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HUMAN RIGHTS IN SERBIA 2006
LEGAL PROVISIONS AND PRACTICE COMPARED TO
INTERNATIONAL HUMAN RIGHTS STANDARDS

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HUMAN RIGHTS IN SERBIA 2006

LEGAL PROVISIONS AND PRACTICE COMPARED TO INTERNATIONAL HUMAN RIGHTS STANDARDS

Belgrade Centre for Human Rights
Belgrade, 2007

Contents

Abbreviations

AEAD – Act on the Election of Assembly Deputies
AI – Amnesty International
ANCP – Act on Non-Contentious Procedure
AP Vojvodina – Autonomous Province of Vojvodina
ASO – Act on Social Organisations and Citizens' Associations
BCHR – Belgrade Centre for Human Rights
BIA – Security and Information Agency
CAT – Committee against Torture
CC – Criminal Code
CeSID – Centre for Free and Democratic Elections
CFA – ILO Committee on Freedom of Association
CoE – Council of Europe
Constitutional Charter – Constitutional Charter of the State Union of Serbia and Montenegro
CPA – Civil Procedure Act
CPC – Criminal Procedure Code
CPT – CoE Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
DEVD – Decision on the Election of AP Vojvodina Assembly Deputies
DSS – Democratic Party of Serbia
ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR – European Court for Human Rights
EU – European Union
FA – Family Act
FNRJ – Federal People's Republic of Yugoslavia
FRY – Federal Republic of Yugoslavia
GSS – Civic Alliance of Serbia
HC – Helsinki Committee for Human Rights in Serbia
HLC – Humanitarian Law Center

HRC – UN Human Rights Committee

HR Charter – Charter on Human and Minority Rights and Civil Liberties

HRW – Human Rights Watch

ICCPR – International Covenant on Civil and Political Rights of 16 December 1966

ICESCR – International Covenant on Economic, Social and Cultural Rights of 16 December 1966

ICG – International Crisis Group

ICMP – International Commission for Missing Persons

ICTY – International Criminal Tribunal for the Former Yugoslavia

IDP's – Internally Displaced Person

ILO – International Labour Organisation

KEK – Kosovo Electric Company

KFOR – Kosovo Forces

LDP – Liberal Democratic Party

LEA – Local Elections Act

LSV – League of Social Democrats of Vojvodina

MIA – Ministry of Internal Affairs

MP – Member of Parliament

NATO – North Atlantic Treaty Organisation

NGO – Non-governmental organisation

ODIHR – Office for Democratic Institutions and Human Rights

OMCT – World Organisation Against Torture

OSCE – Organisation for Security and Co-operation in Europe

PCC of Kosovo – Provisional Criminal Code of Kosovo

PSEA – Penal Sanctions Enforcement Act

REC – Republic Electoral Commission

Report 1998 – Human Rights in Yugoslavia 1998, Belgrade Centre for Human Rights, Belgrade, 1999

Report 1999 – Human Rights in Yugoslavia 1999, Belgrade Centre for Human Rights, Belgrade, 2000

Report 2000 – Human Rights in Yugoslavia 2000, Belgrade Centre for Human Rights, Belgrade, 2001

Report 2001 – Human Rights in Yugoslavia 2001, Belgrade Centre for Human Rights, Belgrade, 2002

Report 2002 – Human Rights in Yugoslavia 2002, Belgrade Centre for Human Rights, Belgrade, 2003

Report 2003 – Human Rights in Serbia and Montenegro 2003, Belgrade Centre for Human Rights, Belgrade, 2004

Report 2004 – Human Rights in Serbia and Montenegro 2004, Belgrade Centre for Human Rights, Belgrade, 2005

Report 2005 – Human Rights in Serbia and Montenegro 2005, Belgrade Centre for Human Rights, Belgrade, 2006

RTS – Radio Television of Serbia

SaM – Serbia and Montenegro

SDP – Sandžak Democratic Party

Serbia – Republic of Serbia

Serbian Constitution – Constitution of the Republic of Serbia of 28 September 1990

SFRY – Socialist Federal Republic of Yugoslavia

Sl. glasnik RS – Službeni glasnik Republike Srbije (Official Gazette of the Republic of Serbia)

Sl. list RCG – Službeni list Republike Crne Gore (Official Gazette of the Republic of Montenegro)

Sl. list SCG – Službeni list Srbije i Crne Gore (Official Gazette of Serbia and Montenegro)

Sl. list SRJ – Službeni list Savezne Republike Jugoslavije (Official Gazette of the Federal Republic of Yugoslavia)

Sl. glasnik SRS – Službeni glasnik Socijalističke Republike Srbije (Official Gazette of the Socialist Republic of Serbia)

SPC – Serbian Orthodox Church

SPS – Socialist Party of Serbia

SRS – Serbian Radical Party

UN – United Nations

UN doc. – United Nations document

UNESCO – United Nations Educational, Scientific and Cultural Organisation

UNHCR – United Nations High Commissioner for Refugees

Universal Declaration – Universal Declaration of Human Rights, UN General Assembly resolution 217 A (III) of 10 December 1948

UNMIK – United Nations Interim Administration Mission in Kosovo

Venice Commission – European Commission for Democracy through Law

VJ – Army of Yugoslavia

W.W.II – Second World War

YUCOM – Lawyers Committee for Human Rights

Preface

The Belgrade Centre for Human Rights has been publishing its synthetic and comprehensive report on the state of human rights in the country for nine years now. The purpose of this Report is to present and assess the constitutional and legal provisions related to human rights. All international documents binding on the State Union of Serbia and Montenegro remain binding on Serbia, as its legal successor. These include treaties by which the state has committed itself to respecting and ensuring the respect for human rights. This is why the analysis focused on establishing the extent to which the local legislation is in conformity with the standards in the two most important universal international treaties adopted by the United Nations and ratified by the state – the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. When Serbia and Montenegro joined the Council of Europe, Serbia assumed the obligation to conform its legislation to the European Convention on Human and the jurisprudence of the European Court of Human Rights.

Report 2006 is divided into three sections. The previous annual reports included a chapter presenting the results of the survey of public awareness of human rights. The survey was not conducted in 2006 because the Belgrade Centre for Human Rights had not obtained financial aid for the Report and could not afford the survey..

Section I analyses and explains in detail the legal provisions related to human rights. It analyses the constitutional provisions, the most relevant valid laws and specific decrees that may impact on the full enjoyment of human rights. This part of the Report also comments on certain important laws that are yet to come into force and draft laws related to human rights. The relevant provisions in the national laws are compared with Articles in the UN Covenants and the European Convention on Human Rights and interpretations provided by the UN Committees and the European Court of Human Rights in their practice. In their analyses of the laws in force, the authors of the Report have used the terminology used in the laws, some of which is obsolete. For instance, some laws mention Yugoslav nationals, others the borders of Serbia and Montenegro. These laws, adopted either at the federal, State Union, or republican levels, have not been amended to reflect the new circumstances.

Section II of the Report is devoted to the actual enjoyment, restrictions or violations of human rights guaranteed by international treaties and the Constitutions and laws of Serbia. BCHR associates have systematically monitored media and reports of international and local NGOs, but have presented only data indicating abuse

of specific rights. The Report does not offer final assessments; rather, it presents data published by the media and in human rights reports. Discrimination was elaborated in greatest detail in the section on minorities, while trials of defendants accused of political assassinations and war crimes were addressed in the section dealing with the right to life.

Section III elaborates topics warranting special attention. Like in the earlier Reports, the authors chose the topics on the basis of their strong political implications and effects on the state of human rights in the country.

The Report was composed by the following associates of the Belgrade Centre for Human Rights and Human Rights Action: Igor Bandović, Dina Dobrković, Bojan Đurić, Vidan Hadži-Vidanović, Ana Jerosimić, Jelena Jolić, Marko Karadžić, Anđelka Marković, Marko Milanović, Damir Milutinović, Jovan Nicić, Gazmend Nuši, Vesna Petrović, Ivan Protić, Duška Tomanović, Ružica Žarevac i Jovana Zorić. They were assisted by Marko Protić, Jovana and Ana Penezić and Tamara Protić.

Introduction

Serbia entered 2006 as a member-state of the State Union of Serbia and Montenegro (SaM) that replaced the Federal Republic of Yugoslavia in 2003.[1] The SaM, the member-states of which had never fully amended their laws in compliance with the main SaM documents, the Constitutional Charter and the Charter on Human and Minority Rights and Civil Liberties, was dissolved after most of Montenegro's citizens voted for the republic's independence on 21 May 2006.

Serbia thus again became an independent state for the first time since 1918 although its population did not have any say on the issue. Montenegro's departure was one of the last effects of the fatal choice most of Serbia's citizens made in the late 1980s, when they supported Milošević: one after another, all the federal units of the then Yugoslavia broke away from Serbia, the government of which had tried to maintain the illusion of Yugoslavia as long as it could. In 2006, it was the turn of the Montenegrin leadership, mostly comprising Milošević's former close political allies, the same ones with whom he had in the nineties launched armed conflicts in the attempt to seize territory.

The right of centre government that came to power in Serbia in early 2004 with the support of Milošević's once omnipotent Socialist Party of Serbia (SPS) was all but ready for Montenegro's independence. Consciously or unconsciously, it made no moves to hold on to any of the normative enactments of the former State Union. Its omission to incorporate the Charter on Human and Minority Rights and Liberties in Serbia's normative system was the most glaring flaw it made in terms of human rights. Until the new Constitution of Serbia was adopted on 8 November 2006, only the meagre articles on human rights in the 1990 Serbian Constitution were in force in Serbia after SaM disintegrated.

As all historical opportunities to replace the 1990 Constitution, adopted at the climax of Milošević's popularity, by convoking a constitutional assembly after the democratic changes in 2000 had been missed, the authorities were forced to apply the difficult amendment procedure envisaged by the Milošević Constitution. Under the procedure, the draft Constitution had to win two-thirds parliamentary support, be upheld by over 50% of Serbia's electorate at a referendum, and then be promulgated by a qualified majority in the Assembly. This feat was carried out in the following manner: the National Assembly unanimously approved the draft Con-

1 The main features of the political, legal and social development in Serbia are given in the Introductions to the Belgrade Centre for Human Rights 1998, 1999, 2000, 2001, 2002, 2003, 2004 and 2005 Annual *Reports* on Human Rights in Yugoslavia (subsequently in Serbia and Montenegro).

stitution at its 30 September session; the draft was upheld by the necessary majority at a two-day referendum on 28–29 November and the Assembly promulgated the Constitution on 8 November.

The feat entailed a large number of major political and moral compromises. Although various draft constitutions drawn up by political parties, NGOs, expert groups and individuals[2] had been presented in Serbia over the years, the final draft was designed behind closed doors by two experts, one of whom represented the Government and the other the President of Serbia. Who, if anyone, had helped them and whom, if anyone, they consulted remains unknown. The National Assembly did not even hold a debate on the draft – the general impression is that the vast majority of deputies voted for the draft without even having read it. The referendum on the draft Constitution simply had to succeed. Although referenda and elections in Serbia are normally held one day, this plebiscite lasted two days. As the second voting day was about to end, it appeared that the 50%+1 turnout requirement would not be fulfilled. Moreover, the electoral rolls did not include the names Kosovo Albanians, who had boycotted all elections and censuses in Serbia in the past twenty years. Their inclusion in the electoral rolls would have considerably increased the already steep 50%+1 turnout requirement.

The impression, yet to be corroborated by insight in documents, is that both the democratic political elite in Serbia and the international community personified by international organisations active in Serbia were for overcoming the obstacle set by the former Constitution. To muster the qualified majority in the Assembly, concessions had to be made to the extreme rightists, above all the Serbian Radical Party (SRS), which held nearly one-third of the seats in parliament. The numerous irregularities were ignored. Many had also gained the impression that even the local and foreign observers had not monitored the referendum with the alacrity they usually demonstrate when observing 'ordinary' elections.

The most manifest concession made to the nationalist right is evident in the very Preamble to the Constitution, according to which:

> Considering the state tradition of the Serbian people and equality of all citizens and ethnic communities in Serbia, and
>
> Considering that the Province of Kosovo and Metohija is an integral part of the territory of Serbia, that it has the status of a substantial autonomy within the sovereign state of Serbia and that the constitutional obligations of all state bodies to uphold and protect the state interests of Serbia in Kosovo and Metohija in all internal and foreign political relations derive from this status of the Province of Kosovo and Metohija,

This tendency is visible by a mere comparison of the operational provisions in the 2006 and 1990 Constitutions. Serbia is no longer a state of all its citizens but

2 Including the Belgrade Centre for Human Rights, see *Ustavna rešenja za Srbiju i Jugoslaviju – Constitutional Reform in Serbia and Yugoslavia*, Beograd, 2001.

a "state of the Serbian people and all citizens living in it" (Art. 1). Under the new Constitution, only the Cyrillic script shall be in official use (Art. 10). In these respects, the new Constitution is more "national" than the Milošević one.

With respect to provisions on human rights, the 2006 Constitution is doubtlessly a step backward from the Constitutional Charter of Serbia and Montenegro, if for no other reason than because many of them have been formulated ambiguously and ineptly. In terms of human rights, the Constitution is more comprehensive and modern than Milošević's; it was, however, too early to assess its effects by the time this Report went into print. The interpretation of these provisions in practice shall be of major importance in view of their lack of clarity and ambiguities.

Parliamentary elections were called for 21 January 2007 as soon as the new Constitution was adopted. The new parliamentarians and the government they vote in will have to face most of the problems, which the outgoing authorities and political elite could not or would not resolve. Two of them are interlinked: in May 2006, the EU suspended Stabilisation and Association Agreement talks with Serbia (SaM at the time) because the Serbian authorities had failed to extradite one of the main ICTY indictees, former Bosnian Serb army commander Ratko Mladić. The government's expectations that the talks would continue even if it did not hand Mladić over to The Hague fell through, because it was yet again proven that Mladić had been in Serbia and free at the time the authorities were claiming they could not find him.

