Crimes Tribunals*. Oxford: Oxford University Press, 127–128.

[31] Škulić navodi da bi bez subjektivnog elementa moglo biti reči o izolovanom delovanju ali ne i o zločinu protiv čovečnosti. V.: Škulić, M. (2005). *Međunarodni krivični sud – nadležnost i postupak*. Beograd: Centar za publikacije Pravnog fakulteta u Beogradu, 252.

[32] Badar, M. E., Porro, S. (2015). Rethinking the Mental Elements in the Jurisprudence of the ICC. *The Law and Practice of International Criminal Court* (eds. Carsten Stahn). Oxford, 665.

[33] Pigaroff, D., Robinson D. (2016). Article 30. Mental Element. *The Rome Statute of the International Criminal Court – A Commentary* (eds. Otto Triffterer, Kai Ambos). München – Oxford, 1124.

[34] Ona smatra da bi, s obzirom na širinu međunarodnih krivičnih dela, bilo teško dokazati postojanje znanja bez uključivanja određenih formi *willful blindness*-a. V.: Finnin, S. (2012). Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis. *International and Comparative Law Quarterly*, 2/2012, 350–351.

[35] Kittichaisaree, K. (2001). *International Criminal Law*. New York: Oxford University Press, 91.

[36] Pigaroff, D., Robinson D. (2016). *Op. cit*., 1124.

HIPOTETIČKI OKVIR I UPOTREBLJENE METODE

Cilj istraživanja

Polazeći od postojeće literature, *znanje kod zločina protiv čovečnosti u međunarodnom krivičnom pravu predstavlja subjektivni element koji se vezuje za svest učinioca krivičnog dela o tome da čini delo u okviru šireg ili sistematskog napada protiv civilnog stanovništva, a koja može da bude različitog sadržaja*. Znanje će se ispitivati u pogledu njegove samostalnosti i sadržaja analizom izvora prava i sudske prakse međunarodnih krivičnih sudova, kao i i ispitivanjem stavova neposrednih primenjivača pravne norme. Ispitivanje će obuhvatiti vreme od osnivanja *ad hoc* tribunala do danas i one prostore na koje se odnosi rad međunarodnih krivičnih sudova odnosno Bosnu i Hercegovinu (dalje: BiH) u studiji slučaja.

Cilj istraživanja je da se utvrdi: 1. da li je znanje na strani učinioca neophodno kod zločina protiv čovečnosti; 2. da li je znanje samostalan subjektivni element u međunarodnom krivičnom pravu; i 3. kakvog kvaliteta znanje mora biti, odnosno da li postoji jedinstven stav u pogledu neophodnog stepena znanja u međunarodnom krivičnom pravu.

Hipotetički okvir

Polazeći od dostupne literature i istraživačkih pitanja, hipotetički okvir istraživanja čine dve osnovne hipoteze. Uz svaku osnovnu hipotezu postavljene su dodatne hipoteze koje na određeni način razbijaju osnovnu hipotezu u delove i njihovim ispitivanjem biće proverena svaka od osnovnih hipoteza. Ispitivaće se sledeće hipoteze:

1. ZNANJE JE SAMOSTALAN SUBJEKTIVNI ELEMENT U MEĐUNARODNOM KRIVIČNOM PRAVU

1a) Znanje nije određeno u izvorima međunarodnog krivičnog prava pre Rimskog statuta.
1b) Rimski statut određuje znanje kao samostalan subjektivni element.
1c) Postoji jednoglasnost u sudskoj praksi da u pogledu činjenja dela u okviru šireg ili sistematskog napada nije potreban umišljaj na strani učinioca.
1d) Postoji jednoglasnost u sudskoj praksi da je znanje neophodan subjektivni element u pogledu činjenja dela u okviru šireg ili sistematskog napada kod zločina protiv čovečnosti.

2. NE POSTOJI OPŠTEPRIHVAĆEN STAV U POGLEDU SADRŽAJA ZNANJA U MEĐUNARODNOM KRIVIČNOM PRAVU

2a) Statuti međunarodnih sudova ne sadrže istu definiciju krivičnog dela zločin protiv čovečnosti.
2b) Statuti svih međunarodnih sudova ne određuju sadržaj znanja kod krivičnog dela zločin protiv čovečnosti.
2c) Ne postoji jedinstven stav u sudskoj praksi u pogledu sadržaja znanja.
2d) *Ad hoc* tribunali uključuju niže oblike znanja (konstruktivno znanje i *willful blindness*).
2e) Međunarodni krivični sud ne uključuje niže oblike znanja.

Upotrebljene metode

Za proveru svih hipoteza koje se odnose na određenje znanja i njegovog sadržaja u izvorima prava opredelili smo se za upotrebu klasičnih metoda koje se koriste za analizu pravnih normi. U ovom segmentu upotrebljeni su jezički i normativni metod kao i sistematsko tumačenje. Upotrebljen je i uporednopravni metod s obzirom na to da analiza obuhvata više izvora međunarodnog krivičnog prava.[37]

Za proveru hipoteza koje se odnose na stav sudske prakse u pogledu samostalnosti znanja kao subjektivnog elementa i njegovog sadržaja korištena je dokumentaciona analiza obrazloženja sudskih presuda. Stavovi u pogledu pitanja relevantnih za ispitivanje hipoteza prikazani su u procentualnim iznosima od ukupnog broja analiziranih presuda iz uzorka.[38] Uzorak je određen tako što je prethodno izvršena trijaža predmeta u kojima su lica bila okrivljena za zločin protiv čovečnosti[39]. S obzirom na to da je broj okončanih predmeta oko

[37] Predmet analize su tri statuta međunarodnih krivičnih sudova, Statuta Međunarodnog krivičnog suda za bivšu Jugoslaviju (dalje: Haški tribunal) i Međunarodnog krivičnog suda za Ruandu (dalje: Tribunal za Ruandu) jer je reč o dva dominantna izvora prava pre Rimskog statuta, kao i sam Rimski statut jer se on smatra najvažnijim izvorom međunarodnog krivičnog prava. Literatura ne pokazuje značaj Statuta Međunarodnog vojnog tribunala u Nirnbergu, stoga ovaj statut nije uzet u obzir. U delu studije slučaja koja se odnosi na BiH, analizira se Krivični zakon Bosne i Hercegovine (dalje: KZ BiH) kao osnovni izvor krivičnog prava u BiH u pogledu ovog krivičnog dela.

[38] Rukovodeći se razlozima iz prethodne fusnote, analizirane su presude dva navedena *ad hoc* tribunala kao i presude Međunarodnog krivičnog suda. Pored toga, u okviru studije slučaja analizirane su presude Suda Bosne i Hercegovine (dalje: Sud BiH).

[39] Na upit poslat Međunarodnom rezidualnom mehanizmu za krivične sudove kao pravnom nasledniku oba *ad hoc* tribunala za pristup informacijama o zvaničnom broju postupaka koji su okončani u pogledu krivičnog dela zločin protiv čovečnosti, odgovoreno je

70 pred svakim od tribunala, uzeto je u razmatranje po 10 okončanih predmeta svakog tribunala, a analizirane su presude oba stepena (ukupno 20 presuda za svaki od tribunala).[40] Kod oba *ad hoc* tribunala su analizirane presude iz svih perioda njihovog rada, dok je kod Haškog tribunala korišten i kriterijum situacije[41]. Uzorak presuda Međunarodnog krivičnog suda čine tri prvostepene presude. Drugostepene presude nisu analizirane jer je Sud samo u jednom predmetu pravosnažno odlučio po žalbi, dok su u drugom predmetu povučene žalbe a u trećem je žalbeni postupak u toku, što onemogućava analizu. U okviru studije slučaja od ukupno 139 presuda Suda BiH[42] uzeto je u razmatranje 15 predmeta u oba stepena (30 presuda) prema sistemu slučajnog uzorka.

Za proveru osnovnih hipoteza pristupili smo studiji slučaja, analizirajući shvatanje znanja kao subjektivnog elementa zločina protiv čovečnosti u BiH. BiH je izabrana kao prostor u kome će se ispitivati ovaj pojam iz više razloga. Krivična dela počinjena na prostoru BiH bila su predmet rada jednog od najznačajnih međunarodnih tribunala, Haškog tribunala. „Sledbenik rada" u ovim predmetima je Sud BiH. Ovaj sud je najveći deo svog postojanja imao delimično međunarodni karakter i dominantno je nadležan za procesuiranje međunarodnih krivičnih dela, što daje razlog za verovanje da se analizom sudske prakse ovog suda može doći do provere hipoteza. Sud je i dalje aktivan što omogućava neposredno ispitivanje stavova učesnika u ovim postupcima.

U okviru studije slučaja izvršena je analiza KZ BiH, dokumentaciona analiza uzorka presuda Suda BiH, kao i analiza odgovora dobijenih anketiranjem sudija Suda BiH i advokata obe advokatske komore u BiH.[43] Anketi je pristupilo 11 sudija Odjela I za ratne zločine u okviru Krivičnog odjelje-

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da takva evidencija ne postoji, pa je ovu trijažu izvršila autorka. Kada je reč o Međunarodnom krivičnom sudu broj presuda je izuzetno mali, pa je bilo jednostavno izvršiti uvid u one koje se odnose na zločin protiv čovečnosti (ukupno tri predmeta).

[40] Analizirane su presude oba stepena da bi se utvrdilo da li je ovo pitanje isticano u okviru žalbe i da li je žalbeni sud menjao stav u odnosu na onaj zauzet u prvostepenoj odluci.

[41] Presude Haškog tribunala najčešće u svom nazivu pored imena lica koja su okrivljena u postupku nose i naziv situacije na koju se odnose koja je najčešće određeni geografski prostor (npr. Lašvanska dolina, Foča, Prijedor i sl.). Ovaj kriterijum je uzet prilikom uzorkovanja kako bi se se ispitalo da li je stav Tribunala bio drugačiji u pogledu različitih situacija. Presude Tribunala za Ruandu ne sadrže oznaku situacije, stoga taj kriterijum nije uzet pri uzorkovanju.

[42] Podaci su na upit dobijeni od Misije OEBS-a u BiH. Podaci se odnose na sve postupke koji su vođeni za krivično delo zločin protiv čovečnosti od osnivanja Suda BiH 2002. do dana sačinjavanja izveštaja 23. 3. 2020. godine. Podaci su traženi od Misije OEBS-a u BiH jer Sud BiH ne sadrži takvu evidenciju.

[43] Nedostatak ove analize predstavlja nemogućnost da se obezbedi sprovođenje ankete sa tužiocima Tužilaštva BiH. I pored više zvaničnih upita i telefonskih poziva, Tužilaštvo BiH nije odgovorilo na zahtev za sprovođenju ankete.

nja Suda BiH.[44] Kada je reč o advokatima, nije bilo moguće napraviti filter koji bi omogućio da anketi pristupe samo advokati koji su postupali u ovim predmetima, ali je u anketi naglašeno da je ona primarno namenjena onim advokatima koji su bili branioci u predmetima ratnih zločina. Anketi je pristupilo 9 advokata Advokatske komore Republike Srpske (dalje: AK RS) i 12 advokata Advokatske komore Federacije BiH (dalje: AK FBiH). Upitnik je sadržavao ista pitanja za sve tri grupe ispitivanih lica kako bi se izvršilo upoređivanje njihovih stavova. U ovom delu će biti izvršena triangulacija.

