

INTERNATIONAL HUMAN RIGHTS GUARANTEES WITH SPECIAL REFERENCE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Abstract

In the twenty-first century, one of the main issues is the question of respect for human rights. Human rights are the basis of modern society and also the matter of ongoing reflection and an inexhaustible subject. The paper analyzes the development of international guarantees of human rights, with a special emphasis on the European Convention on Human Rights and the catalog of guaranteed rights.

Keywords: *Human Rights, International guarantees of Human Rights, European Convention on Human Rights*

1. The concept of human rights

On the concept and content of human rights has been written a lot, so we can freely ask whether we can say something new. However, despite this, human rights and their protection are still discussed and wrote about with undiminished intensity.

Without a doubt, the subject of human rights is one of the biggest legal and socio-political ideas in history and probably the prominent legal and socio-political “invention” and, practically, a novelty of modern.² Thereby, human rights are not only proclamations but also a normative revived through a series of international documents and mechanisms through which human rights are transformed into reality. However, international documents do not provide a definition of human rights, i.e. they do not define them conceptually. Even in the legal literature on this concept, we cannot find a universal definition. In the absence of a unified position on what does the term “human rights” mean, legal theorists are trying to fill the void.

¹ PhD student, Faculty of Law, University of Kragujevac, mail: sanda_bdt@yahoo.com

² J.Hasanbegović, “Kultura i/ili ideologija ljudskih prava – retorika i realnost”, *Analiti Pravnog fakulteta u Beogradu* 4/09, 82.

Some authors are defining human rights as inherent rights of every human being.³ They also denote a set of basic human rights, i.e. rights that human beings do not need to obtain, but have them on the basis of their very existence, independently of their native country or where they live or whether they have a citizenship or not or are refugees.⁴ They are understood as a set of standards that are based on the principles and standards of the international law, including the law of each state.⁵ There are authors who define human rights as a set of principles and standards common to all people that belong to individuals and/or groups, regardless of their gender, race, religion, nationality, political affiliation or origin; those rights are universal, regardless of the disputes that are related to them.⁶ Also, human rights are defined as the basic and the greatest value of modern society and the modern, democratic system.⁷ However, a number of legal authors are setting the question whether the concept of human rights, in general, can be defined in the usual way, which means a number of things that would more or less represent a synonym of the term or the enumeration of its essential characteristic.⁸ The previous is probably the reason why some authors do not define human rights.⁹

The concept of human rights has evolved from the concept of “rights of man” which precedes it in time and what is more important: from the idea of natural right.¹⁰ The concept of natural rights was shaped during the seventeenth and eighteenth century on the foundations of the idea of Thomas Hobbes. These ideas were then expanded by

³ V.Dimitrijević *et al.*, *Međunarodno pravo ljudskih prava*, Beograd 2006., 36.

⁴ V.Ibler, *Rječnik međunarodnog javnog prava*, Zagreb 1987., 236.

⁵ In a similar way the human rights are defined by S.Avramov, M.Kreća, *Međunarodno javno pravo*, Beograd 2007., 297.

⁶ M.Sahadžić, “Međunarodno pravo ljudskih prava: zaštita pojedinaca i skupina”, *Aktuelnost i značaj ljudskih prava i sloboda*, *Zbornik radova Pravnog fakulteta Univerziteta u Istočnom Sarajevu* 2011., 246.

⁷ M.Novaković, “Odnos države prema ljudskim pravima kroz neposrednu primenu međunarodnih konvencija”, *Basic concepts of public international law – Monism & Dualism*, Beograd 2013., 220.

⁸ J.Griffin, *On Human Rights*, Oxford University Press, 2011., 18.

⁹ See for example I.Brownlie, *Principles of International Public Law*, Oxford University Press 2003. and M.N.Shaw, *International Law*, Cambridge University Press 2008. About how the notion of “human rights” fraught with a number of “controversial” moments, which is why it is not surprising that there is not just one concept, school, definition and vision when this term is concerned, see more at P.G.Laurenne, *The Evolution of International Human Rights*, Philadelphia 2011., 2, referred to G.Graovac, “Geneza i važnost prava na osobnu slobodu”, *Zagrebačka pravna revija* 2/2013, 238.

¹⁰ A.Jurić, “Specifičnosti shvaćanja prava na nepovredivost doma u praksi Evropskog suda za ljudska prava”, *Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse* br.10, Mostar 2012., 363.

