# ČLANCI

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## PREVENTIVNA FUNKCIJA KRIVIČNOG PRAVA

**Apstrakt:** Rasprava o preventivnoj funkciji krivičnog prava u prvi plan stavlja svrhu kažnjavanja. Međutim, od podjednakog značaja za ostvarivanje preventivne uloge krivičnog zakonodavstva jeste određivanje njegovih granica, pa su i pitanja kriminalizacije i dekriminalizacije neizbežna. Racionalan krivični zakonodavac mora voditi računa o tome kada će i pod kojim uslovima koristiti krivično pravo. Neprihvatljivo je pretvaranje kriminalne u bezbednosnu politiku jer to vodi još neefikasnijem krivičnom pravu koje je uz to i neprijateljski nastrojeno prema učiniocu krivičnog dela, a i u čitavom društvu stvara takvu klimu u kojoj se u svakom građaninu vidi potencijalni neprijatelj, odnosno onaj ko može da naruši bezbednost. Suzbijanje terorizma, organizovanog kriminaliteta, korupcije i nekih drugih ponašanja sve više nosi sa sobom opasnosti koje se mogu meriti sa samom opasnošću od tih vidova kriminaliteta.

Danas nije realno očekivati da će savremeni krivični zakonodavac prestati da sve više ulazi u (za njega) nedozvoljenu zonu, što će u bliskoj budućnosti dovesti do krize legitimiteta krivičnog zakonodavstva (o njoj se već danas može govoriti). Zadatak je nauke, ali i svakog onog ko racionalno gleda na suzbijanje kriminaliteta, da uoči i upozori na negativne trendove umesto da ih podržava. Zalaganje za preoštru i preširoku krivičnopravnu represiju vodi ozbiljnim štetnim posledicama za pojedinca i društvo, a da se pri tome ne samo da ne dobija ništa na planu prevencije, već to vodi daljem slabljenju krivičnopravnog sistema. Izgleda da je potrebno stalno ponavljati da zaoštravanje propisanih kazni, samo po sebi, nema preventivno dejstvo. Umesto toga, treba postići to da dovoljan broj učinilaca krivičnih dela bude kažnjen srazmernom kaznom. Kao što uže inkriminacije imaju više izgleda da budu primenjivane od onih preširoko postavljenih, tako postoji i veća verovatnoća da će se češće primenjivati umerene kazne od onih prestrogih. Što je stroža propisana kazna, manji su izgledi da će ona biti primenjivana i obrnuto.

Iako je za preventivno dejstvo krivičnog prava ključna njegova primena, to ne znači da je opravdano težiti tome da se primeni krivična sankcija na svakoga ko je učinio (bilo koje) krivično delo. Dovoljno je da se to čini u meri koja pretnju kaznom čini ozbiljnom. Štaviše, preterana primena krivičnog prava s jedne strane ne doprinosi prevenciji, a s druge strane predstavlja preveliki teret za bilo koje društvo.

**Ključne reči:** krivično zakonodavstvo, generalna prevencija, specijalna prevencija, retribucija, kriminalizacija, dekriminalizacija.

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# CRIMINAL LAW AND CRIME PREVENTION

## SUMMARY

When discussing the deterrent effects of criminal law, the aim of punishment is in the foreground. To achieve the preventive role of criminal law, of same importance are the determination of its limits, as well as the inevitable questions of criminalization and decriminalization. Rational criminal legislator has to consider the point in time and the conditions when using criminal law. Converting crime policy in security policy does not guarantee more efficient suppression of crime, and it´s hostile not only to the offender, but to the entire society, creating a climate in which each citizen is seen as a potential enemy, or as someone who may violate security. Combating terrorism, organized crime, corruption and other behaviors carries risks that can be compared even to the danger which arises from these types of crime.