REZULTATI ISTRAŽIVANJA

Normativno određenje znanja – uporedna analiza

Provera hipoteze 1a) jezičkim i normativnim metodom pokazuje da statut nijednog od tribunala ne predviđa znanje na strani učinioca kod zločina protiv čovečnosti, niti statuti sadrže opštu normu koja se odnosi na subjektivni element. Stoga se hipoteza 1a) može smatrati potvrđenom jer znanje u ovim izvorima prava nije određeno. Tabelarni prikaz relevantnih odredbi pokazuje da statuti međunarodnih sudova potpuno različito pristupaju pitanju znanja.

Primena jezičkog i normativnog metoda i sistematskog tumačenja prilikom proveravanja hipoteza 1b) pokazuje da je znanje u Rimskom statutu samostalan subjektivni element i da se ova hipoteza može smatrati potvrđenom. Naime, čl. 7. eksplicitno zahteva znanje u odnosu na kontekstualni element zločina protiv čovečnosti. Sa druge strane, u čl. 30. znanje je postavljeno kao samostalan subjektivni element koji se odnosi na okolnosti dela. Upotrebom sistematskog tumačenja zaključuje se da kontekstualni element zločina protiv čovečnosti iz čl. 7. u vezi sa čl. 30. predstavlja okolnosti dela, pa se samim tim znanje odnosi na njega.

[44] Jedan od sudija je autorki napisao e-poruku sa širim odgovorima na pitanja smatrajući da nije jednostavno dati odgovor „da“ ili „ne“ na pitanja postavljena u anketi. S obzirom na stav uvaženog sudije, autorka nije njegove odgovore na pitanja samostalno podvela pod neki od odgovora.

Tabela 1: Znanje i opšti subjektivni element u statutima međunarodnih sudova

Sadržaj odredbe statuta koja se analizira	Subjektivni element uopšte	Zločin protiv čovečnosti (deo koji se odnosi na kontekstualni element)
Statut Haškog tribunala	Ne sadrži opštu odredbu	Čl. 5. „Međunarodni sud je nadležan da krivično goni osobe odgovorne za sledeća krivična dela kada su počinjena u oružanom sukobu, bilo međunarodnog bilo unutrašnjeg karaktera, i usmerena protiv civilnog stanovništva...“
Statut Tribunala za Ruandu	Ne sadrži opštu odredbu	Čl. 3. „Međunarodni tribunal za Ruandu imaće ovlašćenje za gonjenje lica odgovornih za činjenje sledećih krivičnih dela kada su učinjena u okviru šireg ili sistematskog napada protiv bilo kojeg civilnog stanovništva zbog nacionalne, etničke, rasne ili verske pripadnosti...“
Statut Međunarodnog krivičnog suda (Rimski statut)	Čl. 30. Subjektivni element „1. Ukoliko nije drugačije predviđeno, lice je krivično odgovorno i može se kazniti kaznom propisanom za krivično delo iz nadležnosti Suda, samo ukoliko su materijalna obeležja dela učinjena sa namerom i znanjem. 2. U smislu ovog člana, učinilac ima nameru ako: a) u odnosu na radnju, lice hoće da u njoj učestvuje; b) u odnosu na posledicu, lice hoće nastupnje posledice ili je svesno da će ona prema redovnom toku događaja nastupiti. 3. U smislu ovog člana, „znanje“ znači svest da okolnosti postoje ili da će posledica nastupiti prema redovnom toku događaja.“	Čl. 7. „U smislu odredbi ovog statuta ’zločinom protiv čovečnosti’ smatra se bilo koja od sledećih radnji, kada je preduzeta kao deo šireg ili sistematskog napada usmerenog protiv bilo kojeg civilnog stanovništva sa znanjem o napadu...“

Primena istih metoda pokazuje da je i hipoteza 2b) potvrđena jer se može uočiti da statuti dva međunarodna tribunala ne određuju precizno sadržaj znanja niti Rimski statut daje odgovor na to pitanje. Ovoj analizi treba da se doda i tekst Elemenata krivičnih dela uz Rimski statut u kojima se navodi da se ne zahteva poznavanje svih karakteristika napada.[45] To upućuje na aktivno

[45] Elements of Crime. Dostupno na: *https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf* (28. 3. 2020).

znanje jer se primenom navedenih metoda ne mogu uključiti dva niža stepena znanja, ali se ne zahteva preciznost u poznavanju svakog elementa napada.

Iz svega navedenog jasno proizlazi da statuti ne sadrže istu definiciju ovog krivičnog dela, što potvrđuje hipotezu 2a).

Znanje u sudskoj praksi međunarodnih krivičnih sudova – uporedna analiza

Rezultati dokumentacione analize (vid. Tabelu 2) pokazuju da se hipoteze 1c) i 1d) mogu smatrati potvrđenim. To proizlazi iz toga što je dominantno shvatanje sva tri suda da je znanje neophodan subjektivni element u odnosu na širi ili sistematski napad. To znači da sudovi nisu zahtevali dokazivanje umišljaja, odnosno da to nije subjektivni element koji se traži u pogledu činjenja dela u okviru napada.

Tabela 2: Znanje kod zločina protiv čovečnosti u sudskoj praksi međunarodnih krivičnih sudova

Međunarodni sud		Haški tribunal				Međunarodni tribunal za Ruandu				Međunarodni krivični sud	
		Prvostepena		Drugostepena		Prvostepena		Drugostepena		Prvostepena	
		Da	Nije se izjasnio	Da	Nije se izjasnio	Da	Nije se izjasnio	Da	Nije se izjasnio	Da	Nije se izjasnio
Stav koji se analizira	Znanje je neohodan subjektivni element u pogledu šireg ili sistematskog napada (%)	100	0	60	40	100	0	20	80	100	0
	Konstruktivno znanje je dovoljan subjektivni element u pogledu šireg ili sistematskog napada (%)	70	30	40	60	30	70	20	80	0	100
	Willful blindness je dovoljan subjektivni element u pogledu šireg ili sistematskog napada* (%)	0	100	0	100	0	100	0	100	0	100

* Nijedan od međunarodnih sudova nije eksplicitno izveo zaključak o *willful blindness*-u kao mogućem stepenu znanja u pogledu činjenja dela u okviru šireg ili sistematskog napada zbog čega su podaci obrađeni na ovaj način.

Rezultati takođe pokazuju da nema jasnog stava svih sudova u pogledu sadržaja znanja koji je neophodan u pogledu činjenja dela u okviru šireg ili sistematskog napada što potvrđuje hipotezu 2c).

Hipoteza 2d) je potvrđena u delu koji se odnosi na konstruktivno znanje jer je vidljivo da ga *ad hoc* tribunali smatraju dovoljnim, dok se u pogledu *willful blindness*-a kao drugog dela iste hipoteze ne može izvesti precizan zaključak. Takođe, potvrđena je hipoteza 2e), odnosno rezultati pokazuju da Međunarodni krivični sud ne uključuje niže oblike znanja.

Svi sudovi u prvom stepenu su se izjasnili u svim analiziranim predmetima o znanju kao neophodnom subjektivnom elementu iz čega jasno proizlazi da je njegova priroda kao subjektivnog elementa samostalna. Sa druge strane, drugostepeni sudovi se nisu u svim predmetima izjasnili u vezi sa ovim pitanjem. To može biti posledica toga da žalbe okrivljenih nisu bile usmerene na osporavanje znanja kao utvrđene činjenice u prvostepenoj presudi.[46] Manji broj drugostepenih presuda u kojima se Tribunal za Ruandu izjasnio u pogledu znanja može se objasniti činjenicom da je procesuiranje za zločin protiv čovečnosti pred Tribunalom za Ruandu bilo sporedno jer su sva lica uglavnom terećena i za genocid, pa je ovom krivičnom delu posvećena manja pažnja. Vidljivo je da tamo gde su tribunali raspravljali o ovom pitanju u drugostepenom postupku, nisu odstupili od stava da je ovaj subjektivni element neophodan u pogledu činjenja dela u okviru šireg ili sistematskog napada.

U 70 % prvostepenih presuda Haški tribunal je utvrdio da je konstruktivno znanje dovoljan stepen znanja. Manji broj drugostepenih presuda u kojem se o tome izjasnio je posledica već navedenog pitanja sadržaja žalbe okrivljenog lica i taj broj prati brojku iz prethodno analiziranog pitanja – ako nije bilo žalbe na taj deo presude i Tribunal se uopšte nije izjašnjavao u pogledu znanja, on nije ni ulazio u pitanje konstruktivnog znanja.[47] Tribunal za Ruandu se u svega 30 % presuda izjasnio da je konstruktivno znanje dovoljan stepen znanja. To ukazuje da je u više predmeta bila reč o aktivnom znanju, dok sa druge strane i takva brojka govori u prilog tome da je i pred ovim sudom to dovoljan stepen znanja. Međunarodni krivični sud se nije izjasnio o ovom pitanju.

U pogledu *wilfull blindness*-a je teže izvesti zaključak. Istraživanje pokazuje da je naziv ovog stepena znanja teorijske prirode, on se ne pominje kao takav u sudskoj praksi. Teorijsko objašnjenje sadržaja ovog stepena znanja

[46] To potvrđuje i činjenica da se prilikom analize presuda moglo uočiti da je npr. Haški tribunal raspravljao u drugostepenom postupku o znanju onda kada je odbrana to isticala. V.: Presuda, MKTJ, *Blaškić,* drugostepena presuda, br. IT-95-14-A, 29. jul 2004, paras. 121–128.

[47] S obzirom da su uzorak činile presude koje ne nose oznaku različitih situacija, naglašavamo da u tom pogledu nije primećena razlika u stavovima suda između njih.

govori u prilog tome da, ako je dovoljno konstruktivno znanje, onda je i ovaj oblik znanja dovoljan. Ipak, držeći se empirijskih podataka ne možemo izvesti pouzdan zaključak u pogledu ovog pitanja.

Da su osnovne hipoteze potvrđene pokazuje to što iako *ad hoc* tribunali nemaju statute koji određuju znanje, njihova sudska praksa stoji na stanovištu da nije neophodno dokazivanje umišljaja i da je samo znanje neophodan subjektivni element. Rimski statut svojom normom ukazuje na samostalnost ovog subjektivnog elementa dok je (iako oskudna) sudska praksa Međunarodnog krivičnog suda to potvrdila. Kada je reč o drugoj osnovnoj hipotezi i ona se može smatrati potvrđenom, s obzirom da statuti ne sadrže određenje sadržaja znanja, a da se stav u sudskoj praksi razlikuje – *ad hoc* sudovi smatraju dovoljnim i niže stepene znanja, dok se Međunarodni krivični sud nije izjasnio o tome niti takav stepen znanja uzeo u obzir.[48] Iz svega proizlazi da ne možemo sa sigurnošću utvrditi da li postoji jedinstven stav u pogledu sadržaja znanja.

Znanje kod zločina protiv čovečnosti u Bosni i Hercegovini – studija slučaja

Studijom slučaja su proverene dve osnovne hipoteze – da li je znanje samostalan subjektivni element u međunarodnom krivičnom pravu i da li postoji opšteprihvaćen stav u pogledu sadržaja znanja u međunarodnom krivičnom pravu. Znanje je analizirano u sledeća tri segmenta u BiH.

Normativno određenje pojma znanja u Bosni i Hercegovini

Potrebno je na početku odrediti na koji način je znanje kao subjektivni element kod zločina protiv čovečnosti određeno u postojećem BiH zakonodavstvu. U skladu sa principom paralelno podeljene nadležnosti između BiH i entiteta u oblasti krivičnog prava, zločin protiv čovečnosti je inkriminisan samo u KZ BiH, ne i u entitetskim zakonima.

