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APPLYING A "MODULAR APPROACH" IN THE FIELD OF OBEDIENCE CRIMES IN MILITARY SERVICE – THE CASE OF MONTENEGRO

Abstract

In the course of last decades, the issue of crime of obedience in military service was a critical issue in national and international law. In addition, there are inevitable tensions between the crimes of obedience and crimes of disobedience in framing and drawing the line between those concepts. This tension is particularly apparent in the field of military criminal law, given that obedience to superior orders is the "cardinal virtue" of military profession and discipline. Authors in this paper challenge the view addressed in legal doctrine according to which there is an extensive consensus among jurists to apply a "one-rule-fits-all approach" in framing obedience crimes in military service.

This paper assesses the legal framework of Montenegro in the field of obedience military crimes as to determine whether a modular approach, which was advocated as an alternative to the abovementioned approach has been applied. Where appropriate, a contextual comparative analysis of other South-Eastern European countries will be used. In addition, authors will examine applicable international soft law and hard law instruments as to determine whether they are in favour of the aforementioned approach or leave room for different interpretations.

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Key words: Criminal Code of Montenegro, obedience crimes, disobedience crimes, Rome Statute of the International Criminal Court, OSCE Code of Conduct on Politico-Military Aspects of Security, absolute liability approach, absolute defence approach, conditional liability approach.

INTRODUCTION

In the course of last decades, the issue of crime of obedience in military service was a critical issue in national and international law. Some authors adopt an expansive view of the notion-term of „crimes of obedience" (Padowitz, 2015: 1, Kelman, Hamilton, 1989: 307). Accroding to them, the crime of obedience in the broad sense is defined as "an illegal or immoral act performed in response to orders or directions from authority" (Kelman, Hamilton, 1989: 307).

Opposite to the given expansive approach, this paper will deal with the phenomenon of crime of obedience in its narrow sense by being focused only on criminal acts performed in response to superior orders in military service. That approach is selected as it is prevalent in legal doctrine. Therefore, the cases when an act performed in response to superior orders which are considered immoral by the larger community but are still legal, will not be examined within this paper. In a similar vein, acts performed in response to superior orders which come under the scope of criminal law but are not considered violent, such as white collar crimes, will remain out of the scope of this paper.[3]

There are inevitable tensions between the crimes of obedience and crimes of disobedience in framing and drawing the line between those concepts. Those tensions are particularly apparent in the area of military criminal law, given that obedience to superior orders is the "cardinal virtue" of military profession, hierarchy and discipline (Osiel, 1999: 1). Namely, subordinates are faced with a difficult dilemma if doubtful about the legality of the order received, as they may be convicted for criminal act for disobeying lawful orders, but, on the

[3] See more on this: Padowitz, K., Crimes of Obedience, 2015, available at: http://www.psychology-criminalbehavior-law.com/2015/02/crimes-obedience-kenneth-padowitz-attorney/.

other hand, if they obey to unlawful orders, subordinates face a serious risk to be held criminally responsible for the crimes committed by following legal orders (van Verseveld 2016: 1). Due to the apparent interconnections between the crimes of obedience and crimes of disobedience, the paper will try to examine both categories of crimes.

Authors in this paper challenge the view addressed in legal doctrine according to which there is an "extensive consensus" among jurists to apply a "one-rule-fits-all approach" in framing obedience crimes in military service. To that end, the first section of this paper briefly outlines the development of the three main theories dealing with obedience to illegal orders, and explains the view according to which the one-rule-fits-all characteristic is common to all these approaches. Within this section, the main features of the modular approach that was advocated as an alternative to the "one-rule-fits-all approach" will be also summed up.

In the second, central part of the paper, the relevant provisions of the legal framework of Montenegro in the field of (dis)obedience crimes in military service will be examined as to determine which of two approaches has been applied. Where appropriate, a contextual comparative analysis of other South-Eastern European countries will be used. In addition, authors will examine applicable international soft law and hard law instruments as to determine whether they are in favour of the aforementioned approach or leave room for different interpretations.