Today, it is not realistic to expect that criminal law legislator will stop intervening more and more in a zone that is not authorized for him. Soon, this will lead to a crisis of legitimacy of the entire criminal law justice system. Nevertheless, the task of scholars and everyone who rationally looks at the politics of crime is to detect and warn of the negative trends instead of supporting them. Criminal repression, which is harsh and too broad, leads to serious adverse consequences for the individual and the society. Such criminal policy does not contribute to the crime prevention, but tends to result in further weakening of the criminal justice system. Prescribing harsher penalties and broadening the limits of criminal law has no preventive effect. Excessive use of criminal law on the one hand does not contribute to prevention; on the other hand, it is a too heavy burden for every society. In this article, the arguments supporting minimalist theory of criminalization, which is advocating a realistic approach to the preventive role of criminal law in contemporary societies, and especially in Serbia, are discussed.

The idea of a completely preventive criminal law, existing within a wider security criminal law which would protect citizens and society to a greater extent, may look acceptable at first view. But the author warns that this is a dangerous idea. We cannot be assured that this „new“ criminal law would fulfill protective function in a better way than traditional criminal law does, but it is almost certain that this would lead to strenghtening of totalitarism, which traces can already be seen in some democratic societies. It has to be shown in a clearly and empirically verifiable way that broadening and tightening of repression would pay off through a rising level and quality of protection of human rights for all members in society. Besides this predominantly utilitaristic condition, interests of prevention should never contradict to the principle of justice and proportionality; they always have to be realized as an adequate reaction to crime. This includes, to a certain extent, the need of introduc-

ing retributive elements even in criminal law that is mostly oriented as a preventive one. This doesn´t lead to some kind of mixed theory, nor it imeans that retribution should be put on the same level as prevention, but to capitalize an advantage of retribution over prevention: their ability to set boundaries and quantum of criminal repression. Therefore, it can be barrier to unlimited prevention, which threatens to transform criminal law in wrong direction.

**Key words**: criminal legislation, deterrence, criminalization, decriminalization, retribution, crime prevention.

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# SUICIDE AND SOME OF ITS LEGAL PROBLEMS WITH PARTICULAR REFERENCE TO THE SHIZOPHRENIA PATIENT***

**Abstract.** Suicide is one of the world's largest public health problems. Suicidal behavior as a whole is a complex phenomenon often resulting from the interplay of many factors. Despite efforts to predict and prevent it, inroads toward the reduction of completed and attempted suicide rates remain modest. Both biological and psychological models have been employed to better understand this behavior. Another question about suicide is it's legal aspect. Consideration of the legal implications of malpractice is of main concern to practitioners and insurance companies, which cover them. The legal complaints in malpractice cases involving suicide are the same for schizophrenic and non-schizophrenic populations. The courts have applied various theories in imposing liability on mental health practitioners in suicide cases.

Key words: suicide, factors, malpractice, schizophrenia, negligence, duty, breach of duty, cause in fact, proximate cause•

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• Primedba Redakcije: Samoubistvo kao fenomen ima brojne aspekte kao što su religiozni, moralni i pravni. Među njima poseban značaj imaju krivičnopravni i kriminološki naročito kada se radi o faktorima samoubistva. To je i razlog zbog kojeg je Redakcija odlučila da objavi ovaj rad.

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# SAMOUBISTVO I NJEGOVI PRAVNI ASPEKTI UZ POSEBAN OSVRT NA PACIJENTE OBOLELE OD SHIZOFRENIJE