Tabela 3: Opšti subjektivni element i znanje kod zločina protiv čovečnosti u KZ BiH

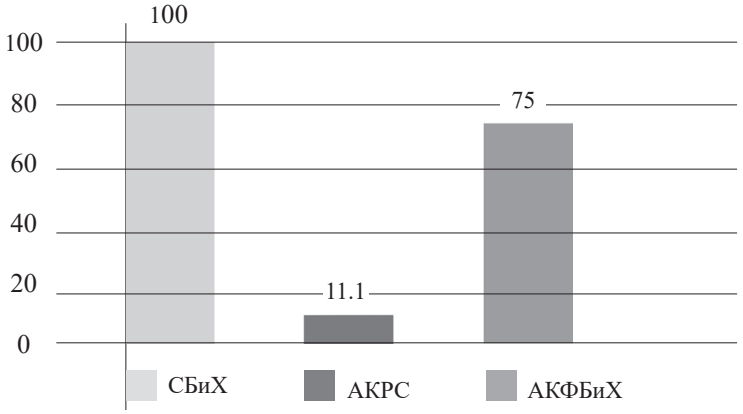
Čl. 33, st. 1, Sadržaj krivice	Čl. 172, st. 1, Zločin protiv čovečnosti (kontekstualni element)
„Krivica postoji ako je počinilac u vrijeme izvršenja krivičnog djela bio uračunljiv i pri tom postupao sa umišljajem.“	„Ko, kao dio šireg ili sistematskog napada usmjerenog bilo protiv kojeg civilnog stanovništva, znajući za takav napad, učini koje od ovih djela...“

[48] Postoji mogućnost da će Međunarodni krivični sud u budućnosti menjati ovaj stav s obzirom da je broj presuda ovog suda mali.

Korištenjem jezičkog i normativnog metoda u odnosu na inkriminaciju zločina protiv čovečnosti u KZ BiH možemo zaključiti da je definicija ovog dela usklađena sa onom u Rimskom statutu. Međutim, sistematskim tumačenjem ovakav zaključak može biti doveden u pitanje iz razloga što opšta odredba koja se odnosi na krivicu zahteva postojanje umišljaja na strani učinioca i ne ostavlja prostor za izuzetke. Ukoliko znanje shvatimo kao samostalan subjektivni element onako kako je on shvaćen u međunarodnom krivičnom pravu, javiće se problem odnosa ove dve norme, jer bi prema čl. 33. ova okolnost morala biti obuhvaćena umišljajem.[49] I pored navedene dileme sudije Suda BiH smatraju da je ova inkriminacija u potpunosti usklađena sa Rimskim statutom (vid. Grafikon 1). Taj stav ne dele članovi AK RS jer je 11,1 % anketiranih smatralo da je ona usklađena sa Rimskim statutom. Advokati AK FBiH su takođe u većem broju smatrali da je definicija usklađena (vid. Grafikon 1). U pogledu sadržaja znanja, BiH zakonodavstvo ne daje odgovor.

Grafikon 1

Да ли је дефиниција кривичног дела злочин против човечности из чл. 172. КЗ БиХ усклађена са дефиницијом овог кривичног дела у Римском статуту? (постотак потврдних одговора)



Znanje u sudskoj praksi Suda Bosne i Hercegovine

Tabela 4. prikazuje rezultate istraživanja koje je vršeno dokumentacionom analizom uzorka obrazloženja prvostepenih i drugostepenih presuda Suda BiH u cilju provere osnovnih hipoteza. Ovi podaci biće ukršteni sa rezultatima

[49] To bi značilo da KZ BiH propisuje teže uslove za odgovornost u odnosu na Rimski statut. To sa aspekta obaveze usklađivanja sa međunarodnim ugovorima nije prihvatljivo.

koji su dobijeni sprovedenom anketom sa sudijama i advokatima koji su prikazani Grafikonom 2.

Vidljivo je da Sud BiH nije zahtevao umišljaj u pogledu činjenja dela u okviru šireg ili sistematskog napada. To proizlazi neposredno iz činjenice da Sud nije zahtevao umišljaj ni u jednom analiziranom predmetu, ali i posredno iz činjenice da je u svim presuđenim predmetima Sud BiH u odnosu na ovu okolnost eksplicitno zahtevao znanje.[50] Iako je Sud BiH u svim predmetima zahtevao znanje u pogledu činjenja dela u okviru šireg ili sistematskog napada, on se nije ni u jednom analiziranom predmetu izjasnio u pogledu toga da li je znanje samostalan subjektivni element. Analiza drugostepenih presuda pokazuje 1) da su se žalbe odnosile i na znanje kao utvrđenu činjenicu i to u 80 % analiziranih predmeta; 2) da je Sud BiH ostao pri stavovima prvostepenog suda da je znanje neophodan subjektivni element u pogledu činjenja dela u okviru napada; 3) da nije neophodan umišljaj; i 4) da se ni drugostepeni sud nije izjasnio u pogledu samostalnosti znanja kao subjektivnog elementa kod zločina protiv čovečnosti. Iz toga što Sud nije zahtevao umišljaj i iz toga što je zahtevao samo znanje, posredno se može zaključiti da je i Sud BiH smatrao da je reč o samostalnom subjektivnom elementu.

Sud BiH se u 66,6 % analiziranih prvostepenih presuda direktno pozvao na praksu Haškog tribunala, dok je broj takvih pozivanja u uzorku drugostepenih presuda manji i iznosi 26,6 %. Oslanjanje na praksu Haškog tribunala objašnjava i odnos prema nižim oblicima znanja u praksi Suda BiH. Iz priložene tabele se vidi da je Sud BiH u svim analiziranim prvostepenim presudama u kojima se o tome izjasnio (46,6 %) bio stava da je konstruktivno znanje dovoljan oblik znanja, što je stav koji sledi praksu Haškog tribunala. U ostatku uzorka se o tom pitanju nije izjasnio. Drugostepeni sud se o ovom pitanju izjasnio u 6,6 % analiziranih presuda i u svim je bio stava da je konstruktivno znanje dovoljno. Treba smatrati da je ovo oblik znanja koji je pred ovim sudom bio dovoljan.

U pogledu *willful blindness*-a može se utvrditi da ovaj pojam ne egzistira ni u sudskoj praksi Suda BiH, već je, kako je prethodno zaključeno, reč o teorijskom pojmu (pogledati napomenu ** uz Tabelu 4).

Iz prikazanih rezultata se može zaključiti da je Sud BiH smatrao da je znanje samostalan subjektivni element. Takođe, aktivno i konstruktivno znanje su relevantni oblici krivice, dok se u pogledu *willful blindness*-a ne može izvesti precizan zaključak.

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[50] Primećuje se da Sud BiH u nekim presudama, iako zauzima stav da je neophodno dokazati samo svest učinioca da delo čini u okviru šireg ili sistematskog napada, kasnije konstatuje da je učinilac „*znao i htio*" izvršenje dela, što implicira da je dokazivao umišljaj učinioca u ovom pogledu, a ne samo znanje. Time se ovo pitanje čini još konfuznijim. V.: Presuda Suda BiH, br. S11K02164418Kri, od. 4. decembra 2018. godine, 38–39; Presuda Suda BiH, br. S11K01512414Kri, od 15. aprila 2016. godine, 50–51.

Tabela 4: Znanje kod zločina protiv čovečnosti u sudskoj praksi Suda BiH

Stav koji se analizira	Stav Suda BiH	Prvostepene presude (%)	Drugostepene presude (%)
Zahteva se znanje u pogledu činjenja dela u okviru šireg ili sistematskog napada	Da	100	80
	Ne	0	0
	Nije se izjasnio	0	20
Potrebno je dokazati umišljaj u pogledu činjenja dela u okviru šireg ili sistematskog napada	Da	0	0
	Ne	100	80
	Nije se izjasnio	0	20
Znanje kod zločina protiv čovečnosti je samostalan oblik krivice*	Da	0	0
	Ne	0	0
	Nije se izjasnio	100	100
Konstruktivno znanje može biti subjektivni element kod zločina protiv čovečnosti	Da	46,6	6,6
	Ne	0	0
	Nije se izjasnio	53,3	93,3
Willful blindness može biti subjektivni element kod zločina protiv čovečnosti**	Da	0	0
	Ne	0	0
	Nije se izjasnio	100	100
Sud BiH se pozvao na sudsku praksu Haškog tribunala u pogledu znanja kod zločina protiv čovečnosti	Da	66,6	26,6
	Ne	33,3	73,3
	Nije se izjasnio	0	0

*Sud BiH je u celokupnom uzorku utvrdio da je potrebno dokazati da je optuženi znao/imao svest o širem ili sistematskom napadu, odnosno da je znao / bio svestan da čini određeno delo u okviru takvog napada. Međutim, Sud BiH se nije izjasnio eksplicitno u pogledu samostalne prirode ovog subjektivnog elementa te smo zbog toga na ovaj način obradili podatke.

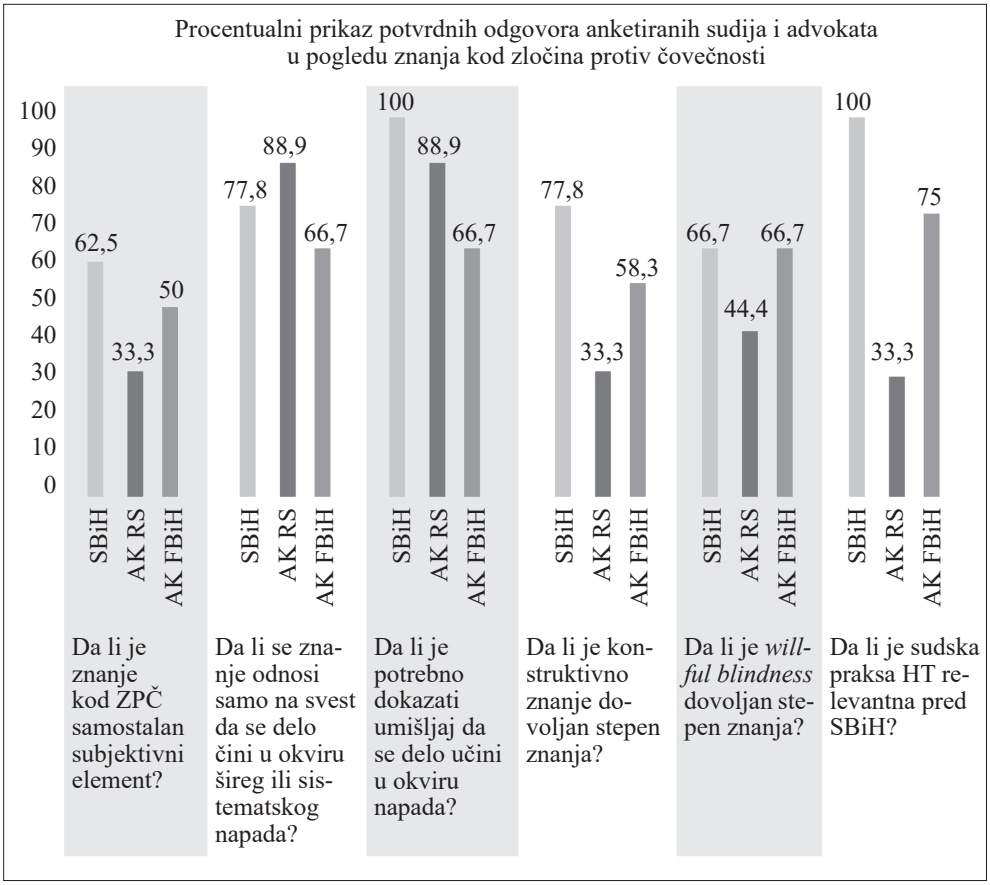
**Sud BiH nije u analiziranim presudama eksplicitno pomenuo ovaj oblik znanja u pogledu činjenja dela u okviru šireg ili sistematskog napada, stoga su podaci obrađeni na ovaj način. Govoreći o mogućim oblicima znanja Sud se izjašnjavao u pogledu aktivnog znanja („znao“, „bio svestan“) i u pogledu konstruktivnog znanja („..ili bar rizikovati“, „imati izvedeno znanje“, „konstruktivno znanje“).