John Locke, who is considered to be a “father of human rights”. In his expose on the natural rights John Locke starts from the idea that they are present in human society since the earliest days of its existence and that people are free and equal, proving that they have a natural right to life, liberty, and property.¹¹ According to the concept of natural rights, people have certain rights simply because they are humans. These rights cannot be waived because they are a natural gift and as such innate to every human being. Thus, the idea of human rights remains the idea of the right that is natural, inasmuch as it is conceived as a moral authority which human beings have as a natural capacity, not because of any particular agreement they entered into or any system of law under whose jurisdiction they fall.¹²

The doctrine of human rights is formed through the idea that each person is subject to a global (general) interest.¹³ In this doctrine dominates the principle of equality, which emphasizes that human rights belong to all human beings, without distinction, for they are based on the values inherent in every person and on the innate human dignity and equality.

The concept of human rights can be analyzed through characteristics that these rights have, although there is not any unified position about them. The following characteristics can be identified in the literature: universality, the moral validity, fundamental importance, priority and abstractions;¹⁴ then, that they are original, universal and inalienable;¹⁵ they are universal, indivisible, interdependent and interrelated;¹⁶ or universal - human rights belong to all people equally, they are inalienable - inseparable from the individual (are not and cannot be a matter of merit, awards or election, cannot be sold, given away or taken away), irreversible – they cannot be revoked by the government (or anyone else), indivisible – they are of the same nature and mutually dependent.¹⁷ However, it appears that none of the

¹¹ N.Deretić, “Uporedna analiza: Prava čoveka u rimskoj državi i savremena ljudska prava”, *Zbornik radova Pravnog fakulteta u Novom Sadu* 3/2011, 487.

¹² D.Boučer, “Prelaz od prirodnih prava do kulture ljudskih prava”, *Ljudska prava – preispitivanje ideje* (ed. Đ. Pavićević), Beograd 2011., 147.

¹³ C.Beitz, *The idea of Human rights*, Oxford University Press, 2009., 1.

¹⁴ R.Aleksi, “Institucionalizacija ljudskih prava u demokratskoj ustavnoj državi”, *Ljudska prava – preispitivanje ideje* (ed. Đ. Pavićević), Beograd 2011., 201.

¹⁵ M.Paunović, B.Krivokapić, I.Krstić, *Međunarodna ljudska prava*, Beograd 2013., 22.

¹⁶ J.W.Nickel, “Rethinking Indivisibility: Towards A Theory of Supporting Relations Between Human Rights”, *Human Rights Quarterly* 4/2008, 985, referred to M.Jovanović, I.Krstić, “Ljudska prava u XXI veku: između krize i novog početka”, *Anali Pravnog fakulteta u Beogradu* 4/2009, 11.

¹⁷ M.Rudić, *Ljudska prava – priručnik za nastavnike*, Beogradski centar za ljudska prava, 2001., 7, <http://chris-network.org/wp-content/uploads/2013/01/Ljudska-prava-Priru%C4%8Dnik-za-nastavnike.pdf>, 15.05.2016.

listed characteristics is inaccurate, and each, but only partially explains the concept of human rights.

In theory, there is no agreement neither about the division of human rights. Namely, the traditional division is on basic and special rights; positive and negative; actionable and non-actionable; civil, political, economic, social and cultural; individual and collective rights. In addition to these partitions, common is also a classification on the different “generations” of human rights.¹⁸ Classifying human rights in “generations”, the phrase “triad of human rights” was created which is still in use, and includes the totality of human, civil and political rights. However, the classification in the “generations” basically just shows historical trends and their development path, that is the course of their recognition, but it does not mean favoring certain rights. The rights of the first generation are personal rights, historically oldest, and they were first formulated during the eighteenth century. The rights of the second generation are linked to the efforts of workers and other socially vulnerable groups to provide suitable economic, labor, social and cultural environment.¹⁹ Therefore, this generation of rights forms economic, social and cultural rights. Third generation of human rights represents collective rights or rights of solidarity, which include the right to peace, to development, to a clean and healthy environment. Regardless of the “generation” to which the rights belong to, all human rights are equal concerning legal obligation and the strength and function as a single unit, but if they are violated as a whole or partially, it withdraws contempt of rights in general.

2. International human rights guarantees

The concept of human rights as we know it today has its historical roots. In fact, the idea of human rights has its origins in the ancient period, continued in early Christian period and in the feudal period in the middle ages.²⁰ England had a leading role in the formal development of human rights, where the historical development of these rights played out through several key stages. The Great Charter of Freedoms (Magna Charta Libertatum) was first adopted in 1215. Then, in 1628, the Petition

¹⁸ The creator of the categorization of human rights into “generations” is Karl Vasak and it was created at the end of the seventies years of last century, see K. Vasak, “Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights”, *UNESCO Courier*, Paris 1977., 29.