## REZIME

Samoubistvo predstavlja jedan od najznačajnih zdravstvenih problema pri čemu se procenjuje da se u svetu na svakih 40 sekundi izvrši jedno samoubistvo a da na svako uspelo samoubistvo dolazi oko 25 pokušaja samoubistava. Mlađa lica čine najugroženiju kategoriju kako u razvijenim tako i u zemljama u razvoju. Samoubistvo je kompleksan fenomen uzrokovan mnogobrojnim faktorima. Neka istraživanja su pokazala da postoji povezanost između samoubistva i određenih bioloških abnormalnosti a takođe se ističe da doprinos mogu imati i neki psihijatrijski poremećaji i psihosocijalne krize. Rizični faktori mogu biti i agresivnost, pol, religija, genetski faktori, iskustva u detinjstvu pri čemu postoji njihova međusobna povezanost. Tako su npr. muškarci agresivniji i skloniji konzumiranju alkohola što bi moglo biti jedno od objašnjenja za višu stopu samoubistva kod ovog pola. Za razumevanje samoubistva mora se uzeti u obzir da ono nije prvenstveno korak ka smrti već pre svega korak usmeren na uklanjanje neprihvatljivih i emocija koje se ne mogu tolerisati. Samoubistvo je rezultat unutrašnjeg dijaloga. Kako bi se uklonio bol, analiziraju se moguće solucije pri čemu se tek posle nekoliko puta pojavljivanja ideje o samoubistvu ona konačno usvaja. Samoubistvo nastaje kada u individui dodje do sjedinjavanja nemira i letaliteta. Nemir je motivacija a letalitet okidač samoubistva. Zato je jedno od ključnih pitanja kod potencijalnih samoubica „Kako ti mogu pomoći?" Neke od emocija koje predstavljaju potencijalni rizik za samoubistvo su: osećanje bespomoćnosti, želja za osvetom, bes, nekontrolisani gnev, osećanje bezizlaznosti, anksioznost itd. Samoubistvo se može sprečiti. Većina suicidalnih pojedinaca želi da živi ali ne uspeva da vidi alternative za svoje probleme.

Samoubistvo ima i pravnih posledica. One se pre svega odnose na pitanja prava osiguranja i nesavesnog postupanja zdravstvenih radnika u bolnicama koji nisu preduzeli potrebne mere radi sprečavanja samoubistva. U drugom slučaju radi se o građanskopravnoj odgovornosti koja postoji ako su ispunjeni određeni uslovi koje dokazuje tužilac: dužnost, kršenje dužnosti, šteta, uzročna veza. Šteta će postojati ako je samoubistvo izvršeno ili ako su nastupile štetne posledice usled pokušaja samoubistva u vidu psihičkih patnji. Drugačije je u pogledu utvrđivanje uzročne veze jer je neophodno utvrditi da li bi posledica izostala da je zdravstveni radnik preduzeo adekvatnu radnju i da li njegovo činjenje odnosno propuštanje predstavljalo

odlučujući, neposredan uzrok posledice. Dužnost se zasniva na odnosu zdravstveni radnik – pacijent. Ona je sastavljena iz više komponenata među kojima su npr. dužnost sprovođenja testova i evaluacije pacijenta kako bi se utvrdila eventualna suicidalna namera, dužnost kontrole i nadgledanja, dužnost analiziranja ranijeg ponašanja pacijenta, dužnost smeštanja pacijenta u sigurnu i obezbeđenu prostoriju kako bi se sprečilo samoubistvo itd. U pogledu dužnosti zdravstvenih radnika, kao posebno se otvara pitanje dužnosti koja bi trebalo da postoji kod određenih kategorija lica kod kojih opasnost od samoubistva postoji zbog nekog psihičkog oboljenja kao što je npr. slučaj sa shizofrenijom.

U cilju minimalizovanja odgovornosti, zdravstveni radnici bi trebalo da se pridržavaju sledećih uputstava: vođenje dokumentacije, razmenjivanje iskustava sa kolegama, upoznavanje sa pravnim pravilima koja regulišu pitanje odgovornosti, prikupljanje podataka o pacijentu a posebno o prošlim događajima i pokušanim samoubistvima, kompetentnost postupanja u specifičnim situacijama, uključivanje porodice pacijenta u tretman.

**Ključne reči:** samoubistvo, uzroci, nesavesno lečenje, shizofrenija, nepažnja, šteta, uzročna veza, dužnost, kršenje dužnosti.