The concluding section of the paper attempts to determine which of two approaches has been applied in Montenegro as well as to identify ongoing trends, as influenced by applicable international soft law and hard law instruments in the field.

DIFFERENT APPORACHES TO THE OBEDIENCE TO ILLEGAL ORDERS IN MILITARY SERVICE

Certain authors (van Verseveld 2016:1, Abrahamsson 2018:17) argue that there were three different theories with regard to the liability for crimes ordered by a superior in military service, which have been developed throughout the legal history: the *respondeat superior* doctrine, the absolute liability doctrine, and the conditional liability doctrine.

According to the ***respondeat superior* doctrine**, only the superior issuing an unlawful order is accountable for the commission of the crime, while the subordinate is not accountable as he/she can successfully invoke a defense of superior orders (van Verseveld 2016:1). The reasoning behind excusing the subordinate is that there is a general duty to obey the orders of superior without hesitation. (Abrahamsson 2018:18) In that context, Oppenheim tried to justify this approach by arguing that since the law requires the individual to follow orders, the law should not require the individual to be punished for it (Oppenheim, 1921: 343). It is undisputed among legal scholars that the *respondeat superior* doctrine was only accepted at the very beginning of the development of the humanitarian law, while later it became outdated and as such no more applicable in the arena of international criminal law (van Verseveld 2016:1, Abrahamsson 2018: 18). Abrahamsson rightly indicates (Abrahamsson 2018: 19) that the main limitation of the said theory is that the concept to automatically excuse any crime cannot apply "for all orders at all times".

The Charter of International Military Tribunal (hereinafter: Nuremberg Charter) rejected the *respondeat superior* doctrine as otherwise it would result in holding only Hitler criminally liable for all the crimes perpetuated during-by the Nazi regime (Dinstein, 2012: 89). Instead, the Nuremberg Statute adopted the **absolute liability doctrine**. The basic idea behind this approach is that a subordinate is only bound to follow lawful orders. The theory in its strict sense does not differentiate as to whether the criminal act was committed pursuant to a superior order or not. However, the Nuremberg Statute introduced

a ground for mitigation of punishment in case when a defendant acted pursuant to superior orders, and by doing so, slightly departed from the absolute liability doctrine in its narrow sense.

The same approach of the absolute liability doctrine along with the same wording was further followed by the respective statutes of the following tribunals: International Criminal Tribunal for the Former Yugoslavia (hereinafter: ICTY) and the International Criminal Tribunal for Rwanda (hereinafter: ICTR), Special Court for Sierra Leone and Iraqi Special Tribunal (Abrahamsson 2018: 21-26).

When it comes to the **conditional liability doctrine**, acting pursuant to an order of a superior constitutes a ground for excluding criminal responsibility of subordinate, unless the subordinate knew or should have known that the order was illegal or alternatively provided that the order was manifestly illegal (Abrahamsson, 2018: 27 referencing Gaeta, 1999: 175). This doctrine has different variations in terms of the test applied, as some authors refer to the criterion of ”obviously unlawful order” or “manifestly unlawful order”, which is mostly interpreted as an objective criterion, whilst others refer to the criterion of “person should have known that the order was unlawful” which amounts to a subjective criterion. (Cassese & Gaeta, 2013: 231-232.)

The conditional liability doctrine constitutes a middle ground between the absolute liability doctrine and the doctrine of *respondeat superior* (Abrahamsson, 2018: 27). While it dates back to the beginning of 20th century when Boer War took place, it gained new momentum by the fact that the given approach is incorporated to the Rome Statute.

Abrahamsson rightly argues that a specific version of the conditional liability doctrine was introduced to the Rome Statute which can be considered as a compromise between the absolute liability doctrine and the conditional liability approach, in that absolute liability is prescribed for the crimes of genocide and crimes against humanity while a conditional liability doctrine is prescribed for war crimes (Abrahamsson, 2018: 30).