¹⁹ S. Gajin, *Ljudska prava – pravno sistemski okvir*, Beograd 2012., 137, http://www.nvo.org.rs/fileadmin/user_upload/Sasa_Gajin_-_Ljudska_prava_E_izdanje_.pdf, 15.05.2016.

²⁰ M. Nastić, *Ustavnopravni osnov primene Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda u postupku pred nacionalnim ustavnim sudovima*, doktorska disertacija, Niš 2012., 4.

of Rights proclaimed the inviolability of citizens and in the 1679 Habeas Corpus Act was adopted: the law that declares the rights and freedoms of the subjects and determines the legacy of the crown (which is considered the most important document on human rights in Anglo-Saxon law). The beginning of a modern legal history of England is linked to the Bill of Rights (1689) which supplements the Habeas Corpus Act, where were shaped the achievements of the English bourgeois revolution. The rights guaranteed in these documents, were applied in the 13 English colonies in North America. Liberation of North American colonies from English jurisdiction and the establishment of statehood were marked with USA Declaration of Independence in 1776.²¹ The USA is based on this document. On the European continent, human rights as the greatest achievement of mankind are most closely related to the French Revolution and the Declaration of the Rights of a Man and a Citizen (*La Déclaration des Droits de l'homme et du citoyen*) from 1789. This declaration proclaims liberty, equality and brotherhood (*liberté, égalité, fraternité*) and is considered to be the foundation of modern democracy and modern state. After the adoption of the American and the French Declaration, human rights receive an individualistic character.

The development of the idea of rights and freedoms of a human being initiate activities for the protection of human rights at an international level. International protection of human rights represents the chapter of legal history, which began to develop at a late stage in the history of mankind.²² The period after the Second World War marks a milestone in the internationalization of the problem of protection of human rights and they appear as a response to the horrors of war and tyranny of individuals. Until then, human rights were not part of international law, nor are there as an internationally accepted term, but fell within the domestic jurisdiction of any state. Exactly in this period, the thing which was the exclusive responsibility of sovereign states has become the subject of international protection and control.²³ However, regardless that the international editing of human rights means that states no longer has exclusive jurisdiction, they still maintained a wide range of rights and responsibilities in this area, in general.²⁴

For the modern concept of human rights of particular importance is the adoption of a number of universal and regional documents. First,

²¹ N.Deretić, 487.

²² C.Tomuschat, *Human Rights between Idealism and Realism*, Oxford University Press 2003., 7.

²³ A.Mowbray, "The Creativity of the European Court of Human Rights", *Human Rights Law Review* 5 (1), 2005., 56-59.

²⁴ M.Milojević, "Evropska konvencija o ljudskim pravima i dužnosti država i Evropska konvencija i unutrašnje pravo", *Revija za evropsko pravo*, 2-3, Kragujevac 2008., 8.

The Charter of the United Nations (1945) was signed in San Francisco, which in its preamble states that the people who founded this organization determined to confirm their faith in fundamental human rights, in the dignity and worth of the human person. Then the United Nations General Assembly adopted the Universal Declaration of Human Rights,²⁵ which represents the codification of rights so far recorded only by charters and declarations of nations. In the preamble of the Universal Declaration, governments are obliged to introduce progressive measures, national and international, to secure their universal and effective recognition and observance of human rights contained in it. This document is the first step on the level of international law that limits the actions of states and puts a pressure on them to accept obligations toward their own citizens with mutual respect of rights and obligations. Announcement of the Universal Declaration is seen as the beginning of the tectonic shifts on the global level, the shift to democratic equality that leaves little space for imperial and racial ideals that have lasted for centuries.²⁶ At the same time, it is an appeal to humanity to respect the fundamental rights and freedoms, the ideal to which the signatory countries have striven, and not the legal regulation that is compelling for the country and due to possible non-compliance the country could be penalized.²⁷ Although not legally binding, the Universal Declaration has strongly influenced the countries to make efforts in the recognition of human, civil, economic and social rights, with the principle that these rights are part of the "basic freedom, justice and peace in the world".²⁸ From 1948 until today the Universal Declaration is the basis of a number of national and international laws and agreements, as well as the cause of numerous regional, national and supranational institutions dealing with the protection and promotion of human rights.²⁹ Thus, two international covenants which guarantee human rights are adopted in 1966,

²⁵ Universal Declaration of Human Right, United Nations, 1948, G.A. res. 217A (III), U.N. Doc A/810.

²⁶ E.Blumenson, "Four Challenges Confronting a Moral Conception of Universal Human Rights", *The George Washington International Law Review* 47/2015, 328, <http://ssrn.com/abstract=2394917>, 20.05.2016.