Another major and traumatic outstanding issue is the fate of Kosovo and Metohija. Under UN Security Council Resolution 1244 that ended the NATO air strikes on Yugoslavia in 1999, Kosovo and Metohija is still legally a part of Serbia although under international administration, wherefore Serbian authorities exercise no real powers there.[3] The international community started taking decisive steps towards definitely resolving the Kosovo issue in late 2005, when it decided to open talks on Kosovo's final status. The UN Secretary General appointed former Finnish President Martti Ahtisaari his special representative and charged him with mediating between the authorities in Serbia and the representatives of the provisional Kosovo institutions controlled by the Kosovo Albanians and proposing a solution acceptable to both sides. No rapprochement was achieved at the meetings between Belgrade representatives and the Kosovo Albanian leaders. Ahtisaari is expected to present his plan for the resolution of the Kosovo issue in early 2007. His proposal is to help the Contact Group, comprising representatives of the major world powers, and, ultimately, the UN Security Council reach a decision on Kosovo's final status.

Serbia's NGOs, which had been generally commended for democratising the country (a view not shared by all of the country's political elite), operated in better circumstances than before 2000, albeit a modern law regulating the status of civil

3 See III.4.

society organisations still had not been adopted by the end of 2006 although work on a draft law on NGOs began in 2001 (and the authorities in 2006 brought in the representatives of the stakeholders to take part in the drafting). As the nationalist right increased its influence, the media anti-NGO campaign gained in momentum, targeting advocates of human rights and cooperation with the ICTY. Just like before 5 October 2000, they were again accused of betraying the nation and "unpatriotic" cooperation with foreign organisations.

Summary

Legal Provisions Related to Human Rights

1. The state of human rights in Serbia was largely affected by the turbulent political events that marked 2006. The dissolution of the State Union of Serbia and Montenegro caused quite a turmoil in the legal systems of the two former member-states. Although Serbia is the legal successor of the State Union under the Constitutional Charter as Montenegro had left the State Union, the issue of former SaM legislation should be regulated by law to ensure legal security. Such a law ought to precisely regulate the transfer of powers from the former State Union to the bodies of the Republic of Serbia. In addition, such a law ought to clearly state which former SaM laws are no longer valid (some have become meaningless when the State Union and its institutions dissolved) and which will apply in Serbia and to what extent. A draft law regulating these issues was submitted to the National Assembly in June 2006, but was not adopted by the end of the year. Some of these issues were partly regulated by the National Assembly Decision on the Obligations of the State Bodies of the Republic of Serbia Regarding the Exercise of Powers of the Republic of Serbia as the Successor of the State Union of Serbia and Montenegro and the Government Decree on the Status of Specific SaM Institutions and Services.

2. In terms of human rights, the question of whether the Charter on Human and Minority Rights and Civil Liberties would apply in Serbia arose as one of the main problems after the dissolution of the State Union. This issue was regulated by the above-mentioned draft law, although not well, as the draft states that only the Charter provisions in compliance with the Constitution of the Republic of Serbia shall be applied. Under the draft, if the Constitution prescribes a lower degree of protection of a specific right than the Charter, the rights acquired while the Charter was in effect are no longer guaranteed. The new Constitution of the Republic of Serbia, adopted in late 2006, includes a catalogue of human rights which largely coincides with, but is not identical to, the catalogue of rights that had been guaranteed under the Charter.

3. The administrative, appellate and misdemeanour courts were to have begun operating on 1 January 2007. However, these courts were not established by the end of the year; the draft law submitted to parliament for adoption in June 2006 and moving the deadline to June 2007 had not been adopted. Therefore, these courts will not be able to begin work on time. The unclear and general provisions of the Constitutional Act on the Implementation of the Constitution allow for postponing

the establishing of the new courts again; this will additionally put off the reform of the judicial system, a prerequisite for improving the court protection of human rights.

4. The new Constitution introduces in the legal system of Serbia the institute of constitutional appeal as a human rights protection mechanism. The effectiveness of this legal remedy may, however, be brought into question if the Constitutional Court is established with delay, which is not inconceivable given the extremely complicated procedure for appointing judges to this Court.

5. Legislation of Serbia does not envisage an effective legal remedy against unreasonably long trials, i.e. violations of the right to a trial within reasonable time guaranteed by Article 6 (para. 1) of the European Convention on Human Rights. This remains one of the chief problems Serbia's courts face with respect to the right to a fair trial. The Supervisory Board within the Supreme Court of Serbia is authorised insight in cases not resolved within reasonable time, but it is not empowered to award compensation of damages.

6. With respect to the freedom of association, Serbia again failed to pass a law on associations of citizens in 2006 and legal insecurity still characterises the work of national and international NGOs.

7. There are still no laws on the opening of state security files, an issue of relevance in terms of the right to privacy. Notwithstanding frequent declarations of the will to address this issue, political elites are still not ready to begin seriously regulating it, although it has greatly burdened the country's public and political life and allowed for manipulations. The Serbian Government 2001 Decree allowing insight in the secret files was declared unconstitutional. However, opening of secret files infringes on the very essence of the right to privacy and ought to be regulated by law, not by decrees. Such a law also needs to reconcile two extremely important needs of Serbia's society – to confront the totalitarian past and rectify the effects of serious human rights violations and simultaneously protect the right to privacy and other important individual rights.

8. Legal regulation of the responsibility of people who had violated human rights in the past is closely linked to insight in state security files. The Serbian law on lustration (Act on the Responsibility for Violations of Human Rights) that was adopted in 2003 has not been implemented at all. Instead of vetting the judiciary in accordance with this Act, the Constitutional Act on the Implementation of the New Constitution envisages the re-election of all judges in Serbia.

9. Other segments of the security services have not been reformed either. Their work is regulated by anachronous provisions not providing for real and serious oversight. In addition, the question of implementing former SaM regulations on security services arose after the dissolution of the State Union. Serbia currently has five security services. Four are working within the Ministries of Defence and Foreign Affairs, which have not been incorporated in the republican legal system, and

are operating in accordance with interim regulations until a law on them is passed. Such a law was not passed by end 2006 for political reasons.

10. Two laws relating to the church were passed in 2006. The Act on Churches and Religious Communities affords religious communities an extremely high degree of autonomy, but many of its provisions violate the principle of separation of the church and the state. Moreover, although it declares that all religious communities are equal, the Act does not abide by that principle and divides the religious communities into four groups; the so-called traditional churches enjoy the most favoured status. As per the Act on the Restitution of Property to Churches and Religious Communities, its main flaw is that it puts religious communities in a more favourable position vis-à-vis other, notably, natural persons, whose property the state had taken away on various grounds.

11. The adoption of the Act on Prevention of Discrimination against Persons with Disabilities ought to be commended. Serbia, however, still lacks a general anti-discrimination law defining the main legal terms, rules and standards binding on the courts and special mechanisms for protecting victims of discrimination.

Human Rights in Practice

1. Substandard performance of institutions charged with protecting human rights still hinders the protection and realisation of human rights. The public prosecutors rarely spoke up when human rights violations occurred; the police investigations of such breaches were long and failed to yield satisfactory results. Court proceedings, too, lasted unreasonably long.

2. There is an impression the executive branch often interferes in the work of the judiciary and legislature and influences some court decisions and legislation, that the laws being adopted are the fruit of a compromise of political parties, not part of the adopted strategies for reforming the legal and economic systems. The laws are thus applied with greater difficulty, exacerbating the citizens' legal insecurity.

3. The failure to try perpetrators of human rights violations committed in the past and the lack of willingness amongst state bodies to investigate and shed light on grave human rights breaches during Milošević's regime and the wars in the former Yugoslavia are the greatest obstacles to instilling democratic values in the society and establishing rule of law. Apart from the Special Prosecutor for War Crimes, other Serbian state bodies appear totally disinterested in addressing these issues and punishing all perpetrators of these grave crimes. Quashing first-instance convictions for war crimes and ordering retrial by the Supreme Court has become a rule rather than an exception.

4. The fight against organised crime is not as fierce as it should be. Judicial institutions prosecuting organised crime have been exposed to political abuse and pressure, as monitoring and analyses of organised crime and war crime trials testify.

5. Torture is often applied to obtain information in investigations. Investigations and criminal proceedings against police officers reasonably suspected of torture are rare. Those found guilty of torture usually receive extremely mild sentences. Many of the proceedings are discontinued because the cases are prolonged until the absolute statute of limitations expires. The authorities' attitude to torture and humiliating treatment has not changed much; internal audits and inspectorial supervision in the Ministry of Internal Affairs have not yielded satisfactory results. The situation in Serbia's prisons is alarming. Inmates staged several prison rebellions in 2006.

6. The competent state bodies in 2006 showed appalling indolence by failing to make proposals and decisions to ensure the smooth work of the courts and prosecutors. The Constitutional Court, for instance, was left without its President when he fulfilled the legal conditions for retirement in early October. The work of the Court is now blocked as it cannot meet and reach decisions. On the other hand, two of the highest prosecutors in the country, the Republican Public Prosecutor and the Belgrade District Prosecutor, have continued working for months although they, too, had fulfilled the legal retirement conditions. Candidates for these offices were not nominated by the end of 2006; all this has greatly obstructed the legal functioning of the Serbian judiciary.

7. Tolerance of discrimination is above all reflected in the inefficient prosecution and punishment of the perpetrators. State bodies are prone to either minimising the significance of the cases of discrimination, which the public hears about mostly thanks to the courage of individuals and reports by media and NGO, or denying that discriminatory motives lie at the root of the violence and other forms of discrimination. Roma were again the greatest victims of discrimination in 2006.

8. The Broadcasting Agency Council in 2006 allocated the most important radio and television frequencies. The process has been flawed from the outset, due to the questionable manner in which the Council members were elected, doubts about their credibility and impartiality, and frequent, urgent and usually furtive amendments to the Broadcasting Act. It remains unclear which criteria the Council used to assess which applicants had fulfilled the requirements, why the same circumstances were taken as a drawback in the case of some applicants and tolerated in case of others. Suspicions were also voiced about the Council denying frequencies to at least two TV stations because the executive authorities qualified their owners as tycoons. The fact that the credibility of this supposedly independent regulatory body has been undermined for good is the gravest effect of such decision-making; doubts about the fairness of the procedure and the decisions it made will be very difficult to dispel.

9. Like in other countries undergoing political and economic transition, economic and social rights remained endangered the most. The situation in Serbia is somewhat specific because most attention had been devoted to the violations of civil and political rights, which had been systematically threatened for years; in re-

sult, economic, social and cultural rights have been sidelined. Trade unions and professional associations thus remain underdeveloped and untrained to efficiently alert to breaches of these rights and so pressure the executive and legislative authorities. The risk that economic and social rights will be seriously violated has increased because a new General Collective Agreement has not been adopted yet. The vulnerable individuals are thus at an even greater disadvantage vis-à-vis both the employers and the state, acting either in the capacity of employer or decision-maker on the country's economic transformation processes.

10. The European Court of Human Rights passed its first judgment on a case against Serbia in 2006. In the Matijašević case, the Court found Serbia had violated its obligations in the European Convention on Human Rights because it did not respect the presumption of innocence.

I
LEGAL PROVISIONS RELATED TO HUMAN RIGHTS

1. Human Rights in the Legal System of Serbia

1.1. Introduction

The present report reviews the legislation of Serbia, covering the civil and political rights guaranteed by international treaties to which Serbia is a party, in particular the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights and Fundamental Freedoms (ECHR) and its Protocols and with the standards established by the jurisprudence of the European Court of Human Rights (ECtHR).[4] Standards established by other international treaties dealing in greater detail with specific human rights, such as the UN Convention against Torture and the Convention on the Rights of the Child, are also reviewed.

The Report deals with the entire Serbian legislation relevant to each of the rights reviewed, going beyond the actual text of the law to include judicial interpretation where it exists. The following elements are used to evaluate the conformity of the legislation with international standards:

– whether a particular right is guaranteed;

– if so, how it is formulated in national legislation and to what extent the formulation differs from that contained in the ICCPR and ECHR;

– whether the right is defined in national legislation and its interpretation by the state authorities carries the same meaning and scope as the ICCPR and ECHR;

– whether the restrictions on rights envisaged by Serbian law are in accordance with the restrictions allow by ICCPR and ECHR;

– whether effective legal remedies exist for the protection of a right.

4 The State Union of Serbia and Montenegro ratified the ECHR on 26 December 2003. SaM was admitted to the CoE on 3 April 2003. See more on www.press.coe.int/cp/2003/178a(2003).htm.

Since this report was produced in 2006, it reviews only legislation that was in effect on 31 December of that year although it also comments and mentions laws taking effect in 2007.

1.2. Constitutional Provisions on Human Rights

The year 2006 was quite tumultuous in terms of the constitutional protection of human rights in Serbia. It was marked by the disintegration of the State Union of Serbia and Montenegro (SaM) in May, which brought into question the validity of the Human Rights Charter, and the adoption of the new Constitution of the Republic of Serbia later in the year.

Until SaM broke up, the Charter on Human and Minority Rights and Civil Liberties (HR Charter), a composite part of the SaM Constitutional Charter, was the highest legislation in the State Union, and all other laws, including the member states' Constitutions, had to be in accordance with the Charter. Unfortunately, the member states had failed to harmonise their legislation with the Charter. The HR Charter provided a much better catalogue of human rights than the 1990 Constitution of Serbia, which was still in force at the time the State Union dissolved.[5] Hence, when the State Union disintegrated, the question arose which catalogue would apply to the citizens of Serbia. This issue has actually never been resolved. The draft law, under which SaM laws, including the HR Charter, would remain in effect in Serbia, submitted by the Serbian Government in July was never adopted. Had it been, the Charter would have ranked as a law of the Republic of Serbia, i.e. it would not have had the legal effect of the Constitution and would therefore have had to be harmonised with the Constitution. Moreover, the draft law even explicitly envisaged that the provisions of the Charter not in accordance with the Constitution would not be applied. This provision was, of course, problematic as the 1990 Constitution regulated human rights in a much more restrictive fashion than the Charter, wherefore much of the Charter could have been qualified "as not in accordance with the Constitution" and citizens would have enjoyed less human rights protection.

This problem was, however, to a large extent addressed by the adoption of the new Constitution of the Republic of Serbia. Notwithstanding all the criticisms of the manner in which it was adopted,[6] the new Constitution includes a more modern and extensive catalogue of human rights than the old Constitution and many of

5 The HR Charter represented great progress in the field of normative regulation of human rights. The final draft of the Charter was evaluated as "excellent" by the CoE European Commission for Democracy through Law (the Venice Commission). See Venice Commission for Democracy Through Law, "Comments on the Draft Charter on Human and Minority Rights and Civil Liberties" (Opinion No. 234/03), by Mr Jan E. Helgesen of 2 April 2003 on www.venice.coe.int/docs/ 2003/CDL(2003)010fin-e.html.