Anketa koja je sprovedena sa sudijama Suda BiH i advokatima dve advokatske komore u BiH pokazuje dve važne stvari – prvo, da među anketiranim učesnicima postoji razlika u shvatanju znanja i sa njim povezanim pitanjima kod zločina protiv čovečnosti, i drugo, da postoji razlika u stavovima zauzetim od strane Suda BiH u njegovim presudama i stavovima sudija ovog suda koji su učestvovali u anketi.

Prateći Grafikon 2. koji sledi može se uočiti da ne postoji saglasnost između anketiranih grupa u pogledu samostalnosti znanja kao subjektivnog

elementa. Tako, 33,3 % advokata AK RS smatra da je reč o samostalnom subjektivnom elementu, dok njih 50 % iz AK FBiH ima takav stav. Iako se u svojim presudama nikada nisu izjasnili u vezi sa ovim pitanjem, 62,5 % sudija Suda BiH smatra da je reč o samostalnom subjektivnom elementu. Rezultati pokazuju da anketirane grupe nemaju ni približno isti stav u pogledu samostalnosti ovog subjektivnog elementa.

Grafikon 2.



Većina anketiranih u sve tri grupe smatra da je u pogledu činjenja dela u okviru šireg ili sistematskog napada neophodno dokazati umišljaj učinioca. Posebnu pažnju izaziva to što je 100 % sudija bilo stava da je neophodno dokazati umišljaj, što je u suprotnosti sa rezultatima dokumentacione analize (str. 15–16). Moguće je da se ovo može objasniti činjenicom da znanje o

određenoj okolnosti treba da bude obuhvaćeno umišljajem prema stavovima u domaćem krivičnom pravu, međutim onda nije jasan odnos takvog stava i stava da je reč o samostalnom subjektivnom elementu. Pored toga, 62,5 % sudija se istovremeno izjasnilo da je znanje samostalan subjektivni element i da je neophodno dokazati umišljaj u pogledu ovog elementa, iako je reč o pojmovima koji se međusobno isključuju.

Sa druge strane, kod anketiranih advokata se primećuje procentualna podudarnost između onih koji nisu smatrali da je reč o samostalnom subjektivnom elementu i onih koji su smatrali da je potrebno dokazati umišljaj. Odgovor sudija treba da bude doveden u vezu sa odgovorom na pitanje usklađenosti sa Rimskim statutom. Nije jasno zašto je potrebno dokazati umišljaj u pogledu ove okolnosti ako je KZ BiH usklađen sa Rimskim statutom koji, kako je zaključeno, ne zahteva umišljaj.

Sve anketirane sudije su smatrale da je sudska praksa Haškog tribunala relevantna za Sud BiH, što je u skladu sa rezultatima dokumentacione analize, dok advokati, posebno oni iz AK RS, nisu imali ni približno isti stav.

Stavovi o relevantnosti prakse Haškog tribunala objašnjavaju i zašto 77,8 % sudija smatra da je konstruktivno znanje dovoljan stepen znanja, dok nešto manje njih, 66,7 % smatra da je *willful blindness* dovoljan stepen znanja. To otvara mogućnost da je Sud BiH uzimao u obzir *willful blindness* u svojoj praksi, ali da nije koristio ovaj termin. Nejasno je zašto, iako je reč o malom broju sudija, neki od njih smatraju da je konstruktivno znanje dovoljno, a *willful blindness* nije, iako je reč o znanju višeg stepena u odnosu na konstruktivno znanje. Može se zaključiti da među sudijama u pogledu neophodnog stepena znanja nema potpune saglasnosti.

Isti zaključak se može izvesti i iz odgovora advokata u BiH. Više od polovine njih iz AK RS smatra da niži stepeni znanja nisu dovoljni, dok je u AK FBiH taj broj veći, ali i dalje se ne može zaključiti da postoji jedinstven stav. Svakako se primećuje da veći broj sudija smatra da je ovo dovoljan subjektivni element u odnosu na ukupan broj advokata.

Na osnovu rezultata studije slučaja ne može se sa sigurunošću konstatovati da je prva osnovna hipoteza potvrđena. Iako je dokumentaciona analiza presuda pokazala da je znanje samostalan subjektivni element, odgovori na pitanje sudija Suda BiH to značajno dovode u pitanje. Svakako da stavovi zauzeti u presudama imaju jaču snagu prilikom procene, ali ne sme se zanemariti da je taj zaključak oslabljen činjenicom da oni koji su tvorci tih presuda imaju krajnje konfuzan i nedosledan stav o ovom pitanju. Sa druge strane, može se tvrditi da je druga hipoteza potvrđena, jer sadržaj znanja nije potpuno jasan ni u jednom analiziranom segmentu u BiH. Ipak, utisak je da u BiH nema temeljnog pristupa analizi odnosa između domaćeg zakonodavstva i Rimskog

statuta i odnosa prema nasleđu Haškog tribunala i (ne)obaveznosti sleđenja njegove sudske prakse.

Na kraju ovog istraživanja može se zaključiti da su osnovne hipoteze potvrđene. Čini se da na temelju svih pojedinačnih zaključaka možemo tvrditi da je reč o samostalnom subjektivnom elementu koji pripada korpusu međunarodnog krivičnog prava. Takođe, možemo tvrditi da ne postoji opšta saglasnost u vezi sa tim koji sadržaj znanja mora da postoji na strani učinioca.

ZAKLJUČAK

U radu smo pokušali da damo odgovor na pitanje da li znanje kod zločina protiv čovečnosti ima samostalan karakter u međunarodnom krivičnom pravu ili je reč o segmentu nekog drugog subjektivnog elementa. Imajući u vidu da je moguće postojanje različitih stepena znanja, nastojali smo da ispitamo da li postoji saglasnost u međunarodnom krivičnom pravu u pogledu sadržaja znanja, smatrajući da u vezi sa ovim pitanjem nema jedinstvenog stava. U cilju tog ispitivanja pristupili smo analizi relevantnih pravnih normi kao prvom stadijumu u ispitivanju navedenih pitanja. Drugi stadijum je analiza sudske prakse najrelevantnijih međunarodnih sudova. Pored toga, smatrali smo da hipoteze mogu biti proverene sprovođenjem studije slučaja u BiH, imajući u vidu da je ovaj sud pri vrhu po broju presuđenih predmeta ratnih zločina nakon Drugog svetskog rata. Na bazi sprovedenog istraživanja možemo izvesti sledeće zaključke.

U međunarodnom krivičnom pravu je normativno određenje pravne prirode i sadržaja znanja izuzetno oskudno. Statuti međunarodnih sudova pre Rimskog statuta uopšte ne pominju znanje kod ove inkriminacije, a isti ne sadrže ni određenje subjektivnog elementa uopšte, pa je analizom normi teško izvesti zaključke. Rimski statut se može smatrati korakom napred i on dosta preciznije određuje znanje kod zločina protiv čovečnosti, kao i znanje u kontekstu opšteg subjektivnog elementa. Ipak, sadržaj znanja nije ni u ovom izvoru prava precizno određen.

Drugi stadijum analize pokazuje značajnije rezultate. Iako je normativno određenje oskudno, sudska praksa svih međunarodnih sudova je dokazivala znanje učinioca u pogledu činjenja dela u okviru šireg ili sistematskog napada. Sudovi su u sudskoj praksi ekplicitni da je u pogledu ovog elementa neophodno samo znanje (ne i htenje) učionica krivičnog dela. To umnogome ukazuje na njegovu samostalnu prirodu. Takođe, možemo videti značajnu razliku u pristupu sadržaju znanja. Dok su *ad hoc* tribunali smatrali konstruktivno znanje, koje je najniži oblik znanja, dovoljnim, Međunarodni krivični

sud se o tome nije izjasnio niti uzeo iste u obzir u svojoj sudskoj praksi. To pokazuje da nema jasnog pristupa u pogledu sadržaja znanja u međunarodnom krivičnom pravu.

Studija slučaja pokazuje, pored navedenih zaključaka, i to da je prisutna konfuznost kod ovog subjektivnog elementa. Diskrepancija između stavova u presudama i stavova u anketi, kao i često dijametralno suprotna shvatanja određenih pojmova između sudija i advokata, pokazuje da je ovaj subjektivni element i nakon više od dve decenije procesuiranja ovog krivičnog dela u BiH nejasan i da nema jednoglasnosti između onih koji su uključeni u krivične postupke.

Čini se da je mala pažnja posvećena razumevanju ovog subjektivnog elementa u međunarodnom krivičnom pravu. Rezultati koji su dobijeni ovim istraživanjem bi mogli poslužiti kao početna tačka za šire istraživanje, ali i kao svojevrstan alarm za potrebu drugačijeg pristupa i boljeg razumevanja onog što tvori jedno od najtežih krivičnih dela – napada i znanja učinioca o njemu. Možda bi to doprinelo suštinskom obrazloženju ovog kompleksnog pojma koje bi zamenilo postojeće fraziranje u sudskoj praksi.

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THE CONCEPT OF KNOWLEDGE AS A SUBJECTIVE ELEMENT IN THE CRIMINAL OFFENSE OF CRIMES AGAINST HUMANITY**

ABSTRACT: The subject of this paper is the analysis of knowledge as a subjective element in terms of crimes against humanity in international criminal law. Starting from the fact that committing an act within a widespread or systematic attack against a civilian population is a circumstance that turns a "common" crime into a crime against humanity, the paper seeks to answer the question of whether knowledge of committing an act within such an attack is an independent subjective element and whether there is a unified position regarding the necessary content of knowledge in international criminal law. The paper is based on a linguistic, normative, systematic and comparative legal analysis of relevant provisions of international criminal law sources, a documentary analysis of sample judgements of the three most important international courts, as well as a case study which analyzes this subjective element in the legislation and case law of Bosnia and Herzegovina. The results of the research show that in terms of the independence of knowledge as a subjective element in crimes against humanity, there is a

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relatively consistent position in international criminal law, while in terms of the content of knowledge there is no such agreement.

Keywords: knowledge, subjective element, crime against humanity, constructive knowledge, *willful blindness*, international criminal courts

INTRODUCTION

A crime against humanity is an international crime consisting of a general element and a series of alternatively determined acts of execution.[1] Consequently, acts such as a murder, rape, etc., escalate into a crime against humanity when committed as a part of a widespread or systematic attack directed against any civilian population.

This research began with the question of whether the perpetrator needs to know that he is committing an act in the context of such an attack and, if so, of what quality his knowledge should be. The fact that the context in which the perpetrator undertakes the act of execution turns an "ordinary" crime into a crime against humanity, makes the answer to the question of the necessity of existence and quality of the perpetrator's subjective attitude towards that context extremely important. This is exactly what Robinson points out, and he believes that a subjective connection between the perpetrator and the context of this specific crime is necessary.[2]

Many authors, such as Ambos[3], Pigaroff and Robinson,[4] Munivrana Vajda[5] address this issue when considering the subjective element in the Rome Statute, while another group of authors address this issue when considering crimes against humanity.[6] In the first case, it is usually a matter of

[1] Škulić, M. (2005). *Međunarodni krivični sud – nadležnost i postupak*. Belgrade: The Publishing Centre of the Univeristy in Belgrade, 251.

[2] Robinson, D. (1999). Defining "Crimes Against Humanity" at the Rome Conference. *The American Journal of International Law*, Vol. 93, No. 1, 51–52.