²⁷ LJ.Mijović, "Uticaj odluka Evropskog suda za ljudska prava na pravne sisteme država članica Vijeća Evrope s posebnim osvrtom na Bosnu i Hercegovinu", *Godišnjak Pravnog fakulteta u Banja Luci* 2012., 233.

²⁸ Namely, as international experience has repeatedly shown, it cannot be trusted to the states that they will respect and protect human dignity inherent to all those who are under their jurisdiction. Therefore, United Nations are trying to establish a universal set of standards which, according to the preamble of the Universal Declaration of Human Rights, represent a "common standard of achievement for all peoples and all nations". A.A.An-Naim, "Univerzalnost ljudskih prava: rešavanje paradoksa u cilju unapređivanja prakse", *Anali Pravnog fakulteta u Beogradu* 4/2009, 39.

²⁹ E.Korljan, *Evropska konvencija o ljudskim pravima i pravo na život*, doktorska disertacija, Beograd 2012., 55.

but also paved the way for the expansion of the catalog of human rights. These are the International Covenant on Economic, Social and Cultural Rights³⁰ and the International Covenant on Civil and Political Rights,³¹ which were revised by two optional protocols from 1989 and 1996. In addition to further elaborate on the rights guaranteed in the Universal Declaration, these international documents are legally binding.

3. The European Convention on Human Rights

Defining human rights within the United Nations has prompted regional organizations to adopt their own mechanisms for the establishment of human rights and their protection. For European countries, the idea of establishing a uniform protection of human rights and fundamental freedoms legally is shaped by adopting the European Convention on Human Rights (hereinafter “the Convention”)³². Its adoption represents an effort to make the goals established in the Universal Declaration obtain a binding legal force. In this way are eliminated shortcomings in the protection of human rights that arose from the non-binding character of the Universal Declaration.

Given the fact that it is prepared and adopted after the Second World War, the adoption of the Convention could be said is a kind of reaction to the dramatic experience of Nazism and fascism, and the massive human rights violations. Violation of human rights by the influential leaders of the time led to the tragic consequences. Therefore, the Convention constitutes a legal expression of the political will of European countries, which aims to prevent the emergence of new non-democratic regimes, but also intends to consolidate peace and ensure the unity of the continent by establishing uniform protection of individual human rights and political freedoms in Europe.³³

As a legal act of the Council of Europe, the Convention was adopted in 1950 in Rome. The adoption and implementation of the Convention is considered as the most important step in the development of law in

³⁰ *International Covenant on Economic, Social and Cultural Rights*, United Nations, 1966, 999 UNTS 3.

³¹ *International Covenant on Civil and Political Rights*, United Nations, 1966, 999 UNTS 71.

³² As a legal act of the Council of Europe, the Convention was adopted in 1950 in Rome. The original version of the European Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in English and French (*Convention Européenne des Droits de l'Homme*). It also applies in the Republic of Serbia (Zakon o ratifikaciji Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda, “*Službeni list Srbije i Crne Gore-Međunarodni ugovori*”, br. 9/2003, 5/2005).

³³ J. Omejec, *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava (Strasbourgški acquis)*, Zagreb 2013., 13.

European history and the crowning achievement of the Council of Europe in a part of a legal theory.³⁴ It is indicated as an essential part of the common European heritage, exceptional testimony to a European ethical and legal culture.³⁵ The former President of the European Court of Human Rights (Rolv Ryssdal) described the Convention as “the basic law of Europe”.³⁶ About the Convention’s character speaks the statement that all documents of the European human rights law containing further elaboration of specific guarantees of human rights or the human rights of certain groups, as a rule, but in their preambles, refer to the Convention, recognizing her so *Lex general* and *Lex superior* in the European system of human rights. Over the years since its adoption, the Convention has become the strongest and most coherent system of human rights protection in the international community.³⁷

The purpose of the adoption of the Convention is to guarantee the corps of rights and then the establishment of mechanisms for their protection on the European continent. It is conceived as “early warning system” that should prevent the country falling into totalitarianism and acts as a sort of “life jackets”, which should cover the violations of human rights that are out of control of national courts.³⁸

Acceding countries undertake to respect its provisions, given that this international instrument has the form of a contract.³⁹ At the same time, the Convention does not specify the manner in which each party shall ensure respect for the rights guaranteed. This is the domain of each country individually. By ratifying the Convention, each country undertakes to practically ensure every person within its jurisdiction their guaranteed rights.⁴⁰ In doing so, it is necessary to point out that

³⁴ M.O’Boyle, “On Reforming the Operation of the European Court of Human Rights”, *European Human Rights Law Review* (1) 2008., 268.