6 More on the adoption of the Constitution in III.1.

the HR Charter provisions. However, probably because of the speed with which it was adopted or for other reasons, some human rights provisions in the new Constitution are deficient or ambiguous, while others, enshrined by the HR Charter, have been left out.[7] It remains unclear why the authors of the Constitution had decided against a more straightforward incorporation of the Charter provisions, some of which had needed merely slight improvement, given the excellent expert appraisal of the Charter and the fact that it had already been applied in Serbia for three years. The Constitution, however, leaves room for correcting some shortcomings in provisions on human rights in practice. Under Article 18 (3), provisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards regarding human and minority rights, as well as the practice of international institutions supervising their implementation.[8] This implies that the views of the e.g. ECtHR or UN Human Rights Committee must be taken into account when interpreting human rights provisions. It may be presumed that an interpretation taking into account views of international human rights protection bodies (which is the obligation of those interpreting these provisions under the Constitution) will be to the benefit of promoting human rights. Although the Constitution contains better provisions on human rights than its predecessor, its legitimacy nontheless remains dubious given the absence of public debate prior to its adoption.

1.3. International Human Rights and Serbia

Serbia is bound by all international human rights treaties ratified by the former SFRY, FRY and SaM.[9]

Under the new Constitution of Serbia, the generally accepted rules of international law and ratified international treaties shall be an integral part of the national legal system and applied directly (Art. 16 (2)). In addition, Article 18 prescribes the direct application of human and minority rights guaranteed by the generally accepted rules of international law and ratified international treaties.

The Constitution, however, includes a disputable provision that places international treaties above laws but below the Constitution in the hiearchy of legislation as it stipulates the compliance of the ratified international treaties with the

7 The human rights provisions in the new Constitution are analysed within the section on individual human rights.

8 See Ružica Žarevac, "Pitanje poverenja i prakse", *Evropski forum* br. 10 (*Vreme* No. 825 of 26 October 2006).

9 In the view of the Human Rights Committee, all states that emerged from the former Yugoslavia would in any case be bound by ICCPR since, once a human rights treaty is ratified, the rights enshrined in it belong to the persons in the jurisdiction of a state party irrespective of whether it subsequently dissolved into more states. See para. 4, General Comment No. 26 (61) on issues relating to the continuity of obligations under the ICCPR, *Committee on Human Rights*, UN doc. CCPR/C/21/Rev.1/Add.8, 8 December 1997.

Constitution (Art 16 (2), Article 194 (4)). Therefore, international treaties that had previously been in force can now not be applied unless they are in accordance with the new Constitution. A state cannot withdraw from the obligations it had accepted under an international treaty by amending national legislation, even the Constitution. The question, therefore arises, of what the practical effects will be if a a ratified international treaty actually is not in accordance with the Constitution. As per international treaties Serbia is yet to accede to, they cannot be ratified if they are not in compliance with the Constitution.

It should be noted, however, that the Constitution stipulates the compliance of only "ratified international treaties" with the Constitution, but does not set these conditions for generally accepted rules of international law, which it explicitly qualifies as part of Serbia's legal order.

The former Yugoslavia ratified all the major international human rights treaties, including the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination, International Convention on the Elimination of Discrimination against Women, Convention on the Rights of the Child, Convention on the Prevention and Punishment of the Crime of Genocide, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see Appendix I). State bodies and courts in Serbia have, however, given small attention to international human rights guarantees.

In 2003, the SaM presented the first reports after the 2000 democratic changes to the UN treaty bodies – the reports under ICCPR[10] and the International Covenant on Economic, Social and Cultural Rights.[11] The Human Rights Committee adopted its Concluding Observations on the implementation of ICCPR in SaM in July 2004.[12] The Report of the Committee on Economic, Social and Cultural Rights on the implementation of the ICESCR in Serbia and Montenegro was published in May 2005.[13]

Serbia also recognises the competence of the Committee against Torture to receive and consider individual communications and communications by states parties under Articles 22 and 21, respectively, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. SaM ratified the Optional Protocol to the Convention against Torture, establishing an efficient system of monitoring prison and detention units, in December 2005.[14] On 22 June 2001, the FRY ratified both the Optional Protocol to the International Covenant on Civil and

10 CCPR/C/SEMO/2003/1.

11 E/1990/5/Add.61.

12 CCPR/CO/81/SEMO.

13 E/C.12/1/Add.108. HRC took into consideration alternative reports submitted by some national and international NGOs.

14 *Sl. list SCG (Međunarodni ugovori*), 16/05.

Political Rights – thereby making it possible for individuals to submit communications to the Human Rights Committee – and the Second Optional Protocol to the Convention abolishing the death penalty.[15]

On 7 June 2001 FRY made the declaration recognising the competence of the Committee on the Elimination of Racial Discrimination to receive and consider individual and collective complaints alleging violations of the rights guaranteed by the Convention on the Elimination of All Forms of Racial Discrimination.[16]

The new Constitution introduces the institute of constitutional appeal for the protection of human rights that shall be considered by the Constitutional Court; it, however, mentions only the protection of rights guaranteed by the Constitution but not those enshrined in international treaties as well.[17]

On 26 December 2003, SaM ratified the ECHR and the 13 Protocols thereto. The ECHR came into force on 4 March 2004. Protocols No. 1 and 4 to the ECHR came into force the same day. Protocol No. 6 came into force on 1 April 2004 and Protocol No. 7 on 1 June 2004, while Protocol No. 13 came into force on 1 July 2004. Protocol No. 12 came into force on 1 April 2005. Serbia and Montenegro also ratified Protocol No. 14 (*Sl. list SCG*, 5/05), but it will come into force only upon ratification by all the ECHR Contracting Parties.

SaM had placed reservations reservations relating to mandatory detention (envisaged by Article 142 (1) of the Serbian CPC), public hearings of administrative disputes in Serbia and certain provisions of the member-states' laws on misdemeanours.[18] When acceding to the ECHR, SaM had placed a reservation on Article 13 ECHR until the SaM Court began operating. A law was in the meantime adopted allowing for the withdrawal of the reservation.[19] The reservation regarding mandatory detention is also no longer in effect.[20]

The Decree on SaM's Agent before the European Court for Human Rights in Strasbourg was adopted in early 2005.[21] The Decree regulates the appointment and dismissal procedures and the powers and actions of the Agent. Slavoljub Carić was appointed Agent.[22]

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15 *Sl. list SRJ* (*Međunarodni ugovori*), 4/01.

16 Multilateral Treaties Deposited with the Secretary-General of the United Nations www.untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapter IV/treaty2.asp.

17 More in I.2.2.

18 *Sl. list SCG (Međunarodni ugovori)*, 9/03.

19 The Act Amending the Act on the Ratification of the European Convention on the Protection of Human Rights and Fundamental Freedoms, *Sl. list SCG* (*Međunarodni ugovori*), 5/05.

20 More on SaM reservations on the ECHR at http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?PO=SAM&NT=&MA=44&CV=0&NA=&CN=999&VL=1&CM=5&CL=ENG.

21 *Sl. list SCG*, 7/05.

22 SaM Council of Ministers Decision on Appointment of SaM's Agent before the European Court for Human Rights, *Sl. list SCG*, 37/05.

The SaM Parliament on 26 December 2003 also ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[23] This Convention came into force on 1 July 2004. The Committee for the Prevention of Torture visited Serbia and Montenegro in September 2004 and submitted its report to the authorities. The Assembly of Serbia and Montenegro ratified the European Charter for Regional and Minority Languages on 21 December 2005.[24]

2. Right to Effective Legal Remedy for Human Rights Violations

2.1. Ordinary Legal Remedies

The right to an effective legal remedy is protected by Articles 22 and 36 of the new Constitution of Serbia. The articles are almost identical to the corresponding provisions in the former SaM Charter on Human and Minority Rights. Article 22 regulates the right to judicial protection:

> Everyone shall have the right to judicial protection in case any of their human or minority rights guaranteed by the Constitution have been violated or denied and the right to elimination of the consequences of such a violation.
>
> The citizens shall have the right to address international institutions to protect their freedoms and rights guaranteed by the Constitution.

Article 36 envisages equal protection of rights and the right to a legal remedy:

> Equal protection of rights in proceedings before courts, other state bodies and organisations exercising public powers and provincial or local self-government bodies shall be guaranteed.
>
> Everyone shall have the right to appeal or to another legal remedy against any decision on his/her rights, duties or lawful interests.

On the other hand, the new Constitution introduces the institute of constitutional appeal in Serbia's legal system for the first time. These provisions allow the Constitutional Court to always have the final say on individual human rights violations.

With respect to the criminal procedure, the National Assembly passed a new Criminal Procedure Code (*Sl. glasnik RS*, 46/06, hereinafter "the new CPC"). In

23 *Sl. list SCG (Međunarodni ugovori)*, 9/03.

24 *Sl. list SCG (Međunarodni ugovori)*, 18/05.

accordance with Article 555 of the new CPC, it will come into effect on 1 June 2007. Until then, the old CPC (*Sl. list SRJ*, Nos. 70/01 and 68/02 and *Sl. glasnik RS*, Nos. 58/04, 85/05 and 115/05, hereinafter "the old CPC") will remain in force.

Both the old and new CPCs allow for initiating criminal proceedings regarding specific crimes by private citizens, whereas the proceedings related to other criminal offences prosecuted *ex officio* may be launched only by the public prosecutor. In the latter case, only if the public prosecutor establishes no grounds for criminal prosecution may the injured party undertake prosecution (Art. 61, the old CPC). Unfortunately, the new CPC (Art. 60 (4)) includes an identical provision, wherefore injured parties may still be deprived of the right to launch criminal proceedings due to the negligence or bad faith of the public prosecutor.

The new CPC considerably alters the character of an extraordinary legal remedy – the request for the protection of legality – which the Republican Public Prosecutor may file with the Supreme Court if a final court decision is in violation of the law. The old CPC left this remedy wholly in the discretion of the public prosecutor, who has had absolute freedom to decide whether to file a request for the protection of legality or not. The discretionary character of this remedy automatically prevented its qualification as effective, i.e. it did not have to be exhausted by a person claiming a human rights violation before an international body, such as the European Court of Human Rights. The new CPC (Art. 438) radically alters the structure of the remedy and allows for appeal to the Supreme Court against the decision of the Republican Public Prosecutor not to file a request for the protection of legality. The Court shall uphold the appeal if it finds *probability of the obvious existence* of the grounds the accused is invoking and shall act as if a request for the protection of legality were lodged (Art. 438 (8 and 9), the new CPC). In practice, once the new CPC comes into effect, a person will have to file a request for the protection of legality before lodging a constitutional appeal with the Constitutional Court or a submission with an international body.

2.2. Constitutional Appeal

A constitutional appeal is a specific legal remedy, envisaged by the former FRY Constitution and the Montenegrin Constitution. The new Constitution introduces this remedy in Serbia's legal order for the first time. A constitutional appeal may be filed with the Constitutional Court against individual enactments or actions of state bodies or organisations exercising public authority and violating or denying human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have been exhausted or do not exist (Art. 170 of the Constitution). Article 170 does not mention protection of rights guaranteed under international treaties by constitutional appeal; this is in contravention of Article 18 (2) of the Constitu-

tion, under which the Constitution shall guarantee and directly apply human and minority rights enshrined in international law. Such a provision would have ensured protection before the Constitutional Court also of those human rights, notably economic and social rights that are not guaranteed by the Constitution, such as the rights to water, food or adequate living conditions.

A constitutional appeal cannot be filed against human rights violations caused by general statutes (laws, decrees et al) even if they *per se* directly violate the human rights enshrined in the Constitution. Such statutes can be contested only by motions for the review of their constitutionality or legality, which the Constitutional Court need not uphold (Art. 168 of the Constitution). The Constitution introduces the possibility of abstract control of constitutionality initiated by a motion for the review of the constitutionality of a law before it comes into effect; such an initiative must be launched by at least a one-third of the national deputies (Art. 169). These various procedures for abstractly controlling the constitutionality of legal statutes cannot *per se* be considered effective legal remedies for specific and individual human rights violations.

The jurisprudence of the former Federal Constitutional Court demonstrated that the institute of constitutional appeal envisaged by the FRY Constitution was wholly ineffective as the Court had dismissed constitutional appeals in case any other form of legal protection was formally envisaged by the law.[25] The new Constitution substantially alters the requirement regarding the admissibility of a constitutional appeal by prescribing that it may be filed if other legal remedies for the protection of human rights "*have been exhausted* or do not exist" (Art. 170). This provision allows for the lodging of a constitutional appeal after the exhaustion of all other effective legal remedies, and renders the Constitutional Court the highest instance ruling on human rights violations before the alleged victims complain to international bodies.

All formal requirements have thus been fulfilled for the constitutional appeal to become a real effective legal remedy and for the appeal to the Constitutional Court of Serbia to become prerequisite to addressing the European Court of Human Rights. The authorities are, however, also to provide the Constitutional Court with all it needs to operate successfully. The effectiveness of the constitutional appeal will ultimately depend on the Court's practice. The extremely complicated procedure of appointing Constitutional Court judges and the badly formulated and confusing provisions in the Constitutional Act on the Implementation of the New Constitution, which fail to define precise deadlines for the appointment of judges, however, give some rise to concern. This may lead to unjustified delays in the establishment of the new Constitutional Court.

25 See e.g. decision U.ž. No. 21/95, Federal Constitutional Court Decisions and Resolutions, 1995, p. 265.

2.3. Ombudsperson[26]

The institute of ombudsperson has to date been established at three levels in the Republic of Serbia: at the state level, at the level of the Autonomous Province of Vojvodina and at the local self-government level. In addition to ombudspersons with general jurisdiction, an ombudsperson with special jurisdiction is to be established soon in Serbia as the Ministry of Labour, Employment and Social Policy submitted to the National Assembly a draft Act on the Protector of the Rights of the Child. The draft Act on Prohibition of Discrimination against Persons with Disabilities had also initially foreseen an ombudsperson for the protection of rights of persons with disabilities but these provisions were left out of the final version of the law.

The introduction of the institute of ombudsperson in a legal system is preceded by its constitutional or legal regulation. The ombudsperson was introduced at different levels in Serbia by law or under decisions of competent authorities and regulated at the constitutional level for the first time by the 2006 Constitution. The idea to partly regulate the institute by Constitution as well is a good one, as the ombudsperson can thus draw on the authority and legal force of the highest law of the state. On the other hand, the Constitution has failed to ensure the future Ombudsperson the best guarantees of independence and status.