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# O ZAŠTITNOM OBJEKTU ZLOČINA PROTIV ČOVEČNOSTI: NOVO RUHO MEĐUNARODNOG PRAVA O LJUDSKIM PRAVIMA[1]

**Apstrakt:** U radu je istraženo pitanje šta čini zaštitni objekat zločina protiv čovečnosti. Zahvaljujući činjenici da je ovo jedina vrsta međunarodnih krivičnih dela koja u nazivu ima izričito označen zaštitni objekat ovo pitanje je dugo vremena zanemarivano u nauci. Autor daje pregled malobrojnih naučnih stavova o ovom problemu i podvrgava kritičkoj analizi preovlađujući pristup koji u čovečnosti vidi samostalnu i samosvojnu vrednost koju je kao takvu moguće zaštiti međunarodnim krivičnim pravom. Temelj za kritiku čini, s jedne strane, očigledno odsustvo ideje o zaštitnim objektima u međunarodnom legislativnom postupku i kriminalnopolitički stav u međunarodnoj zajednici, koji je bio nadmoćan sve do početka 90-tih godina prošlog veka, koji je poistovećivao zločine protiv čovečnosti sa genocidom. S druge strane, pisac drži da je pojam čovečnosti nemoguće upodobiti klasičnom poimanju zaštitnih objekata u nauci krivičnog prava koje u njima vidi osnovna ljudska prava i slobode, a čovečnost to svakako nije. Poreklo pogrešnih stavova o zaštitnom objektu zločina protiv čovečnosti autor vidi u težnji nosilaca legislativnog postupka u međunarodnoj zajednici da međunarodno pravo o ljudskim pravima zaogrnu kaznenim ruhom.

**Ključne reči:** međunarodno krivično pravo, zločini protiv čovečnosti, zaštitni objekat, čovečnost, ljudska prava.

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# ON PROTECTIVE OBJECT OF THE CRIME AGAINST HUMANITY: NEW APPEARANCE OF THE INTERNATIONAL LAW ON HUMAN RIGHTS

## SUMMARY

The legal science has disregarded the issue of protective object of the crime against humanity for a long time. The humanity has been considered as an indisputable and unquestionable category. Since the crimes against humanity include number of different criminal acts, which are per se indisputable and well founded in domestic criminal laws, one may assume that humanity is some kind of a qualitative middle point and the lowest common denominator for protected values of criminal quantities that constitute the content of this type of international crimes. While exploring this possibility the Preamble of Rome Statute has been analyzed, which should serve, as every other non-legal part of the legal act, for interpretation of the used terminology. This scientific task has not succeeded probably because of the lack of consciousness about the role of protective objects in creating incriminations by the founders of the statute of the International Criminal Court. The science was more enthusiastic than international legislator and created more interpretations on humanity as protective object of the crime against humanity, one of them being emphasized in this paper, and that is the most dominant one, which considers humanity as a unique and independent value. If it is considered from the perspective of classical interpretation of protected values in criminal law, which considers them as one of the fundamental human rights and freedoms, it is impossible to avoid a conclusion that humanity does not belong to these categories. Humanity is a principle, similar to legality or legitimacy, and not some kind of special human right that is as such suitable to be protected by the criminal law.

The reason for this attitude lies in a strong spread of international law on human rights in the last few decades which exhausted and exceeded all its own mechanisms of application and expansion until then. It had a crucial impact on reaffirmation of the idea about crimes against humanity as a special type of international crimes. The very source of the idea lies in an extreme wish to give a special content to the concept of humanity in order to promote it to the level of independent value. Otherwise it would not be possible to secure international law protection to this concept and if this kind of robust protection could not be provided to it, the crime against humanity would lose its sense. If that would happen, all the efforts of the international law on human rights to acquire a punitive form would fail.