³⁵ L.Wildhaber, *Annual Report 2004 of the European Court of Human Rights, Council of Europe*, Strasbourg 2005, 33, http://www.echr.coe.int/Documents/Annual_report_2004_ENG.pdf, 23.05.2016.

³⁶ F.Lič, *Obraćanje Evropskom sudu za ljudska prava*, Knjiga 1, Beograd 2005., 5.

³⁷ M.Paunović, *Jurisprudencija Evropskog suda za ljudska prava*, Beograd 1993., 9.

³⁸ M.Nastić, 30.

³⁹ Contractual form is deliberately chosen, as well as in many other international organizations that have accepted the former way of creating legal rules, so that rules of behavior would not be automatically imposed to the members of the organization; These rules apply only to states that explicitly accept them, which is best achieved through a contract which is (at least theoretically) free to accept. M.Milojević, 7.

⁴⁰ Although the Convention states accept certain duties they have retained considerable freedom in the legal regulation of the conditions for the enjoyment of rights and freedoms, including the considerable powers of the introduction of restrictions in the general public interest and the right to put the reserves on certain provisions of the Convention and the Protocol in the event of their disagreement with the law. *Ibid.*

the guaranteed are only those rights that are considered essential for the integration of European democracy, which was possible to formulate in a unique way and, more importantly, for which an agreement was reached on international control over their implementation.⁴¹ Therefore, the catalog of guaranteed rights is not comprehensive. It represents the minimum (lower limit) rights that the contracting states must respect, provided that they can extend and complement other rights.

4. Review of the content of the rights guaranteed by the European Convention on Human Rights

The provisions of the Convention which make up a catalog of Convention's rights are formulated in an abstract way in the spirit of the Euro-continental legal system. How the Convention's rights are not defined or notionally determined in a unique way, it is believed, in theory, that they contain principles rather than pre-care legislation.⁴²

The Convention consists of a Preamble, the basic text, and the 14 Protocols.⁴³

The Preamble stressed that countries by adopting the Convention are taking the first steps towards common human rights stated in the Universal Declaration, with the aim of achieving greater unity between contracting states. One way to achieve this goal is the preservation and development of basic human rights. Therefore, it could be said that the Preamble speaks not only about "protecting" but also the "development of fundamental rights and freedoms", indicating in this way that the subject is not static and defensive, but more dynamic and offensive.⁴⁴ This dynamism is the achievement of an evolutionary process with a tendency to increasingly restrict the sovereignty of states and accelerate the harmonization of law.⁴⁵ In addition, it is

⁴¹ M.Nastić, 32.

⁴² Judge Jean-Paul Costa said that "numerous provisions of the Convention drawn up to include the principle". J.P.Costa, "The Evolution and Current Challenges of the European Court of Human Rights", *Regent Journal of Law & Public Policy*, Washington & Lee Law School 1(1) 2009, 28, referred to J.Omejec, 857.

⁴³ The main text of the Convention consists of three parts. Part I contains a catalog of guaranteed rights (2-18); Part II regulates the organization, powers and jurisdiction of the European Court of Human Rights (19-51); Part III contains other provisions governing jurisdiction and procedural issues relating to the signing, ratifying, the interpretation of the Convention and its implementation (52-59). The text of the Convention is available at http://www.coe.org.rs/REPOSITORY/163_eklip_-_tekst_konvencije.pdf, 30.05.2016.

⁴⁴ Z.Ponjavić, "Evropska konvencija za zaštitu ljudskih prava i pravo na poštovanje porodičnog života", *Pravni život* 9/2003, 824.

⁴⁵ *Ibid.*

necessary to emphasize the dominant character of the rule of law in the Preamble, which is, together with a guarantee of fundamental rights and freedoms, a prerequisite for the construction and preservation of a democratic society.⁴⁶

In the main text of the Convention, the Article 1 defines the obligation to respect human rights or the obligations of states to guarantee the rights and freedoms defined in Section I of the Convention to anyone who falls under their jurisdiction.⁴⁷

The rights guaranteed by the Convention can be grouped according to dominant characteristics and here they are not described in the order specified in the Convention. First, there are rights which are absolutely protected and are not subject to any restriction. This is the right to life, which can certainly be described as the most elementary right and out of which the Convention starts in establishment and protection of the rights. It has a special status and provides the basis and meaning of other values that human being has.⁴⁸ The Convention does not guarantee the unconditional protection of life, nor its specific qualities, but only the obligation of the State that the human life as such is protected. At the same time, it is not considered unlawful deprivation of life that which results from the use of force which is absolutely necessary for the defense of any person from unlawful violence, execution during a lawful arrest or in a case of preventing the escape of a person lawfully detained or regarding legal measures taken to suppress a riot or insurrection. In the group of the absolutely protected rights is the right which prohibits torture, inhuman or degrading treatment or punishment, guaranteed by the Article 3 of the Convention.⁴⁹ This Article provides protection of the moral and physical integrity of human beings and any form of abuse constitutes a “flagrant negation of humanity”.⁵⁰ The enjoyment of this right can’t

⁴⁶ A.Jakšić, *Evropska konvencija o ljudskim pravima – komentar*, Beograd 2006., 49.