The lack of provisions on the ombudsperson in the previous Constitution had inevitably led to questions about his status in republican legislation. The proposer of the republican law, the Ministry of State Administration and Local Government disregarded legal experts' opinions and did not stipulate the election of the ombudsperson (Protector of Citizens) by an absolute or qualified majority, but merely by a relative majority of votes in the Assembly. The authors of the law argued that the then Constitution explicitly listed what issues the Assembly had to adopt by a qualified majority and, as the ombudsperson was not mentioned amongst them, they were not willing to submit an unconstitutional law for adoption. Unfortunately, either intentionally or unintentionally, the new Constitution does not rectify this shortcoming and does not stipulate a special qualified majority for the election of the Ombudsperson at the level of the Republic of Serbia.

2.3.1. Ombudsperson at the Level of the Republic of Serbia. – The National Assembly of the Republic of Serbia passed the Act on Protector of Citizens on 14 September 2005 (*Sl. glasnik RS*, 79/05). The Government accepted some of the recommendations made by international and non-governmental organisations, but

26 The ECtHR has taken the position that the ombudsman himself does not represent an effective legal remedy in terms of Article 13 of the Convention, because the ombudsman does not have the power to change or annul acts violating human rights. However, this institution can significantly contribute to the effectiveness of another legal remedy (see *Leander v. Sweden*, ECtHR, App. No. 09248/81 (1987)).

had in some areas deviated from specific key principles vital for ensuring the ombudsperson's independence and impartiality.[27]

On 7 April 2006, the Serbian Government endorsed the Plan for the Implemention of European Partnership Priorities. The section relating to the reform of the state administration lists as a short-term priority "implemention of legislation for the establishment of the Office of the Protector of Citizens", which will be in the purview of the Ministry of State Administration and Local Self-Government. The Plan sets out that it is necessary to elect the Protector of Citizens and his/her deputies, establish the office and provide the necessary prerequisites for it to begin work. The Government had earmarked 30,856 million dinars for the Office in 2006 budget. The Plan notes that talks are under way with the OSCE Mission in Serbia to support the founding and work of the institution of Protector of Citizens. Under the Plan, these activities were to have been implemented by the second quarter of 2006 or by the fourth quarter of 2006 at the latest.

Unfortunately, both the deadline in the Plan, and the deadline in the Act, under which the first Protector of Citizens was to have been elected within six months from the day the Act came into effect (Art. 39), were exceeded. Neither serious preparations nor consultations on the best candidate for the office were made by the time the deadline set by the Act expired on 24 March 2006. Under the Act, only MP caucuses are authorised to nominate a Protector of Citizens, which precludes NGOs, professional associations and other institutions from directly fielding candidates. The Constitutional Issues Committee of the Assembly upholds the nominees by a majority of votes and submits the candidacies to the Assembly.

The provision under which the Protector of Citizens is elected by a majority of deputies present at the session had met with serious and argumented criticism of international organisations and Serbian NGOs.[28] They were concerned that such manner of election would enable two or more political parties to elect a Protector of their choice through skilful politicial maneouvering. Such suspicions were corroborated already during the first attempt to elect the Protector. Be it due to the irresposibility of the parliamentary political parties, their disregard for the democratic importance of the institution of ombudsperson or insufficient preparations and con-

27 For a more detailed analysis of the Act, see *Report 2005*, I. 2.4, p. 42.

28 Broad Assembly consensus on the Protector of Citizens is vital in order to ensure public support for his or her independence and autonomy. As the Protector lacks significant powers and his or her decisions are not binding, his or her election by a majority of present deputies, rather than by a qualified or two-thirds majority, may bring his or her authority into question in the eyes of administrative bodies. Experts' recommendations that the nominee have the support of two thirds of the Constitutional Issue Committee member or even of both the Administrative and Constitutional Issues Committees. See similar recommendation in e.g. *Joint Opinion on the Draft Law on the Ombudsperson of Serbia by the Venice Commission*, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe, Opinion No. 318/2004, CDL-AD(2004)041, adopted on 6 December 2004. See also BCHR Comments at www.bgcentar.org.yu.

sultations, only one candidate, fielded by the Democratic Party of Serbia (DSS), was proposed at the Constitutional Issues Committee session on 3 April 2006. The session was attended only by the Committee members of the ruling parties, but not by the Committee members from the ranks of the SRS and the DS (the latter had been boycotting the parliament since October 2005). The DSS nominee won the majority of votes at the Committee session and the Committee asked the Assembly to vote on him in an urgent parliamentary procedure.

A group of 15 NGOs on 4 April expressed its dissatisfaction with the way the first candidate for the post of Protector of Citizens was fielded, maintaining that such election, without a debate or broader support from expert circles and the public, had seriously brought into question the independence and authority of the institution. The NGOs expressed doubts whether the candidate fulfilled all legal requirements for the job and reminded deputies it was vital for a state lacking strong democratic foundations to appoint to this office an impartial and independent candidate of high integrity and a flawless reputation. They appealed for the postponement of the election of the Protector and demanded that the nomination of candidates for the office be conducted in keeping with highest democratic standards and without delay. The DSS candidate withdrew his candidacy on 5 April and the Assembly Speaker invited all MP caucuses to nominate their candidates. The Protector was not elected by end of 2006. Under the Constitutional Act, the Protector of Citizens shall be elected at the first session of the Assembly to be convoked after the January 2007 parliamentary elections. In absence of any consultations with the civil sector, the public has no access to information on whether there are any candidates for the office and whether political parties have devoted enough attention to the election of the first ombudsperson.

2.3.2. Vojvodina. – The Autonomous Province of Vojvodina was entitled to independently establish and regulate the position and organisation of the provincial ombudsperson under the Act Establishing Particular Jurisdiction of the Autonomous Province of Vojvodina (Art. 56, *Sl. glasnik RS*, 6/02)[29] and the Vojvodina Statute.[30] At its 23 December 2002 session, the AP of Vojvodina Assembly adopted a Decision on the Provincial Ombudsperson[31] and on 24 September 2003 elected dr Petar Teofilović its first Provincial Ombudsman, who began processing complaints in mid-January 2004.[32] The Ombudsman is headquartered in Novi Sad and has two local offices in Subotica (as of 10 January 2004) and Pančevo (as of 10 January 2005).

The Vojvodina Ombudsman's 2006 report was not issued by the time this report went into print. The 2005 annual report was published in 2006.[33]

29 Article 56, *Sl. glasnik RS*, 6/02.

30 Article 21 (1.1).

31 *Sl. list AP Vojvodine*, 23/02, came into effect on 8 January 2003.

32 S*l. list AP Vojvodine*, 15/03.

33 See Provincial Ombudsman's 2005 Annual Report, Novi Sad, 2006.

The Decision on the Provincial Ombudsman provides a large number of guarantees of independence, but the Office has encountered operational and financial problems. The Ombudsman has from the start confronted various problems, most of which can be attributed to the competent authorities' insufficient awareness of the status, role and tasks of the institution, inadequate planning or inertia.

The normative status of the institution and its non-incorporation in the provincial government system are the gravest problems the institution faces. Although the Decision on the Provincial Ombudsman was passed back in December 2003, only the Decision on Provincial Administration includes provisions related to the status of the Ombudsman, while other regulations affecting the normal operation of the institution have not been amended yet. This has led to different interpretations of the role of the Ombudsman in the system and its relations with other bodies. Although specific funds have been allocated for the Ombudsman in the Vojvodina provincial budget and the Ombudsman's Office proposes its own budget, there are no regulations on how that budget should be set, wherefore the competent bodies apply inadequate regulations, the ones pertaining to the funding of the Executive Council. The initial misunderstandings were subsequently overcome, but the Ombudsman faced financial problems on a number of occasions.

Notwithstanding the Internal Organisation and Job Systematisation Regulations, the Vojvodina Ombudsman faces the problems of understaffing, lack of office space, equipment and official vehicles. For instance, many activities the Office conducts in the field hinge on the good will of the executive authorities to lend it their official vehicles, the very authorities whose work the Ombudsman is to monitor and whom he should be independent of.

The provincial Ombudsman is duty bound to present annual and *ad hoc* reports to the Vojvodina Assembly, but the Assembly Rules of Procedure still lack provisions on the report submission procedure.

2.3.3. Ombudspersons at the Local Level. – The Act on Local Self-Government entitles all municipalities to pass decisions on establishing municipal ombudspersons. To date, local ombudspersons have been established in the city of Belgrade and the municipalities of Bačka Topola, Sombor, Zrenjanin, Šabac, Niš, Kragujevac, Grocka, Rakovica, Vladičin Han and Subotica.

The main problems faced by municipal ombudsmen stem from the lack of awareness of local authorities and citizens of their role, nature and powers. Such lack of awareness came to the fore when the Belgrade Ombudsperson was being elected. In January 2006, the Belgrade City Assembly passed a Decision on the City Ombudsperson. Under the Decision, one of the job requirements included the bar exam, as, in the opinion of the city authorities, the Ombudsperson ought to represent citizens in proceedings against administrative bodies, which is a total misinterpretation of the role of the ombudsperson. A problem emerged also during the procedure in which the first ombudsperson was elected – the competent bodies

advertised the job in the newspapers, a move viewed by some as disparagement of the institution and by others as the city authorities' wish to be transparent.

Municipal decisions on establishing the office of Ombudsperson vary. Most require of the complainants to exhaust all legal remedies before they address the Ombudsperson, which is odd in view of the fact that the institute has been introduced *inter alia* to forestall problems and mediate. As ombudsperson's decisions and recommendations are not legally binding and are not enforceable like convictions or final administrative decisions, the question arises as to what the ombudsperson's powers will be if s/he acts against a conviction or final decision of an administrative court. Nearly all municipal decisions state that the ombudsperson shall operate independently and autonomously but do not include provisions ensuring such independence. The decisions frequently make the ombudsperson accountable for his work to the president of the municipality or the municipal assembly, which essentially negates the idea of efficiency of the institution. Under most decisions, municipal ombudsmen are nominated and dismissed at the proposal of the mayors. Some municipalities stipulate the election of the ombudsperson by a relative majority of councillors, wherefore there is no need for a consensus on the candidate and the ruling party/coalition can thus elect a person who is not necessarily politically independent and impartial. Although some decisions allow for the establishing of a professional service or assistant to support the ombudsperson, most entrust the administrative and technical support to the municipal administration, again placing the ombudsperson in an unfavourable position. Some municipalities have failed to allocate special funds or a budget for their ombudspersons, who need to apply to the local administration for funds; as the decisions do not specify the funding mechanisms and procedures, the ombudsmen are essentially dependent on the bodies the work of which they ought to control and criticise.

2.4. Enforcement of Decisions by International Bodies

The role of international bodies as a corrective factor and guide for national authorities must be adequately acknowledged in Serbia's main procedural laws. This concept has already been recognised by the Civil Procedure Act (CPA, *Sl. glasnik RS*, 125/04). The new CPC (Art. 426 (6)) also allows for retrial a convicted person may benefit from if the ECtHR or another court established under an international treaty ratified by Serbia finds that human rights and fundamental freedoms had been violated during a criminal trial, that the sentence was based on such a violation and that the violation may be remedied by a retrial. In cases not requiring retrial, the new CPC allows for the filing of a request for the protection of legality (Art. 438 (2)).

These provisions in the new CPC and CPA should serve as an example for the amending of Article 51 of the Administrative Disputes Act.

3. Restrictions and Derogation

Article 4, ICCPR:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from Articles 6, 7, 8 (paras. 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A future communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 15, ECHR:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (para. 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

3.1. Restrictions of Human Rights

The Constitution prescribes that guaranteed human and minority rights can only be restricted if such restrictions are allowed by the Constitution. Moreover, guaranteed human and minority rights can be restricted only to the extent necessary in a democratic society to fulfil the purpose for which such restriction is permitted. Restrictions cannot be imposed for purposes other than those they were prescribed for. When imposing restrictions on human and minority rights and interpreting these

restrictions, all state agencies, courts in particular, are bound to take into account the essence of the right subject to restriction, importance of the purpose of restriction, nature and scope of the restriction, the relationship between the restriction and its purpose, as well as to take into account whether there is a way to fulfil this purpose by a lesser restriction of the right, while the restrictions should never infringe the essence of the guaranteed right (Art. 20).

Pursuant to Article 18 (para. 2) of the Constitution, the manner of exercising certain freedoms and human rights may be prescribed by law in two cases: 1) when so explicitly envisaged by the Constitution and 2) when necessary to ensure the exercise of a specific right owing to its nature.

In the first case, the Constitution itself states that the manner of exercising certain rights shall be prescribed by law. This provision confirms that certain rights cannot be exercised directly and that the Constitution itself can explicitly indicate when the exercise of those rights shall be regulated by law. This does not necessarily imply restriction of rights, although the fact that the Constitution leaves it to laws to elaborate how specific rights are exercised creates the possibility for limiting the scope of the enjoyment of such rights.

In the second case, the manner in which human rights are exercised may be prescribed by law when necessary to ensure the exercise of those rights. This provision refers to human rights that cannot be exercised directly, and makes it possible for the legislature to prescribe by law how they will be implemented. This creates a potential for abuse and for imposition of legal restrictions on these rights.

The Constitution explicitly prescribes that a law regulating the realisation of a specific right may not infringe the substance of that right.

Article 20 of the Constitution lists when rights enshrined in the Constitution may be restricted by law. First of all, the restriction must be allowed under the Constitution. The Constitution allows for specific restrictions of human rights in the specific provisions on those rights. For instance, the Constitution contains a provision according to which the freedom of peaceful assembly may be restricted by law „if so necessary to protect public health, morals, rights of others or the security of the Republic of Serbia" (Art. 54), as well as that freedom of movement may be restricted „if so required by criminal proceedings, to protect public order and peace, prevent spreading of contagious diseases or for the defence of the Republic of Serbia" (Art. 39).

The purpose of the restriction must be permitted under the Constitution and the restriction may not infringe the substance of the guaranteed right.