The development of these three theories are undisputed in legal doctrine. Bohrer (Bohrer, 2012: 5) goes one step further, stating that there is an "extensive consensus" among jurists/legal scholars to apply a "one-rule-fits-all approach" when it comes to formulating obedience crimes in military service. According to him, supporters of all the three theories recognized the need to regulate the given issue of obedience crimes through the recourse to a "one-rule-fits-all policy." Bohrer does not deny that those three theories are subject to different interpretations both in legal doctrine and practice. However, according to him, these different interpretations do not attempt to change the one-rule-fits-all feature of all the three approaches, meaning that each of them offers the same principle to be applied to what are sometimes radically different scenarios. In support of his arguments Bohrer notes that very rarely do legal scholars advocate for an approach that regulates obedience crimes in a non-uniform manner. In that context, Bohrer welcomes the /uncommon proposal brought by Ormerod (2008: 357-358) to introduce a conditional liability approach when illegal orders are given during combative actions and an absolute liability approach when illegal orders are given in non-combat situations.

After reasonable criticism of the allegedly predominant recourse to use one-rule-fits-all policy, Bohrer proposes more intensified recourse to a modular approach, which implies that various legal solutions should be created to accommodate for the different situations in which superior orders in military service are given, such as distinguishing the regime applicable to criminal orders given in emergency situations from the one applicable to order given in non-emergency situations (Bohrer, 2012: 53).

From the standpoint of international criminal law, Bohrer's claim that there is an "extensive consensus" among jurists to apply a "one-rule-fits-all approach" *prima facie* does not seem convincing nor well founded. As mentioned earlier, the Rome Statutes clearly distinguishes between the situations where it applies the absolute liability doctrine (crimes of genocide and crimes against humanity) and the situations where it applies a conditional liability approach (war crimes). In addition, it seems that a modular approach is also accepted in the Rome

Statute given that it only deals with the most serious crimes of concern to the international community, therefore it does not envisage the same rule for radically different situations.[4] Apparently, that setting leaves room for national lawmakers to be flexible and creative to some extent, while taking into account that the relationship between the ICC and national jurisdictions is regulated by the principle of complementarity (van den Herik, Stahn, 2012:10)[5] as well as the fact that the Roma Statute is not uniform law but entails only a minimum standard.

In the following section, the authors will examine whether the modular approach, which was advocated as an alternative to the one-rule-fits-all approach has been applied in the national legal framework of Montenegro in the field of obedience military crimes.

NATIONAL LEGAL FRAMEWORK IN MONTENEGRO IN THE FIELD OF OBEDIENCE CRIMES IN MILITARY SERVICE

This section is structured in two subsections in order to examine the Montenegrin legal frameworks governing both the disobedience crimes and the obedience crimes in military service. The apparent tensions between these two categories of crimes in military service were explained earlier in the text. The given assessment will also include the applicable international hard and soft law instruments.

[5] This principle provides an admissibility of a case before the ICC on the basis of a finding of unwillingness or inability of a state to prosecute an ICC statutory crime and the transfer of state jurisdiction to the court, limits the state judicial sovereignty and so portrays the configuration of the Court as a supra-national court.

Crimes of Disobedience in Military Service under Montenegrin Law

The Criminal Code of Montenegro[6] does not treat equally the situations when the superior order was not executed by the military persons and civil servants respectively.[7] This distinction seems reasonable and may be explained by the fact that the Armed Forces do have more hierarchical structure comparing to the civil sector. Accordingly, there is more intensified need for the effective operation/functioning within the Armed Services, than it is the case with civil sector (van Verseveld, 2016: 1). In line with that, the Criminal Code of Montenegro in Article 456 envisages that the crime of non-execution of superior orders or their refusal may only be committed by a person in military service, while it cannot be committed by the civil servants.[8]

However, each non-execution of superior orders or their refusal are not enough for qualifying some conduct as a criminal offence. Instead, the criminal offence exists only when the following two conditions are met:

a) non-execution or refusal of execution of a superior order must be linked to service performance;

b) more severe harmful consequences must be caused for a service or it has to be severely threatened.