The crimes against humanity in their contemporary form are product of attempts that exist in international community to give a punitive dimension to the international law on human right that it misses, and all this in a wrong belief that it will be more efficient. This is certainly a consequence of lack of knowledge about real potentials, implications and impact of the criminal law and absolute belief in „fatalness" of punishment.

**Key words:** international criminal law, crimes against humanity, protective object, humanity, human rights.

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# ODMERAVANJE NAKNADE ŠTETE PREMA VREDNOSTI KOJU JE STVAR IMALA ZA OŠTEĆENIKA

**Apstrakt:** Prema odredbi čl. 189, st. 4 srpskog Zakona o obligacionim odnosima, ako je neka oštećenikova stvar uništena ili oštećena krivičnim delom učinjenim sa umišljajem, sud može da odredi visinu naknade štete prema vrednosti koju je stvar imala za oštećenika. Neka pitanja u vezi sa primenom tog pravila ostala su sporna u pravnoj teoriji i praksi domaćih sudova. Prvo pitanje tiče se prirode pravila o odmeravanju naknade prema vrednosti koju je stvar imala za oštećenika. Da li je reč o subjektivnom merilu naknade imovinske štete ili o afekcionoj vrednosti oštećene ili uništene stvari kao obliku moralne štete? Drugo, da li se pomenuta norma primenjuje kada, prema pravilima o građanskoj odgovornosti za drugoga, neko drugi, a ne sam štetnik, odgovara za štetu pričinjenu umišljajnim krivičnim delom? I treće, može li, za potrebe primene posebnog pravila o odmeravanju naknade štete, parnični sud da rešava o postojanju umišljajnog krivičnog dela kao o prethodnom pitanju?

**Ključne reči:** Odmeravanje naknade stvarne štete prema subjektivnom merilu. – Psihički bol zbog oštećenja ili uništenja stvari (Pretium affectionis). – Odgovornost za drugoga. – Postojanje umišljajnog krivičnog dela kao prethodno pitanje.

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# CALCULATION OF DAMAGES IN CASE OF DAMAGE TO OR LOSS OF A THING CAUSED BY CRIMINAL ACT

## SUMMARY

Under Art. 189, para. 4 of Serbian Law on Obligations (LoO), if a thing is damaged or destroyed by an intentional criminal act, the court may calculate and award damages according to the value the thing had for the damaged party. Some issues regarding understanding and application of this rule remained unresolved both in the Serbian legal doctrine, and in the practice of Serbian courts. The first question is whether the aforesaid rule relates to (1) a special, subjective method of calculation of damages in case of patrimonial damage, more precisely damage to, or destruction of a corporeal thing, or to (2) pain and suffering due to damage to, or loss of a thing, which may only qualify as a type of moral, non-patrimonial damage. Secondly, there is no conclusive answer as to the question of applicability of Art. 189, para. 4 LoO in the event of vicarious liability. And thirdly, there is an open question of whether civil courts may decide on the existence of an intentional criminal act as a preliminary issue or not, and if they may, then under what conditions. Firstly, the author maintains that there are strong arguments to uphold the idea that Art. 189, para. 4 LoO lays down a special, subjective method of calculation of patrimonial damage, but doubts the need of keeping such rule in the context of principle of integral compensation, which is one of the fundamental principles of Serbian tort law. On the second matter, the author supports the idea that the aforesaid rule should also apply in the event of vicarious liability, that is against a person liable for the consequences of the wrongdoer's actions, irrespective of grounds of their civil liabilities. In the end, the author maintains that question of whether an intentional criminal act was performed by the wrongdoer or not, may be resolved before civil courts as a preliminary issue, except for the case where criminal court has already decided on the merits, *i.e.* handed down either a condemnatory, or a verdict of acquittal.

**Key words:** Calculation of damages according to subjective criterion, pain and suffering in relation to loss of corporeal thing (Pretium affectionis), vicarious liability, intentional criminal act as preliminary issue in civil proceedings.