Article 20 of the Constitution clearly defines the principle of proportionality, as well as the standards which courts in particular must adhere to when interpreting restrictions of human rights. The formulation of the provisions in the new Constitution largely coincides with those in the Human Rights Charter, which had been the first to introduce the principle of proportionality in the national legal system. Like the Charter, the Constitution strictly lays out the principle of proportionality. Stand-

ards for evaluating proportionality are in keeping with the jurisprudence of the European Court of Human Rights.[34]

As opposed to the Charter, the Constitution does not explicitly prohibit restrictions of human and minority rights guaranteed by the generally accepted rules of international law, international treaties as well as laws and other regulations in force, on the ground that they are not guaranteed under the Constitution or are guaranteed to a lesser extent, but comprises only a general provision prescribing that the achieved level of human and minority rights may not be reduced.

Articles 43 and 46 of the new Constitution on the freedom of thought, conscience and religion and freedom of expression introduce a category unknown in international practice as grounds for derogation. It allows for restrictions of these rights if it is *inter alia* necessary to protect the „morals of a democratic society". It remains unclear what the authors meant by this phrase. International human rights protection documents (such as the ECHR) allow for restrictions necessary in a democratic society to, *inter alia*, protect public morals. It seems the two requirements have been merged in the new Constitution, resulting in a new concept „morals of a democratic society". Its effects on the exercise of human rights guaranteed by the two Articles of the Constitution remain to be seen.

3.2. Derogation in "Time of Public Emergency"

3.2.1. General

The Constitution allows for derogations from human and minority rights guaranteed under the Constitution but only to the extent necessary upon the declaration of a state of war or state of emergency (Art. 202). Therefore, the Constitution envisages two preconditions for derogations from human rights – declaration of the state of war or emergency (formal condition) and the necessity of the derogation in the given circumstances (material condition). As opposed to the stricter requirements in the Human Rights Charter, the Constitution does not list threat to the survival of the state as a prerequisite for derogating from human rights. However, the existence of a danger threatening the survival of a state or its citizens is prerequisite for the declaration of a state of emergency under the Constitution. Therefore, this prerequisite also has to be fulfilled for derogations from human rights in accordance with the Constitution, at least with respect to states of emergency.

Derogation measures shall be temporary in character and shall cease to be in effect when the state of emergency or war ends.

Derogation from certain human rights during states of war and states of emergency is in accordance with Article 4 of the ICCPR and Article 15 ECHR,

34 See *Handyside v. United Kingdom*, ECtHR, 1 EHRR 737 (1976); *Informationsverein Lentia v. Austria*, ECtHR, 17 EHRR 93 (1993); *Lehideux and Isorni v. France*, ECtHR, App. No. 24662/94 (1998).

which allow such measures "[in] time of public emergency that threatens the life of the nation".

The Constitution lists the rights that may never be derogated from (Art. 202 (4)). The list of these rights is in keeping with the ICCPR and ECHR.

3.2.2. State of War[35]

Under the Constitution, a state of war is proclaimed by the National Assembly, which may then prescribe measures derogating from human and minority rights guaranteed by the Constitution (Art. 201 (1 and 3)). If the Assembly is unable to convene, the decisions on the declaration of a state of war and human rights derogations shall be taken together by the President of the Republic, the National Assembly Speaker and the Prime Minister (Art. 201 (2 and 4)). The Assembly shall confirm all measures taken during the state of war as soon as it convenes (Art. 201 (5)), which is in keeping with OSCE standards in this field.[36] The Constitution, however, does not prescribe what happens if the Assembly does not confirm the measures. It would be logical to presume that the effectiveness of the unconfirmed measures shall cease after the Assembly session. The Charter had explicitly envisaged such a provision and the authors of the new Constitution should have followed suit, instead of unnecessarily leaving this issue open to interpretation.

3.2.3. State of Emergency[37]

The National Assembly shall declare a state of emergency when the „survival of the state or its citizens is threatened by a public danger" and it may then prescribe measures derogating from constitutionally guaranteed human rights (Art. 200 (1 and 4)). The decision on the declaration of a state of emergency shall be in effect 90 days at most and may be extended by another 90 days (Art. 200 (2)).

If the National Assembly cannot convene, the decision to declare a state of emergency shall be reached jointly by the President of the Republic, the National Assembly Speaker and the Prime Minister, while the decisions on measures derogating from human rights are in such cases passed by the Government and co-signed by the President of the Republic (Art. 200 (5 and 6)). Such decisions must be submitted to the Assembly for confirmation within 48 hours, i.e. as soon as the Assembly can convene. In case the National Assembly has not confirmed the decision to declare a state of emergency, the Constitution explicitly sets out that such a

35 For more details on decrees that placed restrictions on certain rights and freedoms during the state of war in FRY in 1999, see *Report 1999*, I.3.2.4.

36 See *Document of the Moscow Meeting of CSCE on the Human Dimension*, 1991, para. 28.2 and the Paris Minimum Standards on Human Rights Norms in State of Emergency, Section A, p. 2, ILA, *Report of the Sixty-First Conference Held at Paris*, London, 1985; 79 *AJIL* 1072 (1991).

37 A state of emergency was declared in Serbia in 2003, after the assassination of Prime Minister Zoran Đinđić, on the basis of the Decision on the Declaration of the State of Emergency (*Sl. glasnik RS*, 21/03) of the Acting Serbian President and at the proposal of the Government. More in *Reports 2003*, IV.1. and *2004,* I.3.2.3.

decision shall cease to have effect when the first National Assembly session held after the declaration of the state of emergency ends and that the effect of measures derogating from human rights shall cease 24 hours from the opening of the first session held after the declaration of the state of emergency (Art. 200 (8 and 9)).

Measures derogating from human rights may be applied a maximum of 90 days, after which they may be „extended under the same terms" (Art. 200 (7)).

A State of Emergency Act (*Sl. glasnik RS*, 19/91), the provisions of which are not in keeping with the new Constitution, is in force in Serbia. For instance, this Act empowers the President to take decisions derogating from human rights. This provision had been in accordance with the previous Constitution, but the new Constitution does not provide the President with such powers. Under Article 15 of the Constitutional Act for the Implementation of the Constitution of the Republic of Serbia (*Sl. glasnik 98/06*), all laws must be harmonised with the Constitution by 31 December 2008.

4. Individual Rights

4.1. Prohibition of Discrimination

Article 2 (1), ICCPR:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26, ICCPR:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 14, ECHR:

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.

Article 1, Protocol No. 12 to the ECHR:

(1) The enjoyment of any right set forth by law 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.

(2) No one shall be discriminated against by any public authority on any ground such as those mentioned in para. 1.

4.1.1. General

Alongside the ICCPR, the ICESCR, the ECHR and Protocol 12 thereto, Serbia is also bound by the following international documents prohibiting discrimination: the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination against Women, ILO Convention No. 111 concerning Discrimination (Employment and Occupation) and the UNESCO Convention against Discrimination in Education.

The new Constitution of Serbia regulates the prohibition of discrimination in Article 21:

Everyone shall be equal before the Constitution and the law.

Everyone shall have the right to equal legal protection, without any discrimination.

Any direct or indirect discrimination on any grounds, notably on grounds of race, colour, sex, ethnic affiliation, social background, birth, religion, political or other convictions, financial standing, culture, language, age or mental or physical disability, shall be prohibited.

Special measures which the Republic of Serbia may introduce to achieve full equality of persons or a group of persons, who essentially do not enjoy a status equal to that of other citizens, shall not be deemed discrimination.

Article 21 of the Constitution is obviously based on Article 3 of the Serbia and Montenegro Human Rights Charter. The authors, however, altered the terminology used in para. 4 of Article 3, which had initially allowed the introduction of special interim measures necessary for the realisation of equality, special protection or progress of persons or groups of persons who are in an unequal position to facilitate the full enjoyment of human and minority rights under equal conditions. The authors of the Constitution also failed to include the provision in Article 3 (5) of the Charter allowing for the application of special measures in para. 4 only until their purpose is attained. The provision on affirmative action measures in the new Constitution unfortunately cannot be qualified as an improvement over those in the HR Charter. The new Constitution lacks the temporal restriction of affirmative action measures, a criterion which is absolutely necessary for assessing the proportionality of these measures. Hopefully, this shortcoming will be overcome in court practice.

The formulation of the nature of discrimination in the Constitution resembles those in international instruments. Under the Constitution, "Any direct or indirect discrimination on any grounds... shall be prohibited", i.e. the Constitution, like the ICCPR and ECHR, provides for the prohibition of discrimination on grounds not explicitly listed in the Article as well.

Discrimination is a criminal offence under the Criminal Code (Arts. 128 and 387). Many other laws also include anti-discriminatory provisions (e.g. Labour Act, Arts 18–23), Employment and Unemployment Insurance Act (Art. 8), Act on the Bases of the System of Education, Health Protection Act, etc).

Serbia still lacks a general anti-discrimination law that would include definitions of the basic legal concepts, the regulations and standards the courts would be obliged to apply and special mechanisms for the protection of victims of discrimination. The Government in 2006 drafted an anti-discrimination law, regardless of a draft written several years ago by an expert NGO.[38]

4.1.2. Act on Prevention of Discrimination against Persons with Disabilities

The Serbian Assembly in April 2006 adopted the Act on the Prevention of Discrimination against Persons with Disabilities (*Sl. glasnik RS*, 33/06). The Act *inter alia* obliges state bodies to provide persons with disabilities access to public services and facilities and prohibits discrimination in specific areas, such as employment, health and education (Arts. 11–31). It includes significant provisions obliging state and local self-government bodies to undertake special measures to encourage equality of persons with disabilities (Arts. 32–38). Although the Act defines these measures only in the most general terms (as they need to be defined in much greater detail in each specific case), it entitles persons with disabilities to sue the competent institutions that have failed to introduce such measures.

The most relevant provisions in the Act are the ones introducing special regulations in civil suits initiated for the protection from discrimination on grounds of disability (Arts. 39–45). The plaintiffs are entitled to ask the court to prohibit an act that may result in discrimination, to prohibit the further commission or repetition of an act of discrimination, to order the defendant to take action to eliminate the effects of discriminatory treatment, to establish that the defendant treated the plaintiff in a discriminatory manner and to order the compensation of material and non-material damages (Arts. 42 and 43). With regard to these disputes, the Act also introduces special rules on the territorial jurisdiction of courts, allows for revision and sets conditions for the introduction of interim measures in such disputes.

4.2. Right to Life

Article 6, ICCPR:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force

38 See *Report 2005*, I.4.1.4.

at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this Article shall authorise any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this Article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 1, Second Optional Protocol to the ICCPR:

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article 2, ECHR:

1. Everyone's right to life shall be protected by law. 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.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Protocol No. 6 to the ECHR:

Article 1

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

Article 2

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Article 3

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Protocol No. 13 to the ECHR:

Article 1

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 3

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

4.2.1. General

The right to life is guaranteed by all main international and regional human rights instruments applicable in Serbia. This right should not be interpreted narrowly.[39] State bodies need to be reminded more frequently of the positive obligation of the authorities to adopt and undertake all measures leading to the effective ensurance and exercise of the right to life, both in terms of procedural obligations, efficient investigations into the circumstances of killings, and taking all reasonable steps to protect the persons under their jurisdiction from a risk they knew existed.[40]

Like the prior constitutional instruments, the new Constitution of Serbia prescribes that human life is inviolable (Art. 24 (1)) and finally prohibits capital punishment (para. 2), which was abolished in criminal law back in 2002.[41]

International documents do not allow derogations of the right to life (Art. 4 of the ICCPR; Article 15 of the ECHR). The ECHR envisages the following exception: deaths resulting from lawful acts of war. The new Constitution prohibits measures derogating from the right to life during a state or war or emergency (Art. 202), whereby it amends the shortcoming of the old Constitution, which did not even list non-derogable rights.

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39 General Comment 6/16, para. 1, adopted on 27 July 1982 at the Human Rights Committee's 378th meeting (16th session).

40 See *Mahmut Kaya v. Turkey*, ECtHR, App. No. 22535/93 (2000); *LCB v. UK*, ECtHR, 27 EHHR 212 (1998).

41 See *Report 2003*, I.4.2.1. Under the CPC provisions on the extradition of foreign nationals, the minister shall specify in the decision approving the extradition of an alien that s/he "may not be sentenced to a harsher penalty than the one s/he has been sentenced to nor to capital punishment", which is in keeping with the obligations Serbia assumed when it ratified the European Convention on Extradition (*Sl. list (Međunarodni ugovori)*, 10/01).

Offences against the right to life are defined in the Criminal Code, and are prosecuted by the state prosecutor *ex officio*. Those are above all offences against life or body (Arts. 113–127), crimes against humanity and other human rights protected by international law such as genocide (Art. 370), crimes against humanity (Art. 371), war crime against civilian population (Art. 372), illegal killing or wounding of enemy combatants (Art. 378) and incitement to a war of aggression (Art. 386). The Criminal Code also comprises groups of crimes which may pose a risk to human lives, such as crimes against human health, general safety, traffic safety, environment, etc.

In Article 119, the CC defines as punishable incitement to suicide and assisting a person to commit suicide and carry a prison sentence ranging between 3 months and 10 years. The CC (Art. 117) does not decriminalise euthanasia (even passive); it defines it as a separate crime, milder than murder.[42]

Like the Charter before it, the new Constitution of Serbia explicitly prohibits cloning of human beings (Art. 24 (3)). The CC envisages the crime of "illegal medical experiments and testing of medications" and specifies that "whoever performs cloning of humans or conducts experiments with that goal shall be sentenced to imprisonment ranging from three months to five years" (Art. 252 (2)).

4.2.2. Arbitrary Deprivation of Life

The ICCPR and ECHR oblige states to protect the lives of people from arbitrary i.e. intentional deprivation of life and to take special measures to prevent arbitrary killing by state security forces.[43] However, not every use of force by the police, which ends in death, is considered a violation of the right to life. Use of force in self-defence, when it is absolutely necessary, during arrest or preventing escape or quelling a riot or insurrection cannot be considered intentional or arbitrary deprivation of life as long as they fulfil the criteria of absolute necessity i.e. proportionality.[44] According to Human Rights Committee and ECtHR jurisprudence, unintentional killing by state forces may constitute a violation of the right to life if the use of force at the time of murder was unjustified or inconsistent with the procedure prescribed by national legislation.[45] The Committee requires that state legislation must strictly control and limit the circumstances in which a person may be deprived of his life by state agents. However, in view of the fact that national legislation itself may be arbitrary and provide excessive powers to state agents, the Committee found that even situations in which the domestic law criteria were fulfilled were violations of the right to life.[46]

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42 See *Report 2005*, I.4.2.1.