[3] Ambos, K. (2013). *Treatise on International Criminal Law – Volume I: Foundations and General Part*. Oxford: Oxford University Press, 280–283.

[4] Pigaroff, D., Robinson D. (2016). Article 30. Mental Element. *The Rome Statute of the International Criminal Court – A Commentary* (eds. Otto Triffterer, Kai Ambos). München – Oxford, 1114–1119.

[5] Munivrana Vajda, M. (2011). Oblici krivnje i Stalni međunarodni kazneni sud. *Hrvatski ljetopis za kazneno pravo i praksu*, 1/2011, 21–22.

[6] Нпр.: Hall, C., Ambos, K. (2016). Article 7. Crime against Humanity. *The Rome Statute of the International Criminal Court – A Commentary* (eds. Otto Triffterer, Kai Ambos). München – Oxford, 175–177; Ambos, K. (2014). *Treatise on International Criminal Law – Volume II: The Crimes and Sentencing*. Oxford: Oxford University Press, 77–78; Škulić, M., (2005). *Op. cit*., 253.

exemplary citation of this crime when considering knowledge as a subjective element in general, while in the second case, this subjective element is generally given disproportionately little attention in relation to other elements of crimes against humanity. There is no more thorough analysis regarding the content of the knowledge either. This means that there is no thorough research on whether, taking into account existing norms and case law in international criminal law, there is a single position regarding the determination of the legal nature of knowledge, nor a thorough analysis of its content. Having in mind that this is one of the most serious crimes with the most severe punishments, we believe that it is necessary to conduct a thorough analysis of knowledge as a subjective element and establish whether there is a unanimous position on the independence of this subjective element and its content.

THE DEFINITION OF THE CONCEPT OF KNOWLEDGE[7] IN CRIMES AGAINST HUMANITY IN LITERATURE

As knowledge or consciousness is not an unknown concept in criminal law of the two great legal systems, the continental[8] and Anglo-Saxon[9], most authors begin their presentations by defining this concept and emphasizing the need for a unique and independent approach to this subjective element in

[7] The paper uses the term "knowledge" and not the term "consciousness". The author opted for the use of this term, believing that the term "knowledge" corresponds to the term "znanje" in the Serbian language, but also to make a distinction between this subjective element in crimes against humanity and consciousness as a component of intent in continental law.

[8] Knowledge is associated with forms of guilt in continental law. See Stojanović, Z. (2020). *Krivično pravo – opšti dio*. Belgrade: Faculty of Law of the University of Belgrade, 170–180; Babić, M., Marković, I. (2019*). Krivično pravo – opšti dio*. Banja Luka: Faculty of Law, 245–246. It exists within it as a cognitive component of intent or conscious negligence and does not stand out as an independent and separate form of guilt. See Đokić, I. (2016). O*pšti pojam krivičnog dela u anglo-američkom pravu*. Belgrade: Faculty of Law of the University of Belgrade, 96. In continental law, the general notion of a criminal offense includes determination in law, illegality and guilt (Đokić, I., *Op. cit.,* 37) and the subjective element is determined in relation to the totality of the elements.

[9] In Anglo-American law, the general notion of a criminal offense includes *actus reus,* which consists of the action, consequence and circumstances of the criminal offense, and it represents the objective side of the criminal offense and *mens rea*, which represents the subjective side of the criminal offense. For this paper, it is especially important that the circumstances of the crime can be marked as "remaining features of the crime" (Đokić, I., *Op. cit.,* 40), i.e. "those features that do not represent an action or consequence" (Đokić, I., *Op. cit,* 42). For each of the mentioned parts of the *actus reus,* the subjective element, i.e. *mens rea*, is proved separately (Đokić, I., *Op. cit*., 96).

international criminal law. Munivrana Vajda points out that these terms should not be interpreted in the way they are interpreted in the existing legal systems, but should be considered autonomously.[10] Finnin[11], Badar and Porro[12] and Ambos[13] emphasize the difference between the *offense-based* and *element-based* approach when determining the subjective element, stating that in international criminal law the latter one is accepted. They define knowledge as a subjective element "reserved" for circumstances of the act as a part of its objective element. However, it should be emphasized that all authors are focused on this issue in the Rome Statute, only sporadically stating that the statutes of the *ad hoc* tribunal did not regulate this issue.[14]

When it comes to crimes against humanity, comitting an act within a widespread or systematic attack directed against any civilian population (contextual element) as an element of the crime in literature is viewed in several ways, which leads to differences in understanding the subjective element in relation to that circumstance. Ambos believes that it is possible that this is an element that gives the act the quality of an international one and for which subjective elements from Art. 30 of the Rome Statute are not required[15], while Hall and Ambos point out in the Commentary on the Rome Statute that it is an "*additional subjective element*" that is different from knowledge.[16] Ambos takes the identical position in the second volume of his book.[17] In the same commentary, Pigaroff and Robinson point out a completely opposite view, according to which it is a matter of circumstances but that a lower level of knowledge is required.[18] Robinson believes that the approach that defines this

[10] Munivrana Vajda, M. (2011). Oblici krivnje i Stalni međunarodni kazneni sud. *Hrvatski ljetopis za kazneno pravo i praksu*, 1/2011, 11.

[11] Finnin, S. (2012). Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis. *International and Comparative Law Quarterly*, 2/2012, 338–340.

[12] Badar, M. E., Porro, S. (2015) Rethinking the Mental Elements in the Jurisprudence of the ICC. *The Law and Practice of International Criminal Court* (eds. Carsten Stahn). Oxford, 652, 664–665.

[13] Ambos, K. (2013). *Treatise on International Criminal Law – Volume I: Foundations and General Part*. Oxford: Oxford University Press, 267, 271.

[14] For e.g., see.: Munivrana Vajda, M., *Op. cit*., 5.

[15] Ambos, K. (2013), *Op. cit*., 278.

[16] Hall, C., Ambos, K. (2016). Article 7. Crime against Humanity. *The Rome Statute of the International Criminal Court – A Commentary* (eds. Otto Triffterer, Kai Ambos). München – Oxford, 176.

[17] Ambos, K. (2014). *Treatise on International Criminal Law – Volume II: The Crimes and Sentencing.* Oxford: Oxford University Press, 77.

[18] Pigaroff, D., Robinson D. (2016). Article 30. Mental Element. *The Rome Statute of the International Criminal Court – A Commentary* (eds. Otto Triffterer, Kai Ambos). München – Oxford, 1116.

element as a jurisdictional condition is outdated and that the person must be aware of the *"basic and central element"*.[19] Cassese[20] and Munivrana Vajda[21] also consider that these are circumstances in relation to which knowledge is required.

Škulić[22] and Cassese [23] believe that in relation to this aspect of the crime, no intention is required, but only knowledge. Badar and Porro[24] claim that this is a consequence of the fact that the circumstances cannot be intended and desired, but only learnt, with which Munivrana Vajda agrees.[25] Ristivojević[26], although the only one thinking so, believes that a person must want or at least agree with his act being a part of such an attack, which indicates the necessity of the existence of intent.

It is evident that not only is there no unanimous position regarding the legal nature of this subjective element in the relevant literature, but also that the authors did not approach a more thorough comparative analysis of this issue in two key segments – the normative segment and the segment of the case law of existing international courts, which they should do in order to determine this subjective element in international criminal law. A normative analysis, although existing, boils down to a comparison of the Rome Statute with some of the statutes of the *ad hoc* tribunal, while the analysis of case law stops at listing several cases from the practice of the Hague Tribunal.

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[19] Robinson, D. (1999). Defining "Crimes Against Humanity" at the Rome Conference, *The American Journal of International Law*, Vol. 93, No. 1, 51–52 *Clark* also states that many, during the adoption of the Rome Statute, considered that the introduction of knowledge into incrimination enables overcoming the attitude that it is only a matter of a jurisdictional requirement. See Clark, R. S. (2008). The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the elements of offences, *Criminal Law Forum,* 12/2001, 316.

[20] Cassese, A. (2008). *The Oxford Companion to International Criminal Justice*, Oxford New York: Oxford University Press, 482.

[21] Munivrana Vajda, M. (2011). Oblici krivnje i Stalni međunarodni kazneni sud, *Hrvatski ljetopis za kazneno pravo i praksu*, 1/2011, 22.

[22] Škulić, M. (2005). *Međunarodni krivični sud – nadležmost i postupak*, Belgrade: The Publishing Centre of the Univeristy in Belgrade, 253.

[23] Kaseze, A. (2005). *Međunarodno krivično pravo*, Belgrade: the Belgrade Center for Human Rights, 193.

[24] Badar, M. E., Porro, S. (2015) Rethinking the Mental Elements in the Jurisprudence of the ICC – y: *The Law and Practice of International Criminal Court* (eds. Carsten Stahn), Oxford, 652, 664.

[25] Munivrana – Vajda, M., *op. cit*., 19.

[26] Ristivojević, B. (2014). *Međunarodna krivična dela – Deo I*, Novi Sad: Faculty of Law of the University of Novi Sad, 66.

THE CONTENT OF KNOWLEDGE IN CRIMES AGAINST HUMANITY IN LITERATURE

Most authors approach the analysis of the content of knowledge by analyzing this issue within the Rome Statute. A more thorough analysis of this issue is rare in sources of law and in the praxis of *ad hoc* tribunals[27].

Ambos and Hall[28] point out that the content of knowledge is controversial. Authors often state that there are three levels of knowledge – active knowledge, *willful blindness* and constructive knowledge. Active knowledge is the first level of knowledge, and it is complete knowledge. The second level of knowledge known in Anglo-American law is *willful blindness,* and the third level of knowledge is constructive knowledge[29]. It can be seen that there is no dispute on active knowledge being a relevant form of knowledge. This is why Marchuk and Schabas speak only of active knowledge.[30] Škulić takes the same position.[31] Badar points out that the linguistic interpretation of the statute shows that only active knowledge is relevant, and the other two forms are not.[32] Munivrana Vajda states that *willful blindness* was rejected during the adoption of the Rome Statute, which speaks in favor of the fact that both lower levels of knowledge (*willful blindness* and constructive knowledge) are not sufficient[33]. Finnin, although he first states the same as Munivrana Vajda, justifies accepting lower levels of knowledge with pragmatism.[34] Kittichaisaree,

[27] For example: Ambos, K. (2014). *Treatise on International Criminal Law – Volume II: The Crimes and Sentencing,* Oxford: Oxford University Press, 77–79.

[28] Ambos, K. (2014), *op. cit*., 77; Hall, C., Ambos, K. (2016). Article 7. Crime against Humanity y: *The Rome Statute of the International Criminal Court – A Commentary* (eds. Otto Triffterer, Kai Ambos), München – Oxford, 176.

[29] For these terms, see: Đokić, I. (2016). *Opšti pojam krivičnog dela u anglo-američkom pravu*, Belgrade: Faculty of Law of the University of Belgrade, 98.

[30] Marchuk, I. (2014). *The Fundamental Concept of Crime in International Criminal Law,* Berlin – Heidelberg: Springer, 107–108; Schabas, W. A. (2012). *Unimaginable* Atrocities – *Justice, Politics,* and *Rights* at *the War Crimes Tribunals*, Oxford: Oxford University Press, 127–128.

[31] Škulić states that without a subjective element, it could be an isolated action, but not a crime against humanity. See: Škulić, M. (2005). *Međunarodni krivični sud – nadležnost i postupak*, Belgrade: The Publishing Centre of the Univeristy in Belgrade, 252.

[32] Badar, M. E., Porro, S. (2015) Rethinking the Mental Elements in the Jurisprudence of the ICC – y: *The Law and Practice of International Criminal Court* (eds. Carsten Stahn), Oxford, 652, 665.