Almost the same provision is contained in criminal codes of most neighbouring countries (such as the Criminal Code of Serbia, the Criminal Code of Croatia,

[6] "Official Journal of Republic of Montenegro", Nos. 70/2003, 13/2004 –correction and 47/2006 and Nos. 40/2008, 25/2010, 32/2011, 64/2011 – Law, 40/2013, 56/2013 - correction, 14/2015, 42/2015, 58/2015 – other law, 44/2017, 49/2018 and 3/2020.

[7] The term "person in military service" refers to the specified categories of military and civilian personnel.

[8] Although the Criminal Code of Montenegro does not explicitly specify the criminal offence in case when the superior order is not executed by civil servant, it is noteworthy that some other criminal offences applicable to civil servants may be invoked in cases when a superior order was not executed by civil servants. These are for instance the following criminal offences: abuse of office (Article 359) and dereliction of duty (Article 417). However, those criminal offences do not explicitly require as their necessary element a conduct, which amounts to non-execution of superior orders or their refusal. Almost identical criminal law provisions are contained in the criminal legislation of the neighbouring countries.

the Criminal Code of Bosnia and Herzegovina).[9] The reason behind this provision is clear: only some aggravated forms of non-execution of superior orders or their refusal will constitute a criminal offence. While each case of non-execution of superior orders or its refusal will constitute a disciplinary offence under the Law on Armed Forces of Montenegro, only some forms of the given conducts will fulfil the aforementioned conditions needed to be qualified as criminal offences.

The Criminal Code of Montenegro, again in a similar vein to other neighbouring countries, does envisage two additional criminal offences, which are also related to non-execution of criminal offences: opposition to a superior[10] and opposition to a person in charge of special military service.[11] Some additional qualified elements are also required for both criminal offences, although they do not amount to causing of more severe consequences as it was the case with the previously mentioned criminal offence. Again, the mere non-execution of superior orders is not enough to have criminal liability triggered. In first case, the joint conduct of different persons is required for a crime, while in the second case, the particular set of competencies of a superior does constitute the necessary element of that criminal offence.

It is noteworthy that some European countries, such as Bulgaria and Romania do define more broadly the crime of refusal to execute an order of a superior. More concretely, their criminal codes specify that a mere fact that a superior order is not carried out or is refused to be carried out by a subordinate is sufficient for establishing a criminal offence.[12] Those provisions reflect the aforementioned view, according to which the military discipline and hierarchy are essential features of any military organization and therefore superior orders

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[9] See for instance, Serbia, Article 400 of the Criminal Code of the Republic of Serbia, Article 357 of the Criminal Code of Croatia and Article 246a of the Criminal Code of Bosnia and Herzegovina.

[10] See Article 457 of the Criminal Code.

[11] See Article 458 of the Criminal Code.

[12] See Article 372 of the Bulgarian Criminal Code and Article 417 of the Romanian Criminal Code.

shall always be carried out (van Verseveld, 2016: 1). Therefore, it is in line with the "one-rule-fits-all approach". However, the approach taken by Montenegrin lawmakers seems better tailored, as it classifies different conducts based on their gravity. Accordingly, the Montenegrin legal framework stipulates that mere refusals or non-executions amount to disciplinary offence, while the aggravated forms of those conducts are to be qualified as criminal offences. Thus, the regime introduced by the Criminal Code of Montenegro complies with the modular approach advocated by Bohrer (Bohrer, 2012: 45).

Similar to criminal legislation of most neighbouring countries, the Criminal Code of Montenegro sets out more severe punishments for the aforementioned offences if they are committed during state of war, state of emergency or armed conflict.[13] The provision on setting more severe punishments for crimes committed during the state of war, the state of emergency or armed conflict is again in line with the modular approach advocated by Bohrer.