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# KRIVIČNO PRAVO I SPOSOBNOST ČOVEKOVOG SAMOODREĐENJA

**Apstrakt:** U radu se razmatra sposobnost čovekovog samoodređenja u kontekstu pojma krivice u krivičnom pravu.

U centralnom delu rada autori analiziraju moć čovekovog samoodređenja kao „individualne stvarnosti", koja se može manifestovati kroz njeno potvrđivanje – u formi krivičnopravne uračunljivosti ili bitno smanjene uračunljivosti, odnosno njeno negiranje – u formi neuračunljivosti.

Isti zaključuje da samo onaj duševni poremećaj koji je bio takvog karaktera i intenziteta da je prouzrokovao potpuni gubitak „unutrašnje slobode" učinioca u smislu njegovog identiteta sa samim sobom, što je dovelo do njegove psihičke nemogućnosti da se ponaša u skladu sa određenom krivičnopravnom normom, isključuje odnosnu sposobnost.

Svoja razmatranja u radu autori su podelili na sledećih šest celina: uvodna razmatranja; generalna sposobnost čovekovog samoodređenja; sposobnost samoodređenja kao „individualne stvarnosti" u krivičnom pravu; individualna (ne)moć čovekovog samoodređenja – neuračunljivost, bitno smanjena uračunljivost, uračunljivost; učinioci krivičnih dela kao generalno podobni adresati krivičnopravnih normi – paradigma krivičnog prava; „bezakonita" sloboda volje kao temelj individualne moći čovekovog samoodređenja u krivičnom pravu.

**Ključne reči:** sposobnost čovekovog samoodređenja, sloboda volje, uračunljivost, bitno smanjena uračunljivost, neuračunljivost.

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# CRIMINAL LAW AND CAPABILITY OF MAN'S SELF-DETERMINATION

## SUMMARY

This paperwork reconsiders the capability of man's self-determination in the context of the concept of guilt in criminal law.

In central part of paperwork the author analyzes the power of man's self-determination as „individual reality", which could be manifested through its affirmation – in the form of criminal accountability or significantly reduced accountability, or through its negation – in the form of mental incompetence.

The author concludes that only mental disorder of such character and intensity that could cause complete loss of „inner freedom" of the offender in terms of his, or her identity with himself or herself which led to his or her incapability to act in accordance with criminal norm, could exclude the mentioned capability.

**Key words:** capability of man's self-determination, freedom of will, accountability, significantly reduced accountability, mental incompetence.

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# ZNAČENJE SINTAGME PRIVATNA IMOVINA U KRIVIČNOM ZAKONIKU RS

**Apstrakt.** Izmenama Krivičnog zakonika koje su stupile na snagu 11.09.2009. godine izvršena je i izmena sintagme imovina građana, umesto koje kod jednog broja krivičnih dela sada stoji sintagma privatna imovina. Značenje sintagme imovina građana koja je ranije figurirala u zakonu nije bilo transparentno što je u krajnjim slučajevima dovodilo do donošenja različitih odluka u sličnim situacijama čime se značajno remetila pravna sigurnost, kao jedan od postamenata pravne države. Utvrđivanje značenja sintagme imovine građana značajno je i zbog odlučivanja ko je ovlašćeni javni tužilac za postupanje pred sudovima. Sve ovo ukazuje na važnost značenjskog tumačenja pomenute sintagme i potrebu da se egzaktno utvrdi šta može stajati pod kapom sintagme imovina građana, odnosno sada privatna imovina.