[33] Pigaroff, D., Robinson D. (2016). Article 30. Mental Element y: *The Rome Statute of the International Criminal Court – A Commentary* (eds. Otto Triffterer, Kai Ambos), München – Oxford, 1124.

[34] She believes that given the wide scope of international crime, it would be difficult to prove the existence of knowledge without involving certain forms of willful blind-

without making a difference in relation to the Hague Tribunal and referring to its practice, believes that all three forms of knowledge may be sufficient.[35] In terms of *willful blindness,* Pigaroff and Robinson believe that this is a matter for a court to assess.[36] What the leading authors agree on is that the perpetrator does not have to know all the characteristics of the attack precisely.

It can be noticed that there is no unanimous position on this issue in the literature, nor a thorough comparative analysis of the sources of international criminal law and case law that would help in establishing whether there is a single position on the necessary content of knowledge in international criminal law.

THE HYPOTHETICAL FRAMEWORK AND THE METHODS USED

The aim of the research

Based on the existing literature, *knowledge in the case of crimes against humanity in international criminal law is a subjective element related to the perpetrator's awareness that he is committing an act within a widespread or systematic attack against the civilian population, which may be of different content.* Knowledge will be examined in terms of its independence and content by analyzing the sources of law and case law of international criminal courts, as well as by examining the opinions of those who directly apply the legal norm. The examination will cover the period from the establishment of the *ad hoc* tribunal until today and those areas to which the work of international criminal courts refers, i.e. Bosnia and Herzegovina (hereinafter: BiH) in the case study.

The aim of the research is to establish: 1. Whether knowledge on the part of the perpetrator is necessary in crimes against humanity; 2. Whether knowledge is an independent subjective element in international criminal law; 3. Of what quality the knwoledge must be, i.e. whether there is a single position regarding the necessary level of knowledge in international criminal law.

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ness. See: Finnin, S. (2012). Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis, *International and Comparative Law Quarterly*, 2/2012, 350–351.

[35] Kittichaisaree, K. (2001). *International Criminal Law*, New York: Oxford University Press, 91.

[36] Pigaroff, D., Robinson D. (2016). Article 30. Mental Element y: *The Rome Statute of the International Criminal Court – A Commentary* (eds. Otto Triffterer, Kai Ambos), München – Oxford, 1124.

The hypothetical framework

Starting from the available literature and research questions, the hypothetical research framework consists of two basic hypotheses. In addition to each basic hypothesis, additional hypotheses are set that in a certain way break down the basic hypothesis into parts; by testing them, each of the basic hypotheses will be tested. The following hypotheses will be tested:

1. KNOWLEDGE IS AN INDEPENDENT SUBJECTIVE ELEMENT IN INTERNATIONAL CRIMINAL LAW

1a) Knowledge had not been defined in the sources of international criminal law before the Rome Statute;

1b) The Rome Statute defines knowledge as an independent subjective element;

1c) There is unanimity in the relevant case law that no intent on the part of the perpetrator is required with regard to committing an act in the context of a widespread or systematic attack;

1d) There is unanimity in case law that knowledge is a necessary subjective element in terms of committing an act in the context of a widespread or systematic attack in the case of crimes against humanity.

2. THERE IS NO GENERALLY ACCEPTED POSITION REGARDING THE CONTENT OF KNOWLEDGE IN INTERNATIONAL CRIMINAL LAW

2a) The statutes of international courts do not define crimes against humanity in the same way;

2b) The statutes of all international courts do not determine the content of knowledge in the case of crimes against humanity;

2c) There is no unanimous position in case law regarding the content of knowledge;

2d) *Ad hoc* tribunals include lower forms of knowledge (constructive knowledge and *willful blindness);*

2e) The International Criminal Court does not include lower forms of knowledge.

Methods used

To test all hypotheses related to the determination of knowledge and its content in the sources of law, we opted for the use of "classical" methods used for the analysis of legal norms. In this segment, the linguistic and normative methods were used, as well as a systematic interpretation. The comparative

law method was also used, considering that the analysis includes several sources of international criminal law.[37]

To test the hypotheses related to the position of court practice regarding the independence of knowledge as a subjective element and its content, a documentary analysis of the reasoning of court judgements was used. Attitudes towards issues relevant to the testing of hypotheses are presented as a percentage of the total number of analyzed judgements from the sample.[38] The sample was determined by previously performing a "triage" of cases in which persons were charged with a crime against humanity[39]. Given that the number of completed cases is about 70 before each of the tribunals, 10 completed cases of each tribunal were taken into consideration, and judgements of both levels were analyzed (a total of 20 judgements for each of the tribunals).[40] Judgement from all periods of their functioning were analyzed in the case of both ad hoc tribunals, while the "situation" criterion was used for the Hague Tribunal[41]. The sample of judgements of the International Criminal Court consists of three

[37] The subject of the analysis are the three statutes of the International Criminal Tribunals, the Statute of the International Criminal Tribunal for the Former Yugoslavia (hereinafter: the Hague Tribunal) and the International Criminal Tribunal for Rwanda (hereinafter: the Tribunal for Rwanda), since they are two most dominant sources of law before the Rome Statue, as well as the Rome Statute itself, because it is considered the most important source of international criminal law. The literature does not show the significance of the Statute of the International Military Tribunal in Nuremberg, therefore this statute was not taken into consideration. In the part of the case study related to BiH, the Criminal Code of Bosnia and Herzegovina (hereinafter: the CC BiH) is analyzed as the basic source of criminal law in BiH in relation to this criminal offense.

[38] Guided by the reasons from the previous footnote, the judgements of the two mentioned *ad hoc* tribunals as well as the judgements of the International Criminal Court were analyzed. In addition, the case study analyzed the judgements of the Court of Bosnia and Herzegovina (hereinafter: the Court of BiH).

[39] The answer to the question directed to the International Residual Mechanism for Criminal Courts as the legal successor of both ad hoc tribunals to access information on the official number of proceedings concluded in relation to the crime of crimes against humanity, was that such records do not exist, so this "triage" was carried out by the author. When it comes to the International Criminal Court, the number of judgements is extremely low, so it was easy to inspect those related to crimes against humanity (a total of three cases).

[40] Judgements of both instances were analyzed in order to determine whether this issue was raised within the appeal process and whether the appellate court changed its position in relation to the one taken in the first instance decision.

[41] The judgements of the Hague Tribunal usually have in their name, in addition to the names of the persons accused in the proceedings, the name of the situation to which they refer, which is most often a certain geographical area (e.g. "Lasvanska dolina", "Foca", "Prijedor", etc.). This criterion was adopted during the sampling to examine whether the Tribunal's position was different in terms of different "situations". The judgments of the Tribunal for Rwanda do not contain an indication of the situation, so this criterion was not considered in the sampling.

first-instance judgements. The second-instance judgements were not analyzed because the Court decided on the appeal in only one case, while in the second case the appeals were withdrawn and in the third the appeal procedure is ongoing, which makes the analysis impossible. Within the case study of a total of 139 judgements of the Court of BiH,[42] 15 cases were taken into consideration in both instances (30 judgements) according to a random sampling system.

To test the basic hypotheses, we took case study approach, analyzing the understanding of knowledge as a subjective element of crimes against humanity in BiH. BiH was chosen as the area in which this term will be examined for several reasons. The crimes committed in BiH were the subject of the activities of one of the most important international tribunals, the Hague Tribunal. The "successor" in these cases is the Court of BiH. This court has had a partially international character for most of its existence and is predominantly competent to prosecute international crimes, which gives reason to believe that the analysis of the case law of this court can lead to the testing of the hypotheses. The court remains active, which allows for a direct examination of the positions of the participants in these proceedings.

Within the case study, an analysis of the CC BiH, a documentary analysis of a sample of judgments of the Court of BiH, as well as an analysis of the answers obtained by interviewing judges of the Court of BiH and lawyers of both Bar Associations in BiH was conducted[43]. Eleven judges of Section I for War Crimes within the Criminal Division of the Court of BiH participated in the survey[44]. When it comes to lawyers, it was not possible to create a "filter" that would allow only lawyers who acted in these cases to access the survey, but the survey emphasized that it was primarily intended for those lawyers who were defense attorneys in war crimes cases.

Nine lawyers of the Bar Association of Republika Srpska (hereinafter: BA RS) and twelve lawyers of the Bar Association of the Federation of BiH (hereinafter: BA FBiH) participated in the survey. The questionnaire contained the same questions for all three groups of respondents in order to compare their opinions. Triangulation will be conducted in this section.

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[42] The data was obtained on request from the OSCE Mission in BiH. The data refers to all proceedings conducted for the criminal offense of crimes against humanity since the establishment of the Court of BiH in 2002 until the day of compiling the report on March 23, 2020. The information was requested from the OSCE Mission in BiH because the Court of BiH does not possess such records.

[43] The disadvantage of this analysis is the fact that the Prosecutor's Office of BiH did not participate in the survey. Despite several official inquiries and telephone calls, the Prosecutor's Office of BiH did not respond to the request for conducting the survey.

[44] One of the judges wrote an e-mail to the author with more elaborate answers to the questions, believing that it was not easy to give a "yes" or "no" answer to the questions asked in the survey. Given the position of the esteemed judge, the author did not independently subsume his answers to the questions under any of the categories.

RESULTS OF THE RESEARCH

Normative determination of knowledge – comparative analysis

The examination of Hypothesis 1a by the linguistic and normative method shows that the statutes of none of the tribunals prescribe knowledge on the part of the perpetrator in crimes against humanity, nor do the statutes contain a general norm relating to the subjective element. Therefore, Hypothesis 1a can be considered confirmed because knowledge in these sources of law is not determined. The tabular presentation of the relevant provisions shows that the statutes of international courts approach the issue of knowledge in completely different ways.

The application of the linguistic and normative method and systematic interpretation in testing hypotheses 1b shows that knowledge in the Rome Statute is an independent subjective element and that this hypothesis can be considered confirmed. Namely, Art. 7 explicitly requires knowledge in relation to the contextual element of crimes against humanity. On the other hand, in Art. 30 knowledge is set as an independent subjective element that refers to circumstances of the act. Using a systematic interpretation, it is concluded that the contextual element of crimes against humanity from Art. 7 in connection with Art. 30 represents the circumstances of the act, and therefore knowledge refers to it.

Table 1: Knowledge and the general subjective element in the statutes of international courts

Content of the statute of the provision being analyzed	The subjective element in general	Crime against humanity (part related to the contextual element)
Statute of the Hague Tribunal	It does not contain a general provision	Art. 5 "The Tribunal shall have jurisdiction to prosecute persons responsible for the following offenses when committed in an armed conflict, whether of an international or internal character, and directed against the civilian population: ...."
Statute of the Tribunal for Rwanda	It does not contain a general provision	Art. 3 "The International Tribunal for Rwanda shall have the power to prosecute those responsible for the following crimes when committed in the context of a widespread or systematic attack on any civilian population on grounds of nationality, ethnicity, race or religion: …."

Statute of the International Criminal Court (Rome Statute)	Art. 30 Subjective element "1. Unless otherwise provided, a person shall be criminally liable and may be punished by a penalty prescribed for a criminal offense within the jurisdiction of the Court, only if the material features of the offense were committed with intent and knowledge. 2. For the purposes of this article, the perpetrator intends if: a) in relation to the act, the person wishes to participate in it; b) in relation to the consequence, the person wants the consequences to occur or is aware that it will occur according to the regular course of events. 3. For the purposes of this article, "knowledge" means the awareness that circumstances exist or that a consequence will occur in the ordinary course of events."	Art. 7 "For the purposes of the provisions of this Statute, a "crime against humanity" is considered to be any of the following acts, when undertaken as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack: ...."