43 General Comment 6/16, supra, n. 1, para. 3.

44 See *McCann and others v. the United Kingdom*, ECtHR, App. No. 18984/91 (1995); *Suarez de Guerrero v. Colombia,* No. 45/79, UN doc. CCPR/C/OP/1 (1985).

45 See *Burrel v. Jamaica,* No. 546/93, UN doc. CCPR/C/53/D/546/1993 (1996); *Stewart v. UK*, ECtHR, App. No. 10044/82, 39 DR 162, (1982); *X. v. Belgium*, ECtHR, 12 Yearbook 174 (1969).

46 See *Suarez de Guerrero v. Colombia,* No. 45/79, UN doc. CCPR/C/OP/1 (1985).

The Act on Police (*Sl. glasnik RS*, 101/05) prescribes that law enforcement officers may use force "only if they cannot otherwise accomplish the law enforcement purpose; in such instances, force may then be applied with restraint and commensurate with the danger threatening legally protected assets and property, i.e. with the gravity of the act they are preventing or subduing" (Art. 84 (2)). Police may use firearms only when other means do not suffice to protect assets and property but they are obliged not to bring the lives of other people into danger. Force may be used to: (1) protect human lives; (2) prevent the escape of a person whilst committing a crime prosecuted *ex officio* and warranting a prison sentence of minimum ten years, or, in case of immediate danger to life; (3) prevent the escape of a person legally deprived of liberty or wanted for a crime in item 2 of the Article, in case of immediate danger to life; (4) repel an immediate life-threatening attack, and (5) repel an attack on a facility or a person safeguarding the facility in case of immediate danger to life (Art. 100). It is not simple to protect certain people or facilities in real life and at the same time meet the test of "strict proportionality"[47] wherefore the implementation of this Act ought to be monitored. Before a law enforcement officer uses a weapon and "whenever circumstances permit", s/he has to warn the person against whom s/he will use the weapon by shouting "Stop, police, I'll shoot" (Art. 106). Although it is possible to imagine situations requiring urgent reaction and use of arms, there are fears that the exception envisaged by Article 106 may be abused. Article 86 envisages the obligation of the law enforcement officer to submit a written report on every use of force to his supervisor as soon as possible, within 24 hours (para. 1). The official authorised by the Minister to assess whether use of force was reasonable and necessary shall recommend to the police director to undertake legal measures in case of unreasonable or unnecessary use of force (paras. 3 and 4). These provisions suffer from the same shortcoming as the old Act – there is no obligation to submit a copy of the report to the competent public prosecutor, who could request the opening of an investigation, i.e. criminal proceedings if s/he deemed one necessary. The competent Ministry still has not adopted subsidiary legislation regulating these powers in greater detail.

4.2.3. Protection of Life of Detainees and Prisoners

A state has a special obligation to take all necessary and available measures to protect the lives of all persons deprived of liberty or serving a jail sentence. Failure to provide medical assistance, withholding of food, torture or failure to prevent the suicide of persons deprived of their liberty or inadequate investigation in case of their death may constitute a violation of the right to life.[48]

47 See *Stewart v. United Kingdom*, ECtHR, App. No. 1004/82 (1982); *McCann and Others v. UK*, ECtHR, App. No. 18984/91 (1995), Publications of ECtHR, Series A, Vol. 324; *Kelly et al. v. United Kingdom*, ECtHR, App. No. 30054/ 96 (2001); *Gul v. Turkey*, ECtHR, App. No. 22676/93 (2001).

48 See *Keenan v. UK*, ECmHR, App. No. 27229/95, (1999); *Dermit Barbato v. Uruguay*, App. No. 84/81, para. 9.2.

In that respect, the new Constitution of Serbia prescribes that persons deprived of liberty must be treated humanely and that their dignity of person shall be respected. It further prohibits any violence against or extortion of statements from persons deprived of liberty.[49] The Penal Sanctions Enforcement Act (*Sl. glasnik RS*, 85/05, in effect since 1 January 2006, hereinafter PSEA) guarantees prisoners free health care (Art. 101). The PSEA also prescribes that a prisoner must have "access to dental services" (Art. 102 (6)). This imprecise formulation may lead to problems in practice as it is unclear whether dental services are free of charge.

The Serbian Assembly adopted a Directive on Police Ethics and Conduct, under which an officer "entrusted with safeguarding a person whose condition requires special care, is obliged to [...] request the assistance of medical staff, and, if necessary, protect the health and life of the person" (para. 20).

The PSEA prescribes conditions in which force may be used against convicts. Force will be used against convicts only if it is necessary to prevent them from: 1) escaping; 2) physically assaulting another person; 3) injuring another person; 4) self-injury; 5) incurring material damage; 6) active or passive resistance."[50] The Act limits the use of arms to fewer instances, i.e. "only if it is otherwise impossible to: 1) repel a concurrent or imminent unlawful attack endangering the life of an accused, staff or another person in the institution; 2) prevent the escape of a convict from a high-security institution; 3) prevent the escape of a prisoner during escort and serving a sentence of minimum ten-year imprisonment" (Art. 131). The Act envisages obligatory medical examinations after the use of coercive measures; in case firearms are used, the prison warden is obliged to immediately submit both to the director and the competent public prosecutor a report on the use of weapons and the medical test records, which is definitely a much better solution (Art. 132).

Subsidiary legislation must be urgently enacted to enable the implementation of this Act. The authorities have to date adopted the Rulebook on Measures for Maintaining Order and Security in Penitentiaries (*Sl. glasnik RS*, 105/06).[51]

4.2.4. Obligation of the State to Protect Lives from Health Risks and Other Risks to Life

States also have an obligation to take active measures to prevent malnutrition, promote medical care and other social welfare activities aimed at reducing the mortality rate and extending life expectancy.[52] The new Constitution of Serbia pro-

49 See I.4.3.

50 The previous PSEA regarded passive and active resistance "to lawful orders of prison guards", but the new PSEA does not include this detail in item 6 of Article 128.

51 See I.4.3.

52 See General Comment No. 6/16, Human Rights Committee, 27 July 1982.

vides special protection to families, mothers, single parents and children (Art. 66 (1)) and prescribes that health care of children, pregnant women, mothers on maternity leave, single parents of children under 7 and the elderly shall be provided from public revenues unless it is provided in some other manner in accordance with the law (Art. 68 (2)).[53]

The Act on Environmental Protection (*Sl. glasnik RS*, 135/04) regulates the realisation of man's right to life and development in a healthy environment and a balance between economic development and the environment (Art. 1). The Act charges the competent Environment Ministry with informing the public and adopting a decree on the introduction of special measures in instances of immediate danger or excessive pollution levels (Art. 42 (1)). In the event pollution is limited to the territory of a municipality, the municipal body shall have the same obligation (para. 2). Moreover, in case of an accident and the assessment that its effects may directly or indirectly endanger human health and the environment, a state of danger must be declared, necessary measures must be undertaken and the public informed thereof (Art. 62).

The Republic of Serbia, the autonomous province and the units of local self-government are obliged to provide "continuous control and monitoring of the state of the environment" (Art. 69). These bodies, as well as authorised organisations and other organisations, are obliged to regularly, timely, fully and objectively notify the public of the state of the environment, i.e. the monitored emission and immission values, of warning measures and of pollution that may pose a hazard to the lives and health of people (Art. 78 (1)). In addition to the obligation of the state bodies, the Act guarantees the public's right to access registries and information systems containing information and data related to environmental protection under specific conditions (Art. 78 (2), Arts. 79–80). The fulfilment of these obligations by the state needs to be monitored more closely as there are doubts about whether the state has been taking preventive measures to preclude hazardous situations and alerting the population about such risks to their lives and health.

The CC devotes a separate chapter to crimes against the environment and envisages new crimes such as: failure to take environmental protection measures (Art. 261), illegal construction and operation of facilities and installations polluting the environment (Art. 262), damaging of environmental protection facilities and installations (Art. 263) damaging the environment (Art. 264). Criminal prosecution of these acts increases the importance of environmental protection and the state's obligations and accountability in this field.

4.2.5. Abortion

Neither the ICCPR nor the ECHR define the beginning of life.[54] ECtHR confirmed that an embryo/foetus may have the status of a human being in terms of

53 See I.4.18.

54 The word "everyone" in Article 2 ECHR allows interpretations that the life of the foetus is also protected, but the European Commission of Human Rights determined that no intention of

protection of human dignity, but not the status of an individual enjoying protection under Article 2 of the ECHR.

Abortion is regulated by the Act on Abortion in Medical Facilities (*Sl. glasnik RS*, 16/95). Under the Act, abortion may be performed only at the request of the woman,[55] and the law also stipulates the written consent of the woman. A simple request by the pregnant woman is sufficient up to the tenth week (Art. 6) and, after the tenth, or sometimes even after the twentieth week of pregnancy, in exceptional circumstances listed in the law.

Every abortion after ten weeks of pregnancy is considered exceptional. Decisions on abortions up to the tenth week of pregnancy are made by the attending physician; up to the twentieth week by a panel of medical doctors, and after the twentieth week by the medical ethics board of the hospital.

The CC (Art. 120) envisages the criminal offence of illegal termination of pregnancy or abortion committed, initiated or assisted in contravention of regulations. The penalty for this crime depends on whether it was committed with or without the consent of the pregnant woman, i.e. her parents or guardians in the event she is not yet 16 years of age. The prescribed sentence is harsher in the event the abortion resulted in death, serious health damage or another serious physical injury of the woman whose pregnancy was terminated.

4.3. Prohibition of Torture, Inhuman or Degrading Treatment or Punishment

Article 7 ICCPR:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

Article 3 ECHR:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

State Parties to the Convention to protect the right to life of the foetus could be established from the context of Article 2 (see *X. v. United Kingdom*, ECtHR, App. No. 8416/78 (1980)). Last year, the ECtHR, too, found in the case *Vo v. France*, ECtHR, App. No. 53924/00 (2004), that the issue of when life begins was within the jurisdiction of the states as there is no consensus in Europe on the scientific and legal definition of the beginning of life.

55 Under the new Constitution of Serbia, everyone shall have the freedom to decide whether to have children or not and the state shall encourage parents to have children and help them therefor (Art. 63).

4.3.1. General

In addition to the obligation to prohibit torture in accordance with Article 7 of the ICCPR and Article 3 of the ECHR, Serbia is also bound by the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: Convention against Torture (CaT). By ratifying the Convention, the former SFRY also recognised the competence of the Committee against Torture to receive and consider communications from state parties (Art. 21 (1)) and from or on behalf of individuals (Art. 22 (1)). In December 2002, the UN General Assembly adopted an Optional Protocol to the Convention against Torture, which established an efficient system of supervising prison and detention units. SaM ratified the Protocol in December 2005 (*Sl. list SCG (Međunarodni ugovori)*, 16/05).

Within the CoE, Serbia is obliged by the ECHR and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which prescribes in detail the obligations of states in that respect and provides an efficient system of monitoring the fulfilment of obligations in prison institutions. SaM ratified this document on 26 December 2003 (*Sl. list SCG (Međunarodni ugovori)*, 9/03). Moreover, the ICC Statute defines torture as a crime against humanity (*Sl. list SRJ (Međunarodni ugovori)*, 5/01).

The Constitution of Serbia explicitly prohibits torture in Article 25:

> Physical and mental integrity shall be inviolable.
>
> Nobody may be subjected to torture, inhuman or degrading treatment or punishment, or to medical or other experiments without their free consent.

The Constitution devotes another article to guarantees of the prohibition of torture during criminal proceedings and other cases of deprivation of liberty (Art. 28). Unfortunately, it does not include a general right of persons deprived of liberty to have access to a doctor. Under the Constitution, prohibition of torture may not be derogated from even during a state of war or a state of emergency (Art. 202 (4)).

The CoE Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT),[56] attaches particular importance to the rights of persons deprived of their liberty: the right to inform a person of their choice about the deprivation of freedom without delay, the right to be interrogated in the presence of an attorney of his/her own choice, and the right to be examined by a doctor of his/her own choice. The Constitution of Serbia recognises the first two rights in Arts. 27 (2) and 29 (1), but does not incorporate the right of access to a doctor. The right was, however, elaborated by the Criminal Procedure Code in line with the Committee opinion. It prescribes that a request to the investigative judge to order a medical examination may be made by the attorney, family member or the person with whom the person deprived of liberty and brought before an investigative judge has been living in an extramarital or other form of long-term union.

56 See CPT's second general report www.cpt.coe.int.

The Constitution guarantees the right to effective court protection in the event of violation of the right to inviolability of physical and psychological integrity, and the right to reverse the consequences of such violations, which also implies the right to compensation in cases of torture or similar treatment, notwithstanding who had inflicted the maltreatment (Art. 22).

4.3.2. Criminal Law

The Convention against Torture binds states to criminalise acts of torture, attempts to commit torture and any other act by any person, which constitutes complicity in an act of torture, and to prescribe appropriate penalties commensurate to the gravity of the offence (Art. 4).

Under the Criminal Code, maltreatment and torture are separate criminal offences (Art. 137).

As Article 1 of the Convention against Torture envisages torture inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, the crimes against the freedoms and rights of man and citizen are of primary relevance. The provision in Article 137 of the CC replaced and expanded hitherto incrimination of abuse in discharge of duty. The new provision also replaces the crime of abuse in the performance of duty, which omitted in the description of the crime both the intention and acts of inflicting severe physical or mental pain and intimidation; therefore, the old provision did not sanction torture, but only those acts that may constitute inhuman or degrading treatment.

The crime of unlawful deprivation of liberty is envisaged by criminal law. It is committed by a public official who unlawfully detains another, keeps him in custody or otherwise deprives him of liberty or restricts his freedom of movement.

The CC distinguishes between the simple and qualified forms of the crime; the latter is committed by a public official. The CC also lists deprivation of the freedom of movement as a simple form of the offence. Depending on the manner of commission, simple forms of the criminal offence correspond to inhuman or degrading treatment, while the aggravated forms correspond to the concept of torture if accompanied by infliction of greater physical or psychological suffering (Art. 132).

Extortion of statements as a criminal offence is formulated in Article 136 of the Criminal Code. The simple form of this crime in practice usually implies inhuman or humiliating treatment in which the intensity of the force used or the gravity of the threat is not so great so as to result in grave physical or mental suffering. If extortion of a statement is accompanied by grave violence, then it can be qualified as an act of torture corresponding to the concept of torture in Article 1 of the Convention against Torture. The prohibition of extortion of statements "by other impermissible means or in another impermissible fashion" relates primarily to the ban on subjecting a person to medical or scientific experiments.