⁴⁷ The first article of the Convention defined in this way, interpreted in the literature as a rather imprecise. The first reason is the fact that Part I includes articles 15-18 which do not guarantee the rights and the other reason is that the rights guaranteed in the Protocols are not included. Ch.Grabenwarter, *European Convention on Human Rights (Commentary)*, München 2014., 2.

⁴⁸ Convention in Article 2/1 provides that everyone’s right to life shall be protected by law and no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

⁴⁹ Torture constitutes inhuman treatment causing very serious and cruel physical or mental suffering. Inhuman treatment involves causing severe physical or mental suffering. Degrading treatment or punishment of abuse that denigrates a person, diminishes her dignity, causing a feeling of fear and mental suffering able to break the morale of a person, referred to O.Račić, B.Milinoić, M.Paunović, *Ljudska prava*, Beograd 1998., 90.

⁵⁰ M.Paunović, (1993), 52.

be limited by reference to some special circumstances (e.g. emergency situation, state or war).⁵¹ However, in order to speak about the violation of this right it is necessary that the violation is of much greater intensity than usual, or to reach the minimal level of severity. Prohibition of slavery or servitude is guaranteed by Article 4 of the Convention, it is also one of the absolutely protected rights and it can't be reversed in any situation and under any circumstances. The autonomy of the will on the basis that a person consented to slavery and thereby denied these guarantees is not permitted, because it is contrary to *jus cogens* in international law. The second paragraph of Article 4 prohibits the performance of forced or compulsory labor, while the third paragraph is provided for situations that can't be subsumed under the term "forced or compulsory labor" and they are: a) work required to be done in the ordinary course of the imposed detention according to the provisions of Article 5 of this Convention or during conditional release from such detention; b) service of a military character or in case of conscientious objectors, in countries where they are recognized, service exacted instead of compulsory military service; c) service exacted in case of an emergency or calamity threatening the life or well-being of the community; d) work or service which forms part of normal civic obligations.

The second group consists of Convention's rights that suffer certain limitations. Previously, it is needed to note a very useful classification of these restrictions set in theory. Specifically, it is stated that the states contractors of all international instruments that guarantee basic rights are entitled in the precisely defined situations to subject these rights to certain restrictions and even some of them put out of the force for a while.⁵² Depending on the type and character of individual rights it is possible to talk about three types of such restrictions: repeal (derogations) of individual human rights, then there are the so-called inherent (built-in) limits of certain categories of human rights and at the end, the state has available optional restrictions that it can, but need

⁵¹ The Council of Europe in order to protect this right went a step further by adopting the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (it also applies in the Republic of Serbia: Zakon o ratifikaciji Konvencije o sprečavanju mučenja i nečovečnih ili ponižavajućih postupaka i kažnjavanja, izmenjene i dopunjene Protokolom 1 i Protokolom 2 uz Konvenciju, "Službeni list SCG - Međunarodni ugovori", br. 9/2003 od 26.12.2003.). The importance of this Convention, among other things, is that it establishes a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. This special mechanism is composed of experts from different fields and does not consider individual complaints, nor treats them, but monitoring compliance and implementation of the commitments by States Parties.

⁵² M.Paunović, *Osnovi ljudskih prava – izvornik i pojmovnik*, Beograd 2002., 60.

not introduce relying on so-called restrictive clauses that accompany some of the protected rights.⁵³

First, the derogations as a limitation provided by the Convention in Article 15 is bind to some extraordinary circumstances. In this sense, the Article also provides that in time of a war or other public emergency threatening the life of the nation any country may take measures derogating from its obligations under this Convention. In addition, the variation in time of emergency can only be to the extent strictly that the situation requires, in addition to the fulfillment of two conditions: that such measures must comply with the obligations of country which it has under international law and under the condition that the competent authority (the Secretary General of the Council of Europe) is informed about it.