The application of the same methods shows that Hypothesis 2b was also confirmed, because it can be noticed that the statutes of the two international tribunals do not precisely determine the content of knowledge, nor does the Rome Statute provide an answer to that question. The text of the Elements of Criminal Offenses to the Rome Statute, which states that knowledge of all the characteristics of the attack is not required, should be added to this analysis[45]. This refers to active knowledge because the application of these methods cannot include two lower levels of knowledge, but it does not require precision in knowing each element of the attack.

From all the above, it is clear that the statutes do not contain the same definition of this crime, which confirms Hypothesis 2a.

[45] Elements of Crime. Available at: *https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf.* Retrieved on: March 28, 2020.

Knowledge in the case law of international criminal courts – a comparative analysis

The results of the documentary analysis (see Table 2) show that hypotheses 1c and 1d can be considered confirmed. This stems from the fact that the dominant position of all three courts is that knowledge is a necessary subjective element in relation to a widespread or systematic attack. This means that the courts did not require proof of intent, i.e. that this is not a subjective element required in terms of committing an act within the scope of the attack.

Table 2: Knowledge as it relates to crimes against humanity in the case law of international criminal courts

Tribunal		The Hague tribunal				International Tribunal for Rwanda				International Criminal Court	
		First-instance		Second-instance		First-instance		Second-instance		First-instance	
		Yes	Did not comment	Yes	Did not comment	Yes	Did not comment	Yes	Did not comment	Yes	Did not comment
Position being analyzed	Knowledge is a necessary subjective element in terms of a widespread or systematic attack (%)	100	0	60	40	100	0	20	80	100	0
	Constructive knowledge is a sufficient subjective element in terms of a widespread or systematic attack (%)	70	30	40	60	30	70	20	80	0	100
	Willful blindness is a sufficient subjective element in terms of a widespread or systematic attack* (%)	0	100	0	100	0	100	0	100	0	100

* None of the international courts had explicitly made conclusions about *willful blindness* as a possible level of knowledge regarding committing an act in the context of a widespread or systematic attack, which is why the data was processed in this way.

The results also show that there is no clear position of all of the courts regarding the content of knowledge that is necessary in terms of committing an act within a widespread or systematic attack, which confirms hypothesis 2c.

Hypothesis 2d was confirmed in the part related to constructive knowledge because it is evident that *ad hoc* tribunals consider it sufficient, while in terms of *willful blindness* as another part of the same hypothesis no precise conclusion can be drawn. Also, hypothesis 2e was confirmed, i.e. the results show that the International Criminal Court does not include lower forms of knowledge.

All courts in the first instance declared that knowledge is a necessary subjective element, from which it clearly follows that its nature as a subjective element is independent. On the other hand, the appellate courts did not declare their position regarding this question in all of the cases. This may be due to the fact that the defendants' appeals were not aimed at challenging the knowledge as an established fact in the first-instance judgement[46]. Smaller number of second-instance judgements in which the Rwanda Tribunal ruled in terms of knowledge can be explained by the fact that the prosecution for crimes against humanity before the Tribunal for Rwanda was "secondary" because all persons were mostly charged with genocide, so crimes against humanity got less attention. In those cases in which the tribunals discussed this issue in the second instance it is evident that they did not deviate from the position that this subjective element is necessary in terms of committing an act within a widespread or systematic attack.

In 70 % of first instance judgements, the Hague Tribunal determined that constructive knowledge is a sufficient level of knowledge. The smaller number of second-instance judgements in which the Tribunal expressed the position is a consequence of the already mentioned issue of the content of the defendants' appeal, and this number follows the figure from the previously analyzed issue – if there was no appeal against that part of the judgement and the Tribunal did not rule on knowledge at all, it did not even consider the issue of constructive knowledge[47]. The Tribunal for Rwanda stated that constructive knowledge is a sufficient level of knowledge in only 30 % of judgements. This indicates that the majority of cases dealt with active knowledge, while on the other hand,

[46] This is confirmed by the fact that during the analysis of the judgements, it could be noticed that, for example, the Hague tribunal discussed knowledge in the second-instance procedure when the defense pointed it out. See: Judgement, MKTJ, *Blaškić,* second-instance judgement, No. IT-95-14-A, July 29th, 2004., 121–128.

[47] Given that the sample consisted of judgements marked by different situations, we emphasize that in this regard, no difference was observed in the views of the court between them.

such a figure speaks in favor of the fact that even before this court, constructive knowledge is a sufficient. The International Criminal Court has not ruled on the matter.

In terms of *wilfull blindness*, it is harder to draw a conclusion. The research shows that the name of this level of knowledge is of a theoretical nature, and it is not mentioned as such in case law. The theoretical explanation of the content of this level of knowledge speaks in favor of the fact that if constructive knowledge is sufficient, then this form of knowledge is sufficient as well. However, based on empirical data, we cannot draw a reliable conclusion on this issue.

That the basic hypotheses have been confirmed is shown by the fact that although *ad hoc* tribunals do not have statutes that determine knowledge, their case law holds that it is not necessary to prove intent and that knowledge alone is a necessary subjective element. The Rome Statute, with its norm, indicates the independence of this subjective element, while the (albeit scarce) case law of the International Criminal Court has confirmed this. As for the second basic hypothesis, it can be considered confirmed, given that the statutes do not contain a definition of the content of knowledge, and that the position in case law differs – *ad hoc* courts consider lower levels of knowledge sufficient as well, while the International Criminal Court has not ruled nor did it take such a degree of knowledge into account[48]. It follows from all of this that we cannot determine with certainty whether there is a unanimous position regarding the content of knowledge.

Knowledge in the case of crimes against humanity in Bosnia and Herzegovina – a case study

The case study tested two basic hypotheses – whether knowledge is an independent subjective element in international criminal law and whether there is a generally accepted position regarding the content of knowledge in international criminal law. Knowledge is analyzed in the following three segments in BiH.

[48] There is a possibility that the International Criminal Court will change this position in the future, given that the number of judgements of this court is small.

The normative definition of the concept of knowledge in BiH

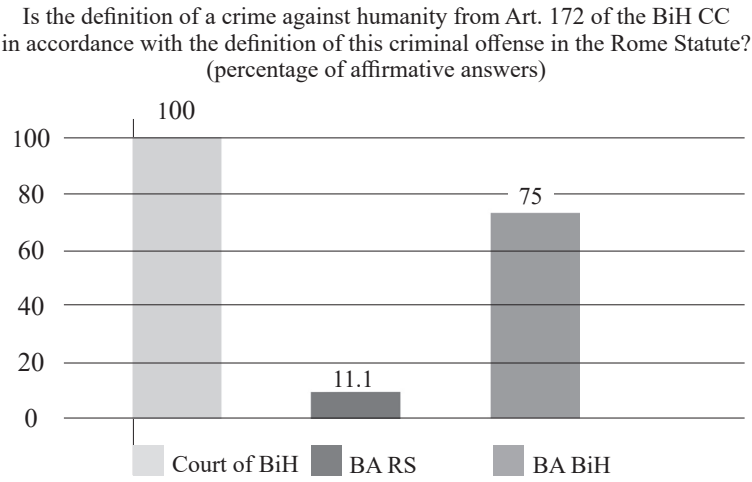
First, it is necessary to determine how knowledge as a subjective element in crimes against humanity is defined in the existing BiH legislation. In accordance with the principle of parallel divided competence between BiH and the entities in the area of criminal law, the crime against humanity is incriminated only in the BiH CC, not in the entity laws.

Table 3: The general subjective element and knowledge in the case of crimes against humanity in the BiH CC

Art. 33, p. 1, The content of guilt	Art. 172, p. 1, Crime against humanity (contextual element)
"Guilt exists if the perpetrator was sane at the time he committed the criminal offense and if he acted with intent."	"Whoever, as part of a widespread or systematic attack directed against any civilian population, knowing of such an attack, commits any of these acts ...."

Using the linguistic and normative method in relation to the incrimination of crimes against humanity in the BiH CC, we can conclude that the definition of this act is in accordance with the one in the Rome Statute. However, a systematic interpretation can make such a conclusion questionable because the general provision relating to guilt requires the existence of intent on the part of the perpetrator and leaves no room for exceptions. If we understand knowledge as an independent subjective element as it is understood in international criminal law, the problem of the relationship between these two norms will arise, because according to Art. 33 this circumstance should be covered by intent. Despite the stated dilemma, the judges of the Court of BiH consider that this incrimination is completely in accordance with the Rome Statute (see Graph 1). Members of the Bar Association of the Republic of Srpska do not share this position, since 11.1 % of the respondents found it to be in the accordance with the Rome Statute. Also, a larger number of lawyers of the Bar Association of BiH found the definition to be in accordance with the Rome Statute (see Graph 1). Regarding the content of knowledge, BiH legislation does not provide an answer.

Graph 1



Knowledge in the case law of the Court of BiH

Table 4. shows the results of the research conducted by means of documentary analysis of a sample of explanations of first and second instance judgements of the Court of BiH in order to test the basic hypotheses. This data will be cross-examined with the results obtained by conducting the survey with judges and lawyers, which are shown in Graph 2.

It is evident that the Court of BiH did not require intent to commit an act as a necessary condition in the context of a widespread or systematic attack. This follows directly from the fact that the Court did not request intent in any of the analyzed cases, but also indirectly from the fact that in all adjudicated cases the Court of BiH explicitly requested knowledge in relation to this circumstance[49]. Although the Court of BiH required knowledge regarding the commission of an act in the context of a widespread or systematic attack in all of the cases, it did not state in any of the analyzed cases whether knowledge was an independent subjective element. The analysis of the second-instance judgements shows (1) that the appeals also referred to knowledge as an established

[49] It can be noticed that in some judgements the Court of BiH, although it takes the position that it is necessary to prove only the perpetrator's awareness that he committed the act within a widespread or systematic attack, later finds that the perpetrator "knew and wanted" to commit the act, which implies that the Court aimed to prove intent and not just knowledge. This makes the whole issue even more confusing. See: Judgement of the Court of BiH, No. S11K02164418Kri, from December 4th, 2018, 38–39; Judgement of the Court of BiH, No. S11K01512414Kri, from April 15th, 2016, 50–51.

fact in 80 % of the analyzed cases (2) that the Court of BiH maintained the views of the first-instance court that knowledge is a necessary subjective element in terms of committing the act within an attack (3) that intent is not necessary; and (4) that the second-instance court did not declare its position regarding the independence of knowledge as a subjective element in cases of crimes against humanity. From the fact that the Court did not require intent and that it required only knowledge, it can be indirectly concluded that the Court of BiH also considered that it was an independent subjective element.

In 66.6 % of the analyzed first-instance judgements, the Court of BiH directly referred to the practice of the Hague Tribunal, while the number of such references in the sample of second-instance judgements is smaller and amounts to 26.6 %. Reliance on the practice of the Hague Tribunal also explains the attitude towards lower forms of knowledge in the practice of the Court of BiH. The attached table shows that the Court of BiH in all of the analyzed first-instance judgements in which it ruled (46.6 %) was of the opinion that constructive knowledge is a sufficient form of knowledge, which is a position that follows the practice of the Hague Tribunal. The Court did not declare its position regarding this questions in the remaining part of the sample. The second-instance court ruled on this issue in 6.6 % of the analyzed judgements, and in all of them it was of the opinion that constructive knowledge was sufficient. It should be considered that this is a form of knowledge that was sufficient before this court.

As for *willful blindness*, it can be determined that this term does not exist in the case law of the Court of BiH, but that it is, as previously concluded, a theoretical term (see note ** to Table 4).

From the presented results it can be concluded that the Court of BiH considered that knowledge is an independent subjective element. Also, active and constructive knowledge are relevant forms of guilt, while in terms of *willful blindness* no precise conclusion can be drawn.