In a similar vein as criminal laws of neighbouring countries, the Criminal Code of Montenegro specifies a set of criminal offences, which may be committed by a military person only during the state of war, state of emergency or armed conflict. By providing for the criminal offences, which may be executed only during a specific circumstances, the Montenegrin lawmaker followed the modular approach. However, it seems that one of those criminal offences is defined too broadly and this may negatively affect the legal security. The given crime is titled "non-performance of work commitment" and it does not require any specific additional necessary elements for the establishment of criminal liability.[14] Most of neighbouring countries do not provide the same criminal offence. Along with other previously analysed crimes, this crime is also classified within the chapter titled "Criminal Offences against the Armed Forces of Montenegro".

[13] See for instance Article 417 of the Criminal Code of Serbia, Article 357 para. 2 of the Criminal Code of Croatia and Article 246p of the Criminal Code of Bosnia and Herzegovina. The same applies for Bulgarian and Romanian criminal codes.

[14] Article 452 of the Criminal Code of Montenegro.

Crimes of Obedience in Military Service under Montenegrin Law

The Criminal Code of Montenegro contains relevant rules governing the situations when a military person commits the crime in executing a superior order. According to the Criminal Code of Montenegro, a subordinate shall not be punished for an offence committed at orders of a superior relating to official duty, unless the order relates to commission of a criminal offence punishable by imprisonment of five or more years and the subordinate was aware that complying with the order constitutes a criminal offence.[15] The identically worded provision is contained in criminal codes of certain neighbouring countries.[16] This legal provision seems to be in line with the conditional liability approach, as it envisages that superior orders in military service constitute a ground for a criminal law defense as long as a subordinate did not know that an order is unlawful.

In addition, the Montenegrin Criminal Code reflects the modular approach, having in mind that its norms rely on an objective criterion, amounting to the prescribed imprisonment period. More specifically, the modular approach is applied given that the Montenegrin legal solution did not determine one rule for addressing all the situations; instead it envisaged different regimes depending on the potential duration of imprisonment, which is provided for the criminal act committed in response to the military order.

The established regime is different than it is the case with some other neighbouring countries, such as Croatia. The Criminal Law of Croatia does not establish the criterion linked to prescribed imprisonment period, nor the criterion that committed criminal offence should be linked to an official duty.[17] More precisely, the former Criminal Law of Croatia also used to recourse to the duration related condition, but this solution was omitted in the new Criminal Law. Therefore, under the new Criminal Law of Croatia, even the perpetrator of some severe criminal offences shall not necessarily be held liable

15 See Article 485 of the Criminal Code of Montenegro.

16 See for instance Article 430 of the Criminal Code of Serbia.

17 See Article 380 of the Criminal Law of Croatia.

for crimes committed at orders of a superior. More specifically, the Criminal Law of Croatia states that military person will not be criminally liable when the conduct, which correspond to some of determined criminal offences, is committed at orders of a superior unless any of the following two conditions are met:

- Military person was aware that complying with the order constitutes unlawful act,
- The order was manifestly unlawful.

It is further clarified that an offence of genocide and crime against humanity are always manifestly unlawful.

It seems that the reason behind the amended provision of the new Croatian Criminal Code is the alignment with Article 33 of the Rome Statute.[18] In contrast to the Criminal Code of Montenegro, the regime established by existing Criminal Law of Croatia fully complies with the international standards embodied in the Rome Statute. It appears that there is upcoming tendency to fully align national criminal law provisions with Article 33 of the Rome Statute.

To recall, the aforementioned distinction in the Rome Statute made between the regime applicable to war crimes on the one hand, and the genocide and crime against humanity, on the other, is also in line with the modular approach advocated by Bohrer.

However, it is important to keep in mind that Article 33 of the Rome Statute did not resolve legal uncertainty when it comes to the interpretation of the requirement of the order not to have been "manifestly unlawful". It is not clear how the manifest unlawfulness of the conduct should be determined and

[18] See Article 33 providing: "Superior orders and prescription of law 1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

whether this an objective or subjective criterion (van Verseveld, 2016:1, Posner & Sykes, 2007: 20). For that reason, it is important for each state to carefully consider whether to fully align criminal law provisions with somewhat vague requirements from Article 33 of the Rome Stature. On the other hand, the duration of potential imprisonment, as determined by the Montenegrin Criminal Code, is not expected to create any problems in practice either, as it properly follows modular approach.