Another type of so-called inherent (embedded) limitation of the Convention's rights implies that these rights are limited in the formulation, i.e. permanent. These limits are defined by precise enumeration of exceptions when a specific right can't be used or when it is not invoked.⁵⁴ An example of this type of restriction of the right is evident in Article 5 of the Convention. This right primarily protects the individual against arbitrary arrest and detention and states that everyone has the right to liberty and security of a person and that no one can be deprived of liberty except in clearly specified cases and in accordance with the procedure prescribed by law. The same position is determined by the permitted grounds of deprivation of liberty, a crawling list of exceptions to the general rule. Therefore, Article 5 creates an obligation that any arrest or detention shall be in accordance with the law (procedural and substantive) and is *de facto* carried out by the Convention's following circumstances. It also means that each country has the discretion to create a new kind of justification for detention or arrest, but must act within the framework established by the Convention.⁵⁵

A special type of permitted limit is optional restrictions, or authorizations that country on various grounds, in the general public interest, can limit the implementation of individual rights.⁵⁶ In Articles 8-11 of the Convention are grouped the rights which include this type of restrictions concerning the mental and moral integrity of persons.

The Convention, in Article 8 protects the right for private and family life, home and correspondence. This protects the private sphere of the

⁵³ M.Paunović (2002), 60.

⁵⁴ *Ibid.*

⁵⁵ M.Nastić, 33.

⁵⁶ M.Paunović, B. Krivokapić, I. Krstić, 69.

individual, the right of human being to live as he/she wants, protected from the public and to some extent also includes the right to establish and cultivate relationships with other human beings, especially in the emotional sphere, to develop its own personality.⁵⁷ Freedom of thought, conscience, and religion is guaranteed by Article 9. This right includes freedom to change a religion or a belief, freedom of the individual to personally or in the community, publicly or privately, manifests his/hers religion or belief by preaching, practice and observance.⁵⁸ Freedom of expression is guaranteed by Article 10 of the Convention.⁵⁹ The right to freedom of expression, in various forms and ways, is not only one of the cornerstones of democracy, but also a prerequisite for the implementation of many other rights and freedoms set forth in the Convention. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Article 11 concerns the freedom of assembly and association with others, including the right to form and join trade unions for the protection of interests. Institutes of free assembly and association are very close and therefore are regulated by the same article.⁶⁰ In the case of public meetings is necessary to obtain the permission of the state, which is, in this case, obliged to protect its participants. In this respect, it is emphasized that this Article implies various positive obligations of the state, especially in the legislation.

Nomotechnics in the formation of these articles is identical and each of them has two positions: the first recognizes the right or freedom and is always in the same form, “everyone has the right”. The text of these standards, therefore, does not define who are the persons that can seek protection guaranteed by law. It is clear therefore that no one has primacy in search of protection. The term “any” means that all citizens who are under the jurisdiction of a state party may seek the protection of the rights guaranteed. In addition to nationals, protection may be requested by other persons (e.g. foreigners or stateless) in a

⁵⁷ A.Drzemczewski, *The right to respect for private and family, home and correspondence*, Human right files No.7, Strasbourg 1984., 7-8.

⁵⁸ The right to freedom of thought, conscience and religion is often referred as one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned (*Case of Kokkinakis v. Greece*, No. 14307/88 од 25. маја 1993., §31).

⁵⁹ Unlike Article 9 which guarantees the free and undisturbed internal, philosophical and psychological life of the individual, Article 10 guarantees so-called *forum externum*, or the freedom of communication. A. Јакшић, 292.

⁶⁰ Freedom of assembly is considered to be less formal than the freedom of association and includes all types of public and private meetings, public walks and demonstrations, except where there is an intention to use force.

condition that they are within the jurisdiction of a state party. These individuals in the legal theory are referred to as beneficiaries. The term “beneficiary” refers to a fundamental expectation of those to which human rights belong and this is a benefit, expected from the exercise, or exercise of rights.⁶¹

Second paragraph of the Article 8-11 foresees exception clause and lays down certain restrictions. These are the conditions that can legally be used by the public authorities of the state party in respect to the implementation or enjoyment of the rights recognized in these articles, or in one word: their realization. The key is that this kind of restriction allows the state the option to decide only on the scope of this realization. In this sense, it stipulates that in its implementation the public authority will not interfere, unless it is in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals or for the protection of the rights and freedoms of others.

Furthermore, when talking about the content of the rights guaranteed by the Convention, it should be noted that Article 12 guarantees the right to marry and found a family. This article is most closely associated with Article 8 and it actually, protects traditional marriage between persons of opposite biological sex. Men and women of appropriate age have the right to marry and found a family in accordance with the national laws governing the execution of this right. Thus, this article refers to national law accepting the possible differences between the legal systems of the contracting states.⁶²

A right that is essential for the functioning of any democratic society is guaranteed by Article 6. It is a fair trial, which represents “the embodiment of the rule of law”, without which there is no respect for other human rights.⁶³ The rights under this section relate to the basic principles on which civil and criminal court proceedings should be based. Additionally, it contains guarantees of equality and above all the right to access to court without any discrimination and equal

⁶¹ S.Gajin, 137.