Table 4: Knowledge in relation to crimes against humanity in the case law of the Court of BiH

Position being analyzed	Position of the Court of BiH	First-instance judgements (%)	Second-instance judgements (%)
Knowledge is required regarding committing an act within a widespread or systematic attack	Yes	100	80
	No	0	0
	Did not comment	0	20
It is necessary to prove intent regarding committing an act in the context of a widespread or systematic attack	Yes	0	0
	No	100	80
	Did not comment	0	20

Knowledge in terms of crimes against humanity is an independent form of guilt *	Yes	0	0
	No	0	0
	Did not comment	100	100
Constructive knowledge can be a subjective element in terms of crimes against humanity	Yes	46,6	6,6
	No	0	0
	Did not comment	53,3	93,3
Willful blindness can be a subjective element in terms of crimes against humanity **	Yes	0	0
	No	0	0
	Did not comment	100	100
The Court of BiH referred to the case law of the Hague Tribunal regarding knowledge in terms of crimes against humanity	Yes	66,6	26,6
	No	33,3	73,3
	Did not comment	0	0

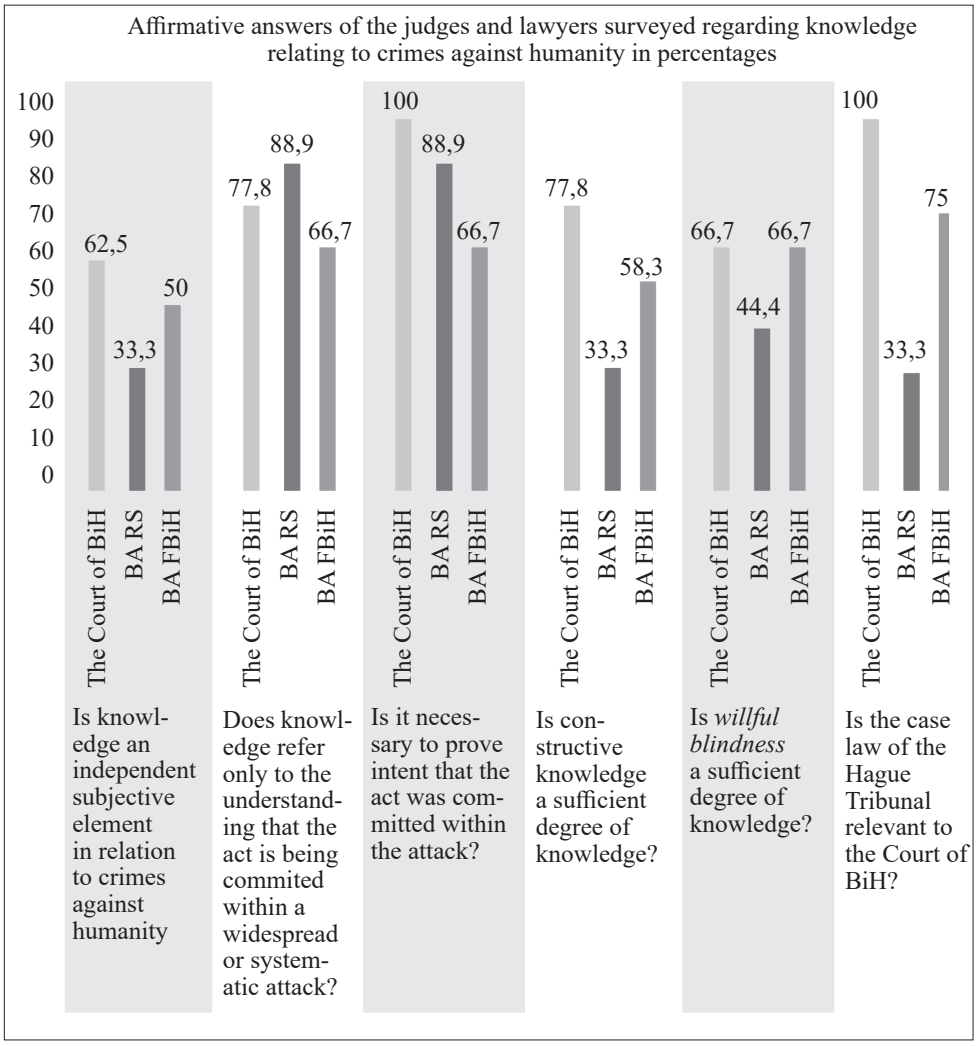
* The Court of BiH determined in the entire sample that it is necessary to prove that the Accused knew / was aware of a widespread or systematic attack, i.e. that he knew / was aware that he was committing a certain act within such an attack. However, the Court of BiH did not declare itself explicitly regarding the independent nature of this subjective element, and we therefore processed the data in this way.

** The Court of BiH did not explicitly mention this form of knowledge in the analyzed judgements regarding the commission of an act within a widespread or systematic attack, therefore the data was processed in this way. Speaking about possible forms of knowledge, the Court ruled in terms of active knowledge ("knew", "was aware") and in terms of constructive knowledge ("...or at least take risks", "have derived knowledge", "constructive knowledge").

The survey conducted with judges of the Court of BiH and lawyers of the two Bar Associations in BiH shows two important things – first, that there is a difference in the understanding of knowledge and related issues in crimes against humanity and, second, that there is a difference in views by the Court of BiH in its judgements and the views of the judges of this court who participated in the survey.

By analyzing Graph 2, it can be seen that there is no agreement between the surveyed groups regarding the independence of knowledge as a subjective element. It can be seen that 33.3 % of Bar Association of Republic of Srpska lawyers believe that this is an independent subjective element, while 50 % of lawyers from the Bar Association of BiH are of the same opinion. Although they have never ruled on this issue in their judgements, 62.5 % of judges of the Court of BiH consider it to be an independent subjective element. The results show that the surveyed groups do not have even approximately the same attitude regarding the independence of this subjective element.

Graph 2



The majority of the respondents in all three groups believe that it is necessary to prove the perpetrator's intent in committing an act within a widespread or systematic attack. The fact that 100 % of judges were of the opinion that it was necessary to prove intent is particulary interesting, and this is contrary to the results of the documentary analysis (p. 17–18). It is possible that this can be explained by the fact that knowledge of a particular circumstance should be encompassed by intent in accordance with domestic criminal law,

but then the relationship between such a position and the position that it is an independent subjective element is not clear. In addition, 62.5 % of judges simultaneously stated that knowledge is an independent subjective element and that it is necessary to prove intent regarding this element, even though these are mutually exclusive concepts.

On the other hand, among the surveyed lawyers, there is a percentage match between those who did not consider it an independent subjective element and those who considered it necessary to prove intent. The judges' answer should be connected to the answer to the question of compliance with the Rome Statute. It is not clear why it is necessary to prove intent in terms of this circumstance if the BiH CC is in accordance with the Rome Statute, which, as concluded, does not require intent.

All interviewed judges considered that the case law of the Hague Tribunal was relevant for the Court of BiH, which is in line with the results of the documentary analysis, while the lawyers' opinion, especially those from the Bar Association of Republic of Srpska, was not even approximately the same.

Opinions on the relevance of the practice of the Hague Tribunal also explain why 77.8 % of judges believe that constructive knowledge is a sufficient level of knowledge, while slightly fewer of them, 66.7 %, believe that *willful blindness* is a sufficient level of knowledge. This opens the possibility that the Court of BiH took into account *willful blindness* in its practice, but did not use the exact term. It is unclear why, although it is a small number of them, some judges believe that constructive knowledge is sufficient, and *willful blindness* is not, even though it is knowledge of a higher degree in relation to constructive knowledge. It can be concluded that there is no definite agreement among judges in terms of the necessary level of knowledge.

The same conclusion can be made based on the responses of lawyers in BiH. More than half of them from the Bar Association of Republic of Srpska believe that lower levels of knowledge are not sufficient, while in the Bar Association of BiH that number is higher, but it still cannot be concluded that there is a unanimous position. What can definitely be concluded is that a larger number of judges consider this to be a sufficient subjective element compared to the total number of lawyers.

Based on the results of the case study, it cannot be concluded with certainty that the first basic hypothesis has been confirmed. Although the documentary analysis of the judgements showed that knowledge is an independent subjective element, the answers the judges of the Court of BiH gave to this questions make it highly questionable. Certainly, the positions taken in the judgements are more important for the assessment, but one should not neglect the fact that this conclusion is weakened by the fact that those who gave the

judgements have extremely confusing and inconsistent positions regarding this issue. On the other hand, one can claim that the second hypothesis has been confirmed, because the content of knowledge is not completely clear in any of the analyzed segments in BiH. However, the impression is that there is no detailed approach to the analysis of the relationship between domestic legislation and the Rome Statute and the position on the "legacy" of the Hague Tribunal and the (non) obligation to follow its case law in BiH.

At the end of this research, it can be concluded that the basic hypotheses have been confirmed. It seems that on the basis of all the individual conclusions we can claim that this is an independent subjective element that belongs to the corpus of international criminal law. Also, we can claim that there is no general agreement as to what kind of the content of knowledge must exist on the part of the perpetrator.

CONCLUSION

In this paper, we have tried to answer the question of whether knowledge in crimes against humanity has an independent character in international criminal law or is it a segment of some other subjective element. Having in mind that the existence of different levels of knowledge is possible, we have tried to examine whether there is an agreement in international criminal law regarding the content of knowledge, believing that there is no unanimous position on this issue. For the purpose of this examination, we approached the analysis of the relevant legal norms as the first stage in the process of examining the mentioned issues. The second stage is the analysis of the case law of the most relevant international courts. In addition, we considered that the hypotheses could be tested by conducting a case study in BiH, bearing in mind that this court has one of the highest numbers of war crimes cases adjudicated after the Second World War. Based on the conducted research, we can make the following conclusions.

In international criminal law, the normative determination of the legal nature and content of knowledge is extremely scarce. The statutes of international courts before the Rome Statute do not mention knowledge at all in terms of this incrimination, and they do not contain a determination of the subjective element at all, so it is difficult to draw conclusions by analyzing the norms. The Rome Statute can be considered a step forward and it defines knowledge in crimes against humanity, as well as knowledge in the context of the general subjective element much more precisely. However, the content of knowledge is not precisely determined in this source of law either.

The second stage of the analysis gives more significant results. Although the normative determination is scarce, the case law of all international courts proved the exitence of the perpatrators' knowledge regarding committing an act in the context of a widespread or systematic attack. In case law, courts explicitly state that, in terms of this element, only knowledge (not the will) is required on the part of the perpetrators. This indicates the independent nature of this element. Also, we can notice a significant difference in the way the content of knowledge is considered. While tribunals considered constructive knowledge, which is the lowest form of knowledge, to be sufficient, the International Criminal Court did not rule on it or take it into account in its case law. This shows that there is no clear approach regarding the content of knowledge in international criminal law.

In addition to the above conclusions, the case study indicates that there is certain confusion in regard to this subjective element. The discrepancy between the attitudes expressed in the judgements and the attitudes displayed in the survey, as well as the, often diametrically, opposed ways in which judges and lawyers understand certain terms, shows that this subjective element is unclear even after more than two decades of prosecuting this crime in BiH, and that there is no unanimous position of those who partcipated in the criminal proceedings.

Little attention seems to have been paid to understanding this subjective element in international criminal law. The results obtained by this research could serve as a starting point for a broader study, but also as a kind of a warning that there is a need for a different approach and a better understanding of what constitutes one of the most serious crimes – the attack and the perpetrator's knowledge of it. Perhaps this would contribute to an essential rationale of this complex concept that would replace the existing "phrasing" found in case law.

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