Ill-treatment inflicted by a private person is also criminalised through the following criminal offences: incitement of national, racial or religious hatred, dissent or intolerance (Art. 317); genocide (Art. 370), war crimes (Arts. 371–374), brutal treatment of the wounded, sick or prisoners of war (Art. 381), grave bodily injury (Art. 121), mild bodily injury (Art. 122), coercion (Art. 135), abduction (Art. 134), libel (Art. 171), insult (Art. 170), crimes against the dignity of a human person and morals (Arts. 103–110), crimes against sexual freedoms (Arts. 178–182), human trafficking (Art. 388), neglect or maltreatment of minors (Art. 193), domestic violence (Art. 194), violent behaviour (Art. 344), etc.

The Convention against Torture not only prohibits torture committed by a public official or another person acting in an official capacity, but all forms of maltreatment committed at the explicit order or with the consent of a public official as well.[57] An explicit order by a public official is penalised in local criminal law as deliberate incitement (Art. 34), while a public official who consented to the infliction of torture may be accountable for the following criminal offences: abuse of official position (Art. 359), dereliction of duty (Art. 361), failure to report a criminal offence or the perpetrator of a criminal offence carrying a prison term of minimum five years (Art. 332).

Pursuant to the obligation in Article 4 of the Convention against Torture, all forms of complicity in an act of torture are punishable. So are all attempts to commit the criminal offences of illegal deprivation of liberty or extortion of statements. As per maltreatment and torture in Article 137, the Criminal Code sanctions the attempt to commit the graver form of the same crime notwithstanding the capacity of the perpetrator. Serbia in this respect does not fulfil the obligation in Article 4 of the Convention against Torture prescribing that states ensure that all incriminations with elements of torture, inhuman or degrading treatment or punishment are offences under criminal law. The legislators should either increase the penalties or explicitly prescribe penalties for attempts to commit these crimes.

In view of the gravity of the crimes of torture, inhuman or humiliating treatment or punishment, penalties envisaged for perpetrators of torture in the discharge of duty (maltreatment in the discharge of duty and milder forms of ill-treatment and torture) of maximum one-year i.e. between three months and three years of imprisonment appear inadequate. The new Criminal Code envisages milder penalties for the crime of unlawful deprivation of liberty and extortion of a confession or statement than the amendments to the previous Criminal Code. The judicial penal policy is still milder than the legislative policy; the national courts mostly convict the accused to sentences milder than the legally prescribed penalties and subsequently

57 The case of *Hajrizi et al v. Yugoslavia,* in which the CPT found a violation of the Convention against Torture in 2002, pertained to an incident in 1995, when a Roma settlement in Danilovgrad was demolished and its inhabitants evicted in retaliation for the rape of a non-Roma girl allegedly committed by the inhabitants of the settlement; the policemen were watching the torching of the houses but failed to take any measures to protect them.

apply the institute of suspended sentences to them. This is not in keeping with the state's obligations under the Convention against Torture.

4.3.3. Criminal Proceedings and Penalty Enforcement

The Criminal Procedure Code includes provisions on the respect for the personality of a suspect and the indictee. Any violence against a person deprived of liberty or whose liberty has been restricted is prohibited and punishable, as is any extortion of a confession or another statement from the indictee or another person taking part in the proceedings (Art. 9). The CPC prohibits resort to force, threats, deceit, promises, coercion, attrition or other methods aimed at obtaining a statement or a confession or to another act which may be used as evidence against the accused or for the achievement of any other goals (Art. 143 (4)).

Also, the CPC prohibits any medical intervention or means to a suspect, indictee or witness that would affect their consciousness or will while they are giving a statement (Art. 143 (5)). However, the law allows the physical examination of the suspect or indictee even without his/her consent if this is necessary to establish facts relevant to the criminal proceedings. Such legal provisions do not give rise to concern from the viewpoint of prohibition of torture, inhuman or degrading treatment, as they amount to ordering a medical examination, which *per se* does not constitute the lowest degree of maltreatment and which a doctor performs in accordance with the rules of the medical profession. Also, pursuant to Article 143 (2) of the CPC, blood sampling and other medical action necessary for the analysis and determination of other facts relevant to criminal proceedings may be carried out without the consent of the examined person unless such actions would incur damage to the person's health. Blood sampling is prescribed here primarily to determine the alcohol levels of drivers; as a diagnostic measure, it does not constitute an experiment in terms of Article 7 of the ICCPR. Greatest controversy arises from the extremely vague concept of "other medical action".

The Criminal Procedure Code prescribes that court decisions may not be based on evidence when the content of or manner in which it was collected was in contravention of the provisions of the Code, another law, the Constitution or *international law* (Art. 15).

The CPC contains special provisions on respect for the personality of detainees. Article 148 prohibits offending the personality and dignity of a detainee during detention and prescribes the application of only such restrictions against the detainee which are necessary to prevent his or her escape and to ensure the unhindered conduct of criminal proceedings (Art. 180). With the consent of the judge, visits by an attorney, close relations and at the request of the detainee, a doctor and other persons, or diplomatic and consular representatives to the detainee are ensured. A detainee may correspond with persons outside the prison under the supervision of the judge unless such correspondence would be detrimental to the proceedings (Art. 182). Supervision of the detention facilities and treatment of a detainee must

be conducted at least once a week. The House Rules on Applying Detention Measures (*Sl. glasnik RS*, 35/99) are inconsistent with the CPC provisions and do not include the prohibition of maltreatment.

The PSEA eliminates most of the shortcomings of the hitherto legislation that had given uncontrolled discretionary powers to the minister, wardens and public officials, excluded the possibility of judicial supervision of violations of the rights of convicts, failed to prescribe any penalties for public officials violating the law, mandatory periodic supervision and reporting.

The PSEA envisages that the penal sanction is enforced in a manner guaranteeing the respect of the dignity of the person it is enforced against and prescribes explicit prohibition and punishment of treatment by which a person against whom the sanction is enforced is subjected to any form of torture, abuse, humiliation or experiments, as well as punishment of disproportionate use of force in the enforcement of the sanction (Art. 6). The Act envisages the prohibition of discrimination of prisoners and entitles them to protection of their fundamental rights guaranteed by the Constitution, *ratified international documents, generally accepted rules of international law* and this Act (Arts. 7 and 8).

The PSEA envisages better treatment of convicts: a medical examination of a prisoner is mandatory in case a coercive measure was applied against him/her and s/he must undergo two more medical examinations within the next 24 hours; both a report on the use of coercive measures and the medical report are submitted to the prison warden (Art. 130). In case firearms are used, the report on the use of firearms and the medical report are submitted both to the head of the Prison Administration and the competent public prosecutor (Art. 132). Special measures, such as placement in a secure cell, tighter supervision, solitary confinement and testing for infectious diseases or psychoactive substances, are pronounced and applied only with the prior consent and under the supervision of a doctor; the measures may be applied for limited periods of time and the prisoners may appeal the decisions on the special measures (Arts. 136–143). The Act explicitly details the conditions which the solitary confinement room must fulfil in terms of size, light, equipment and hygiene (Arts. 151 and 152). A convict may file a grievance about a violation of his rights or other irregularities to the prison warden; the warden is obliged to carefully review the complaint and reach a decision thereupon within 15 days, which may be appealed against to the head of Prison Administration. As opposed to prior legislation, the new PSEA envisages court protection in an emergency procedure against final decisions restricting or violating the rights of prisoners (Arts. 9, 165 and 166). The PSEA introduces also the right of the convict to complain to the person authorised to supervise the work of the penal institution without the presence of prison employees and appointees (Art. 114). Although the Act keeps the provision under which the content of the complaints and appeal is secret, its shortcomings are eliminated by provisions related to the transparency of the work of correctional institutions. Apart from the obligation of the justice minister and the head of Prison Ad-

ministration to inform the public on the enforcement of sanctions, the Act also allows representatives of national and foreign human rights institutions and associations and media to visit prisons and to talk to the convicts without the presence of authorised officials (Arts. 29 and 30).

A new Rulebook on Measures for Maintaining Order and Security in Penitentiaries was adopted in late November 2006 (*Sl. glasnik RS,* 105/06) as stipulated by the Penal Sanctions Enforcement Act. Unfortunately, the new Rulebook, which sets out rules for the treatment of inmates, does not explicitly prohibit maltreatment, limiting itself to a provision which requires that the human dignity of the prisoners be respected and their state of health be taken into consideration during the application of measures for maintaining order and security (Art. 7 (1). The Rulebook stipulates a medical check-up of a prisoner subjected to coercive measures (which shall be carried out two more times within the following 24 hours). A report on use of coercion shall be submitted to the prison warden (Art. 7 (1 and 2)).

With regard to prohibition of torture, inhuman or degrading treatment or punishment, the state has an obligation of *non-refoulement* of a person to a state where she/he may be exposed to ill-treatment. This prohibition pertains both to deportation and extradition. It arises from the ICCPR[58] and is explicitly prescribed by Article 3 of the Convention against Torture.[59] A similar provision is found in Article 33 of the Convention Relating to the Status of Refugees (*Sl. list FNRJ (Dodatak)*, 7/60). This right has been reconfirmed by the ECtHR on a number of occasions as well. The ECtHR applied the same principle also to deportation.[60]

As the extradition of indicted and convicted persons is implemented in accordance with provisions of international multilateral and bilateral agreements, authorities are obliged to respect the above rule when concluding such agreements. In the event of there being no international agreement or of an agreement not regulating certain issues, the local extradition procedure is implemented in accordance with the provisions of the CPC (Art. 516). The CPC prescribes that in such instances, an authority authorised by a special decree shall not allow the extradition of an alien if there are serious grounds to believe she/he will be exposed to inhuman treatment or torture in the state requesting the extradition.

The Criminal Code prescribes the possibility of pronouncing this security measure alongside every sanction pronounced against a foreigner in a criminal proceeding, but its duration is restricted to a maximum of ten years (Art. 88). Para. 4 of the Article, envisaging that this measure shall not be ordered against an offender enjoying protection pursuant to the ratified international agreements, is a significant novelty.

58 The HR Committee underscores this obligation in its General Comment No. 20 (44), para. 9.

59 The Convention against Torture binds the obligation on a state only in the event of a threat that the person will be exposed to torture, but not if there is a threat she/he will be exposed to milder forms of maltreatment.

60 See *Report 2005,* I.4.3.3.

4.3.4. Use of Force by Police

A code of conduct for police officers, who are most often alleged to be the perpetrators of maltreatment, is incorporated in the new Act on Police which replaced the Act on Internal Affairs.[61]

Use of force by the police is regulated in greater detail by the Regulations on Circumstances and Manner of Use of Means of Coercion (*Sl. glasnik RS*, 133/04) which will remain in force until the regulations adopted on the basis of the Act on Police are adopted. The Regulations envisage that an officer will when using force "endeavour to whenever possible protect the life of the person and perform his duty with the least harmful consequences for the person or persons against whom force is used" and only while reasons for using force exist and will apply the principle of proportionality (Art. 2). Force may be used only against a person caught in the commission of a crime, to counter the resistance of a person disrupting public law and order or a person who must be remanded in custody, restrained or deprived of liberty, to repel an attack on oneself, another person or a facility s/he is safeguarding, to prevent the escape of a person deprived of liberty, a person using force or threatening to immediately use force (Art. 1). Every use of force will be reported to the immediate superior, within a maximum of 24 hours. If the use of force resulted in death, bodily harm, material damages or civil disquiet, the Regulations envisage the obligation to immediately inform the competent public prosecutor and investigating judge who will organise an investigation, collect and provide material evidence, as well as the General Inspectorate Service, which will establish the justifiability of the use of force (Art. 35). The procedure for establishing whether use of force was reasonable and necessary is significantly improved by the introduction of several levels of internal investigation, including the possibility of lodging a complaint to the Police Inspector General. The main shortcoming of the previous procedure[62] was eliminated by a provision prescribing the obligation to review the assertions of persons against whom force was used and other persons who can testify about the relevant circumstances in each stage of the procedure (Art. 36).

The Directive on Police Ethics and Conduct (*Sl. glasnik RS,* 41/03) needs to be mentioned in this respect. The Directive is based on the European Code of Police Ethics and will be a mandatory subject in police schools. It foresees that no Ministry employee is allowed to order, commit, incite or tolerate torture or other brutal or inhuman treatment degrading the personality of a person and that a police officer who witnessed one of the proscribed actions is obliged to report this to his superior, the Inspector General and external civilian control bodies.

61 See *Report 2005,* I.4.3.4 for an analysis of the Police Act.

62 Article 34 of the Rulebook on Circumstances and Manner of Use of Means of Coercion (*Sl. glasnik RS*, 40/95, 48/95, 1/97).

4.4. Prohibition of Slavery and Forced Labour

Article 8, ICCPR:

1. No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour;

(b) Para. 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well being of the community;

(iv) Any work or service that forms part of normal civil obligations.

Article 4, ECHR:

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term 'forced or compulsory labour' shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(b) any 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) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.

Article 1, Protocol No. 4 to the ECHR:

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

4.4.1. General

With regard to the prohibition of slavery and forced labour, Serbia is bound both by the ICCPR and many other international treaties on prohibition of slavery and other forms of servitude.[63] By ratifying these treaties, the state assumed the responsibility to protect certain rights, together with the obligation to suppress and punish all forms of slavery, practices akin to slavery, transport of persons in the position of slavery, trafficking in human beings and forced labour.[64]

4.4.2. Trafficking in Human Beings and Smuggling of People

Article 4 (2) of the ICCPR prohibits the derogation of rights listed in Article 8 (1 and 2), because they pertain to the overall situation of the human being, whereas the other rights listed in this article pertain to labour that is not voluntary, but is neither permanent nor constant. Keeping someone enslaved has recently become a topical issue, since it occurs massively in the form of trafficking in human beings. Contemporary international standards on combating human trafficking are incorporated in the United Nations Convention against Transnational Organized Crime and its two Protocols.[65]

63 The Slavery Convention (*Sl. novine Kraljevine Jugoslavije*, 234/29), ILO Convention No. 29 Concerning Forced Labour (*Sl. novine Kraljevine Jugoslavije*, 297/32), Convention on the Suppression of Trade in Adult Women (*Sl. list FNRJ*, 41/50), Convention for the Suppression on the Trafficking in Persons and of the Exploitation of the Prostitution of Others (*Sl. list FNRJ*, 2/51), Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (*Sl. list FNRJ (Dodatak)*, 7/58), International Covenant on Economic, Social and Cultural Rights (*Sl. list SFRJ*, 7/71), Convention on the Elimination of All Forms of Discrimination against Women (*Sl. list SFRJ* (*Međunarodni ugovori*), 11/81), Convention on the High Seas (*Sl. list SFRJ (Dodatak)*, 1/86), Convention against Transnational Organized Crime and additional protocols (*Sl. list SRJ (Međunarodni ugovori)*, 6/01), Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (*Sl. list SRJ* (*Međunarodni ugovori*), 7/02), the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (*Sl. list SRJ (Međunarodni ugovori)*, 7/02, ILO Convention No. 105 regarding the abolition of forced labour (*Sl. list SRJ (Međunarodni ugovori)*, 13/02), Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (*Sl. list SRJ (Međunarodni ugovori)*, 13/02) and the ILO Convention No. 182 on the Worst Forms of Child Labour (*Sl. list SRJ (Međunarodni ugovori)*, 2/03).