⁶² In recognition of the rights of citizens to marry national laws are invited to regulate the form of marriage and the ability of people to marry (minimum age) and certain bans or interference (eg. kinship etc.). Freedom of the state in determining the prerequisites for marriage is limited to the extent that the prescribed standards must not be arbitrary, nor such as to deprive the guaranteed right of its content or the meaning of provisions of the convention. M. Alinčić, “Zaštita prava na sklapanje braka i osnivanje obitelji u europskim dokumentima o ljudskim pravima i u nacionalnim zakonodavstvima”, *Godišnjak Akademije pravnih znanosti Hrvatske* 1/2013, 25.

⁶³ M.Paunović, B. Krivokapić, I. Krstić, 167.

treatment in the process. It is understood that the court must be drawn up to allow the adoption of a fair judgment, and in addition, must necessarily be based on law.⁶⁴ This Article names the presumption of innocence as one of the most important guarantees of a fair trial in criminal proceedings. In addition, there will also be a public trial and a trial within a reasonable time.⁶⁵ In paragraph 3 of this Article, the accused in criminal proceedings are guaranteed by the notice of the nature and cause of the charge, the possibility of preparing a defense, the right to counsel, the right to examine witnesses and the right to free assistance of an interpreter.

The provision of Article 7 contains a basic principle of criminal law *nullum crimen sine lege, nulla poene sine lege*. It is necessary, therefore, that some form of behavior is prescribed by law as forbidden so that each person knew that something constitutes an illegal form of behavior and be responsible for the possible violation of the prohibitions. From that continues to derive two principles: first, that this article prohibits the retroactive application of criminal law, while the second principle requires the availability and sufficient specificity of criminal law. However, this rule knows exceptions, which refers to the fact that this may prejudice the trial and punishment of any person for any act or omission which at the time of execution was criminal according to generally accepted principles of law.

The rights guaranteed by Article 13⁶⁶ and Article 14⁶⁷ are not independent and the reference to their violation is conditioned by the reference to the violation of another convention's rights, including the rights contained in the Protocols. Although not identified as an independent rights in the judicial practice the right to an effective remedy (Article 13)

⁶⁴ D.Popović, *Evropsko pravo ljudskih prava*, Beograd 2012., 251.

⁶⁵ In addition, the wording of this provision does not prescribe the duration or length of the proceedings before the national court, on the basis of which it could be assess that a reasonable period is not exceeded.

⁶⁶ Article 13 of the Convention guarantees the right to an effective remedy. It states that everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. The essence of this article is that individuals have the ability to obtain satisfaction on a national level before the proceedings before the court.

⁶⁷ The guarantees laid down in Article 14 are prohibiting discrimination. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The person is discriminated, unless under the illegal basis, is treated differently from others in a similar situation if there is no reasonable or objective justification for differential treatment. In contrast, positive discrimination is not automatically prohibited under article 14 and it will depend on the justification for the difference in treatment in each case.

and the right to non-discrimination (Article 14) recognized the autonomous character. The autonomy means that the application of these provisions does not necessarily presuppose that was previously committed another violation of substantive Convention rights.⁶⁸

6. Conclusion

Proclamation and protection of human rights represent the highest value of the modern world. Human rights become a global brand that strives to universal human values. The idea of affirmation of human rights strengthens over the world, especially in Europe. For European countries, the idea of establishing a uniform protection of human rights and fundamental freedoms, the rule is shaped by adopting the European Convention on Human Rights. Its adoption is a cornerstone of modern understanding of human rights and a new approach to their protection in the territory covered by the members of the Council of Europe.

Sanda Ćorac, master prava
doktorand Pravnog fakulteta Univerziteta u Kragujevcu

MEĐUNARODNE GARANTIJE LJUDSKIH PRAVA SA POSEBNIM OSVRTOM NA EVROPSKU KONVENCIJU O LJUDSKIM PRAVIMA

Rezime

U dvadesetprvom veku jedno od osnovnih pitanja jeste pitanje poštovanja ljudskih prava. Ljudska prava su osnova savremenog društva, pa su ujedno i predmet neprestanog promišljanja i neiscrpna tema. U radu se analizira razvoj međunarodnih garantija ljudskih prava, a poseban akcenat je stavljen na Evropsku konvenciju o ljudskim pravima i katalog prava koje garantuje.

Ključne reči: ljudska prava, međunarodne garantije ljudskih prava, Evropska konvencija o ljudskim pravima

⁶⁸ M.Nastić, 36.