Moreover, what can be used as an argument against full alignment with Article 33 of the Rome Statute, is the fact that the Rome Statute is not uniform law - instead it only entails a minimum standard. Consequently, it does not require a full alignment by signatory states.

Taking all this into account, it is not surprising that there are still numerous national lawmakers who rightly resisted and did not follow the tendency towards aligning their national criminal law provisions with Article 33 of the Roma Statute. The case of Montenegro clearly shows that the modular approach that is strongly advocated in legal doctrine can be adopted without the strict and literal incorporation of the provision of the Roma Statute to national legislation.

Finally, it is noteworthy to mention the OSCE Code of Conduct on Politico-Military Aspects of Security (hereinafter: OSCE Code of Conduct). It is considered as an instrument that regulates issues, which traditionally fall under the national jurisdiction of a state (Ćeranić, J., 2013: 39). However, the OSCE Code of Conduct is only of limited relevance when it comes to shaping the national criminal provisions on the road to full alignment with the modular approach. According to the OSCE Code of Conduct, the responsibility of a superior for illegal orders does not exempt subordinates from individual responsibility for executing such order without going in further details and providing any exceptions from the rule. Hence, it seems that the only principle that derives from the OSCE Code of Conduct in this respect is that both superior and subordinate shall be held criminally liable for the criminal offence committed in executing the superior order, subject to some exceptions.

On the other hand, international criminal law determines precise conditions when a subordinate can be held liable for most serious crimes of international concern, which are committed in executing superior orders as well as respective exceptions from criminal liability. Nevertheless, sufficient room for flexibility and creativity of national lawmakers is left given that the relationship between the International Criminal Court and national jurisdictions is regulated by the principle of complementarity (van den Herik, Stahn, 2012: 10),[19] coupled with the fact that the Roma Statute is not uniform law but entails only a minimum standard with regard to most serious crimes of international concern (Fernandez Jankov, 2020:100).[20]

CONCLUSION

The international criminal law framework and the criminal law framework of Montenegro do not apply a "one-rule-fits-all approach" in formulating obedience crimes in military service. Therefore, the Bohrer's claim that there is "an extensive consensus" among jurists to apply a "one-rule-fits-all approach" in framing (dis)obedience crimes in military service has been not confirmed by the findings reached in this paper. Instead, both the international and Montenegrin criminal law framework opt for a modular approach. In doing so, the Rome Statute applied a kind of the hybrid model prescribing the absolute liability principle for crimes of genocide and crimes against humanity, while prescribing the conditional liability principle for war crimes, thus departing from the "one-rule-fits-all approach". Moreover, the modular approach of the Rome Statute derives from the fact that it is limited only to the most serious crimes of concern to the international community and that it does

[19] This principle provides a admissibility of a case before the ICC on the basis of a finding of unwillingness or inability of a state to prosecute an ICC statutory crime and the transfer of state jurisdiction to the court, limits the state judicial sovereignty and so portrays the configuration of the Court as a supra-national court.

[20] See about the interpretation of the requirement of the gravity of crimes before other international organizations (Marković, D., 2018: 43).

not constitute a uniform law but entails only a minimum standard.[21] Therefore, the identified tendency of full alignment of legal frameworks of some South-Eastern European countries with the Rome Statute is not an optimal approach to be taken by national lawmakers as it does not sufficiently address all the possible situations.

The limited international criminal law jurisdiction further leaves room for national lawmakers to be flexible and creative in developing their respective national legal frameworks governing obedience crimes in military service. Furthermore, the OSCE Code of Conduct as an international soft law instrument does not impose limitations on national authorities when it comes to formulating legal provisions governing the obedience crimes in military service. It does not go any further than stating that in principle both superior and subordinate shall be held criminally liable for the criminal offence committed in executing the superior order.