**Ključne reči**: imovina građana, privatna imovina, Krivični zakonik, interpretacija.

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# MEANING OF THE TERM PRIVATE PROPERTY IN THE SEBIAN CRIMINAL CODE

## SUMMARY

Serbian Criminal Code was changed on 11th September 2009. Among these changes in some criminal acts in the Code the term property of citizens was changed into the term private property. The former term caused problems in its interpretation by courts and prosecutors. This led to different solutions in similar cases which endangered principle of legal certainty as one important postulate of the rule of law. Determination of the former term was important to decide who is an authorized prosecutor before courts – public or private prosecutor? In situation of incorrect interpretation, consequence was violation of a provision of Criminal Procedure Code which represented a basis for the abolition of the verdict. It is our opinion that it is not questionable that under property of citizens entered property of individuals, but in situations of legal entities it was necessary to determine *intuitu personae* elements, or in other words to determine if the property of legal entity is separated from the property of members of the legal entity or not. After the last legal changes it is not important anymore which form of the company exists. The only question is whether the net assets of the state exist or not. All mentioned indicates the need for precise interpretation of the term property of citizens and its distinction from the term private property.

**Key words**: property of citizens, private property, Criminal Code, interpretation.

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# KONVENCIJA O POBOLJŠANJU SUDBINE VOJNIH RANJENIKA U VOJSKAMA U RATU OD 22. AVGUSTA 1864. GODINE

**Apstrakt**. U ovom radu dat je kratak prikaz, pravni aspekt i analiza Ženevske Konvencije o poboljšanju sudbine ranjenika u vojskama u ratu od 22. avgusta 1864. godine. Ova konvencija se smatra kao prvi najznačajniji međunarodni dokument iz ratnog prava, kojim se vrši zaštita ranjenika i bolesnika. Nastanak Ženevske Konvencije iz 1864. godine se vezuje za Međunarodni Crveni krst u Ženevi, kao i za njegovog osnivača švajcarskog književnika J. Henry-a Dunant-a. Konvencija je imala snažan odjek u čitavom svetu, i uz nekoliko dopuna koje su izvršene kasnije u XX veku nastale su poznate četiri Ženevske konvencije iz 1949. godine i Dopunski protokol I i II uz Ženevske konvencije iz 1949. godine. U našoj literaturi ova Ženevska konvencija iz 1864. godine samo je sumarno obrađena, i neopravdano zaboravljena. Prvi put se objavljuje i originalni tekst Ženevske konvencije iz 1864. godine na francuskom jeziku. Srbija je pristupila Ženevskoj konvenciji iz 1864. godine, 24. marta 1876. godine. Nažalost, Ženevska konvencija iz 1864. godine je više puta prekršena u ratovima u XIX i početkom XX veka.

**Ključne reči:** Konvencija, vojni ranjenici, bolesnici, Međunarodni Crveni krst, potpisnici.

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# CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED IN ARMIES IN THE FIELD, GENEVA, 22nd AUGUST 1864

## SUMMARY

Geneva Convention for Amelioration of the Condition of the Wounded in Armies in the Field, from August 22nd 1864 is considered as the first major international instrument of military law, which protects wounded and sick. The Convention consists of 10 Articles.

Origin of this Geneva Convention is related to the International Red Cross in Geneva, as well as its founder Swiss writer J. Henry Dunant. On June 24th, 1859, Dunant found himself in Northern Italy and witnessed the Battle of Solferino. Dunant immediately began organizing local inhabitants to carry the wounded from the battlefield. They were taken to local churches where local doctors and their assistants and nurses helped relieve their suffering and this was the idea for writing this Convention.

After this battlefield, Henry Dunant decided to write a book about his experiences in Solferino. The name of this book is A Memory of Solferino (1862)and his intention was to promote humanization of war, protection of sick and wounded combatants, making and adopting of convention about protection of wounded and sick combatants which would be signed between the countries.

The Convention had a powerful influence in the entire world. It is considered that this Convention was the base for later Convention Relative to the Treatment of Prisoners of War from 1929 and Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field from 1929, and later Four Geneva Convention of 1949 and their Additional Protocols I and II from 1977.

In our literature this Convention from 1864 is only summarily treated, and unjustly forgotten. The original text of the Convention was published on French language. In our legal literature the French version of this Convention was never published and it is the first time it is published integrally on French and Serbian Language.