The conducted assessment shows that due to the lack of comprehensive international standards in this field, the national criminal law frameworks on subject remain divergent. Among South-Eastern European countries, Bulgaria and Romania are exceptional as they failed to introduce any distinctions based on the criterion of gravity, thus inclining to the “one-rule-fits-all approach” when it comes to disobedience crimes.

When it comes to Montenegrin law pertaining to disobedience crimes in military service, it is fully in line with the modular approach advocated by Bohrer (Bohrer, 2012: 45) as it classifies different disobedience related conducts in military service based on their gravity and nature. In addition, the Montenegrin legal solution providing for setting more severe punishments for disobedience crimes committed during state of war, state of emergency or armed conflict is again in line with the modular approach advocated by Bohrer.

Further, the Montenegrin national legal framework governing obedience crimes in military service is also in line with the said approach as it did not stick to one

[21] These are as follows: genocide, crimes against humanity, war crimes and crimes of aggression.

rule for addressing all the situations but instead it envisages different regimes depending on the potential duration of imprisonment, or in other words gravity of the criminal act, which is committed in response to the military order.

The benefits of the modular approach advocated by Bohrer seem undisputable. The Montenegrin legal framework in the field of (dis)obedience crimes in military service undoubtedly constitutes a case of good practice. However, the identified divergences among national criminal law frameworks of the aforementioned South-Eastern European countries show that there is a room for more intensified contribution of legal scholars in further development of the modular approach. That contribution could be provided by tailoring legal solutions that would appropriately address varied situations pertaining to (dis) obedience crimes in military service.

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PRIMENA „MODULARNOG PRISTUPA” U ODNOSU NA KRIVIČNA DELA IZVRŠENA PO NAREĐENJU PRETPOSTAVLJENOG U VOJNOJ SLUŽBI – PRIMER CRNE GORE

Apstrakt

Tokom poslednjih decenija, pitanje krivičnog dela izvršenja po naređenju pretpostavljenog u vojnoj službi bilo je ključno pitanje međunarodnog i nacionalnog prava. Uz to, očigledne su neminovne tenzije između krivičnih dela izvršenih po naređenju pretpostavljenog i krivičnog dela neizvršenja naređenja pretpostavljenog prilikom formulisanja ovih koncepata i njihovog razgraničenja. Ovakve tenzije naročito su vidljive u oblasti vojnog krivičnog prava, budući da je izvršenje naređenja pretpostavljenog „ključna vrlina” vojne službe i discipline. U ovom radu, autorke ispituju stav iskazan u pravnoj doktrini prema kome među pravnicima postoji široka saglasnost o primeni pristupa „jednog pravila za sve” prilikom formulisanja krivičnih dela usled izvršenja naređenja pretpostavljenog u vojnoj službi.

U radu se ocenjuje pravni okvir Crne Gore u ovoj oblasti kako bi se utvrdilo da li je u njemu primenjen modularni pristup, koji se u pravnoj teoriji zastupa kao alternativa prethodno pomenutom pristupu. U okviru analize autorke po potrebi pribegavaju kontekstualnoj uporednopravnoj analizi normativnih rešenja u drugim državama Jugoistočne Evrope. Nadalje, autorke ispituju odgovarajuće instrumente međunarodnog mekog i čvrstog prava, kako bi utvrdile da li je u

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njima primenjen prvi pomenuti pristup ili se ostavlja prostor i za drugačija tumačenja.

Ključne reči: *Krivični zakonik Crne Gore, Rimski statut Međunarodnog krivičnog suda, Kodeks ponašanja u vojno-političkim aspektima bezbednosti, krivično delo neizvršenja ili odbijanja izvršenja naređenja, krivična dela izvršena po naređenju pretpostavljenog, „apsolutna odgovornost“, „apsolutna odbrana“, uslovna odgovornost.*