Serbia signed this Convention on March 24th 1876, and very shortly it was accepted in the Serbia legal system.

This international convention regulated the status and legal protection of wounded or sick combats. In the very short period of time many countries signed this Convention from 1864, but unfortunately it was breached very soon in the wars during the end of nineteenth Century, as well as on the beginning of the twentieth Century, especially during the Great War, that is, First World War started in 1914 and grave breaches of this Convention occurred.

This paper gives a presentation, legal aspects and analysis of the Geneva Convention for Amelioration of the Condition of the Wounded in Armies in the Field, from August 22nd 1864.

**Key words:** Geneva Convention for Amelioration of the Condition of the Wounded in Armies in the Field, J. Henry Dunant, International Red Cross, wounded and sick.

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# RATNI IZVEŠTAČI KAO SVEDOCI U MEĐUNARODNOM KRIVIČNOM PRAVU – „SLUČAJ RANDAL“

**Apstrakt.** Odlukom žalbenog veća Međunarodnog krivičnog tribunala za bivšu Jugoslaviju (MKTJ) u slučaju Brđanin i Talić (IT–99–36) od 11. decembra 2002. godine ustanovljena je relativna zabrana ispitivanja ratnih izveštača kao svedoka u postupcima pred MKTJ. Neposredan povod za ovakvu odluku jeste odbijanje američkog novinara Džonatana Randala (Johnatan Randal) da svedoči u predmetu – naime, iako je prvobitno pretresno veće pozvalo Randala da svedoči, pa čak mu i izreklo obavezujući nalog za svedočenje pod pretnjom kazne, u žalbenom postupku, usled pritiska mnogobrojnih novinarskih udruženja, ovaj nalog je stavljen van snage. Do tog trenutka teorija i praksa međunarodnog krivičnog prava nisu poznavale nikakve privilegije kojima bi se ratni izveštači kao svedoci mogli služiti u krivičnom postupku, a danas ova odluka predstavlja priznati precedent poznat kao „slučaj Randal“ (Randal case).

Na početku rada upoznajemo se sa slučajem „Randal“. Prateći hronologiju preduzimanja radnji u postupku autor, kritički analizirajući, izlaže argumente stranaka i stavove sudskog veća u vezi sa stvaranjem tzv. „novinarske privilegije“. U zaključku, autor zauzima stav da je ustanovljavanje ove privilegije opravdano, imajući na umu značaj rada ratnih izveštača ali i pravilno uspostavljanje ravnoteže između osnovnih ljudskih prava i njihovih ograničenja.

**Ključne reči:** ratni izveštač, svedok, krivični postupak, Međunarodni krivični tribunal za bivšu Jugoslaviju, slučaj „Randal“.

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# WAR CORRESPONDENTS AS WITNESSES IN INTERNATIONAL CRIMINAL LAW – RANDAL CASE

## SUMMARY

In a decision from 11 December 2002, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), in the case of *Prosecutor v. Brdjanin and Talic (IT–96–36), decided* not to compel a former war correspondent Jonathan Randal to testify against the accused Radoslav Brdjanin, whom he had interviewed in 1993. That was for the first time that an international court has recognized a qualified privilege for war correspondents, thereby extending the traditional categories of privileged persons. The Appeals Chamber holds that in order for a Trial Chamber to issue a subpoena to a war correspondent (to compel a war correspondent to testify) a two-pronged test must be satisfied: first, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case, and second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere.

This article discusses that decision through critical analysis of the arguments of the parties and the views of the chambers. The author concludes that the establishment of this privilege is justified, bearing in mind the importance of war correspondents (in some situations compelling journalists to testify may hinder the ability of the press to provide accurate and reliable information) and the balance between basic human rights and their limitations (not only the press has the task of imparting information and ideas on matters of public interest, the public also has a right to receive them).

**Key words:** war correspondent, witness, criminal proceedings, International Criminal Tribunal for the former Yugoslavia, Randal case.