64 On 16 May 2005, SaM signed another important international treaty – the Council of Europe's Convention on Action against Trafficking in Human Beings. The Assembly of Serbia had not ratified this Convention by the end of 2006.

65 Article 3 (1) of the First Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children of the Convention against Transnational Organized Crime (hereinafter: First Protocol), defines trafficking in human beings. Article 3 (1) of the Second Protocol against Smuggling of Migrants by Land, Sea and Air, which supplements the Convention against Transnational Organized Crime (hereinafter: Second Protocol) defines smuggling of people.

4.4.2.1. Trafficking in Human Beings. – Important steps have over the previous years been taken to change the penal policy with regard to the gravest criminal offences.[66]

Like Article 13 of the Human Rights Charter, the new Constitution of Serbia explicitly prohibits slavery, keeping persons in conditions akin to slavery and all forms of trafficking in persons (Art. 26 (1 and 2)). Like the Charter, this explicit ban on human trafficking by the highest state legislation is a significant step forward in the protection of fundamental human rights and freedoms.

The Criminal Code incriminates human trafficking (Art. 388) as well as trafficking in children for adoption purposes (Art. 389).[67]

The provision prohibiting trafficking in humans does not state that the victim's consent to exploitation shall be considered irrelevant in the event of a crime committed in any of the above listed ways. In that sense, the Code deviates from the standard set in Article 3 (b) of the First Protocol.

Contrary to prior legislation, the valid provision banning trafficking in persons does not prescribe the qualified form of the crime if committed against several persons, by abduction or in a particularly brutal or degrading manner.[68]

Decreasing the sentence from minimum 5 to minimum 3 years of imprisonment for trafficking of a minor constitutes the most serious flaw of the new CC.[69]

The criminal offence of trafficking in children for adoption purposes (Art. 389) stipulates that the perpetrator shall be punished if a victim is under the age of 14. As Article 1 of the Convention on the Rights of the Child and Article 3 (d) of Protocol No. 1 prescribe that every person under the age of 18 is to be considered a child, this provision of the CC is in contravention of international standards and fails to provide protection for children between 14 and 18 years of age.

The penalty for mediation in prostitution ranging between 3 months to 5 years imprisonment is now decreased to range from a fine to maximum 3-year imprisonment (Art. 184). Reduction of the minimum sentences is totally in contravention of initiatives to exonerate persons forced to prostitution (i.e. victims of human trafficking) and to calls for criminal prosecution of and strict convictions for those who mediate in or force others to prostitution.

The similar situation exists in the case of the crime of enslaving (Art. 390), where the minimum sentence of minimum 3-year imprisonment was reduced to

66 See *Report 2003*, I.4.4.3, *Report 2004*, I.4.4.2.1. and *Report 2005*, I.4.4.2.1.

67 See *Report 2005,* I.4.4.2.1.

68 See *Report 2005,* I.4.4.2.1.

69 This shortcoming is all the more serious in view of the fact that witness protection measures may be requested only if the accused is charged with a crime warranting a minimum 10-year prison sentence or, exceptionally, a crime punishable by four-year imprisonment (Art. 117 of the CPC).

between one to 10 years of imprisonment. Considering the flourishing of modern forms of slavery, it remains unclear why the Serbian policy makers took the edge off the law by decreasing the sentences. In addition, this provision stipulates transport of enslaved persons "from one country to another" as a precondition for a criminal offence. Transport of enslaved persons should be prescribed as a crime notwithstanding whether the enslaved are being transferred across borders or internally.

Local legislation does not incriminate the purchase of services provided by human trafficking victims.[70] In that respect, Recommendation 1545 (2002) of the CoE Parliamentary Assembly on an anti-trafficking campaign insists on punishing those who *knowingly* purchased sexual services from a woman who is the victim of trafficking in human beings.[71]

The Centre had noticed some of the shortcomings in the then Draft CC and alerted the Working Group drafting the CC together with the Serbian Ministry of Justice on time.[72]

The Movement and Residence of Aliens Act (Art. 34 (4), *Sl. list SRJ*, 68/02) does not contain any provisions allowing temporary residence permits for victims of trafficking in human beings, although by-laws allowing them residence were adopted in 2004. However, legislation on aliens and asylum needs to be modernised and conformed to relevant international standards to provide a higher degree of protection.[73]

After two and a half years of work on a plan for combating human trafficking, the Government on 7 December 2006 adopted the Strategy for Combating Human Trafficking in the Republic of Serbia (*Sl. glasnik RS*, 111/06).[74]

4.4.2.2. Trafficking in Human Organs. – Provisions on human trafficking prescribe as purposes of committing the crime, inter alia, the removal of a body organ (Art. 388 (1)). A prison sentence ranging from 3 months to 3 years in jail for selling or mediating in the sale of one's own body part or that of another live or dead person in Serbia is envisaged only by the Act on Conditions for Removal and Transplantation of Human Body Parts (Arts. 24–26, *Sl. list SFRJ*, 63/90, 22/91; *Sl. list SRJ*, 28/96).

70 Under the Act on Public Law and Order, a 30-day prison sentence shall be pronounced against a person involved in prostitution (Art. 14 (1), *Sl. glasnik RS,* 51/92, 53/93, 67/93, 48/94, 85/05 and 101/05). The law, however, does not incriminate clients of prostitutes.

71 See http://assembly.coe.int/Mainasp?link=http//assembly.coe.int/document/adoptedtext/t02/erec1545.

72 See the Comments on counter-trafficking provisions in the draft CC (23 August 2004).

73 In keeping with Article 7 (1) of the First Protocol, SaM is obliged to review the adoption of legal and other adequate measures allowing human trafficking victims temporary and, in specific cases, even permanent residence, whereby they will be excluded from the category of illegal immigrants. See Articles 5, 6 (1 (c)), 16 and 18 of Protocol No. 2.

74 See *Report 2005,* I.4.4.3.

The national criminal legislation needs to comprehensively regulate this issue in accordance with contemporary international standards.[75]

4.4.2.3. Smuggling of People. – The CC prohibits human smuggling (Art. 350 (2)), prescribing that anyone who for the purpose of gaining profit enables any person without SaM citizenship to illegally enter, transit or stay in SaM,[76] shall be sentenced to between 3-month and 6-year imprisonment. Endangering the life or health of an illegal migrant is prescribed as an aggravating circumstance and is punishable by between 1 and 10 years imprisonment (Art. 350 (3)). This provision, however, does not afford adequate protection to the smuggled persons – inhuman or humiliating treatment and exploitation of smuggled migrants are not a qualified form of the crime, which is not in accordance with the standard set in Protocol 2 (Art. 6 (3)).

The CC does not hold migrants criminally responsible for becoming victims of human smuggling, for possession of forged travel and identification documents for the purpose of smuggling or for staying in the given state without fulfilling the legal residence requirements, whereby the Code departs from the standard set in Protocol 2 (Art. 5).

4.4.3. Protection and Redress of Victims

4.4.3.1. Protection of Victims. – The testimony of a victim-witness at the main hearing is of particular relevance in trials of human traffickers.

The CPC comprises provisions on the general protection of witnesses and on protected witnesses (Arts. 110 and 116–122).[77]

The Act on the Protection of Participants in Criminal Proceedings (*Sl. glasnik RS*, 85/05), which came into force on 1 January 2006, prescribes extraordinary

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75 The CoE Convention on Human Rights and Biomedicine (Art. 21) and its Additional Protocol on Transplantation of Organs and Tissues of Human Origin (Arts. 21 and 22) and Recommendation 1611 (2003) of the CoE Parliamentary Assembly on Trafficking in Organs (Arts. 12 and 14 (iii e)) insist on the prohibition of using the human body and organs for the purpose of financial gain, of advertising the need for, or availability of, organs or tissues, with a view to offering or seeking financial gain or comparable advantage, on the amendments of national criminal law to ensure that those responsible for organ trafficking are adequately punished, including sanctions for medical staff involved in transplanting organs obtained through illegal trafficking, brokers, intermediaries, hospital/nursing staff and medical laboratory technicians involved in the illegal transplant procedure, as well as medical staff who encourage and provide information on "transplant tourism" and who are involved in follow-up care of patients who have purchased organs if they fail to alert the health authorities of the situation. (See http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta03/EREC1611.htm,http://conventions.coe.int/Treaty/EN/Treaties/Html/164.htm, http://conventions.coe.int/Treaty/EN/Treaties/Html/186.htm).

76 The Act, adopted while the State Union still existed, refers to the border of Serbia and Montenegro. It has not been amended since the dissolution of SaM.

77 See *Report 2005,* I.4.4.3.1.

protection measures to be applied only in the event of the most severe criminal offences, including organised crime cases.[78]

The National Assembly in 2005 also adopted the Health Protection Act (*Sl. glasnik RS*, 107/05), under which foreign victims of human trafficking shall receive health care at the expense of the Republic of Serbia (Art. 241 (6)).

It can be concluded that amendments in the legislation made so far enable adequate protection of human trafficking victims in court proceedings and facilitate their overall status.

4.4.3.2. Confiscation of Crime Proceeds and Redress of Victims. – On 16 May 2005, SaM signed the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.[79] The Assembly of Serbia had not ratified this Convention by the end of 2006.

The state must undertake measures ensuring victims receive information on relevant procedures (criminal and civil procedures),[80] free legal aid in exercising commensurate compensation of sustained damages[81] and to establish a compensation fund to which the proceeds of individuals and legal persons who took part in the human trafficking chain will be channelled.[82]

4.4.4. Forced Labour

Forced or compulsory labour encompasses every work done under threat or punishment.[83] According to Article 6 (1) of the ICESCR, persons who do not work may be deprived of material compensation for work, but they must not be forced to work, meaning that there is the right, but not the obligation to work.

The new Constitution explicitly bans forced labour in Article 26 (3)). This article, which is almost identical to Article 13 of the HR Charter, expands the protection of rights set by international standards by envisaging that sexual or economic exploitation of vulnerable persons shall be deemed forced labour. Article 26 (4) of

78 See *Report 2005,* I.4.4.3.1.

79 http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=198&CM=8&DF=20/07/2005&CL=ENG.

80 See Article 6 of the First Protocol.

81 Legal aid to victims in nearly all human trafficking court trials held in SaM has been provided by NGOs: See ASTRA, FHP, CPD and OMCT, *State Violence in Serbia and Montenegro: An Alternative Report to the United Nations Human Rights Committee*, Geneva, September 2004, p. 72.

82 Confiscated proceeds would be used to compensate the victims and cover the costs of assistance and legal services provided to them; See International Centre for Migration Policy Development, *Preliminary draft of Guidelines of best regional practices in developing and implementing a comprehensive national response to human trafficking,* October 2004, pp. 46 and 47.

83 Article 2 (2) of the Convention No. 29 of the ILO, has defined forced labour as "any labour or service required from a person under threat of punishment and for which this person did not volunteer" (See also *Van der Mussele v. Belgium*, ECtHR, App. No. 8919/80 (1983)).

the Constitution lists which forms of labour shall not be deemed forced labour; this provision is compatible with Article 8 (3c) of the ICCPR.

Article 8 (3b) of the ICCPR prescribes that prohibition of forced or compulsory labour cannot be interpreted as prohibition of execution of forced labour sanctions pronounced by the competent court. Under Article 181 of the CPC, an inmate may perform specific jobs in the prison compound, but only on a voluntary basis and at his or her own request and shall for that work receive financial compensation set by the prison warden.

In terms of convict labour, the European Court of Human Rights, in the case of *De Wilde, Ooms, Versyp v. Belgium* (App. No. 2832/66 (1971)) ruled that convict labour that did not contain elements of rehabilitation was not in accordance with Article 4 (2) of the ECHR. In the provisions on work obligation of convicts, the PSEA (Arts. 86–100, *Sl. glasnik RS*, 85/05) emphasises the rehabilitation element of work performed by convicts.

Relevant provisions of national legislation have in that respect been harmonised with international standards.

The Constitution does not stipulate a general military obligation. The Yugoslav Army Act (*Sl. list SRJ*, 37/02) in its part on military service sets that Yugoslav citizens join the Army on the basis of an authorised body decision on referral to the Army *in accordance with compulsory military service* or on the basis of a decision of enrolment in military service i.e. a military school (Art. 14). The obligation in the Yugoslav Army Act is not considered compulsory work,[84] only if it is purely military in character (Art. 2 (2.a) Convention ILO No. 29 on compulsory labour).

The Act on Defence (*Sl. list SRJ*, 43/94, 11/95, 28/96, 44/99, 3/02) prescribes the work obligation of citizens during the state of war, immediate threat of war or state of emergency (Art. 24 (1)). It is envisaged that the work obligation cannot be imposed without the prior consent of persons listed in the Law as particularly vulnerable, such as the parent of a child under 15 years of age whose spouse is performing military service, a woman during pregnancy, childbirth and maternity, a person unfit for work (Art. 24 (3)), which is in keeping with international standards. However, the Act on Defence does not prescribe the duration of the work obligation of individuals.

The ICCPR does not absolutely prohibit derogation of para. 3 of Article 8. In keeping with this is Article 26 (4) of the Constitution, which specifies situations that shall not be considered forced labour, including labour or service of military staff and labour or services during a state of war or emergency in accordance with measures set during the declaration of war or state of emergency.

However, the failure to precisely set the duration of the compulsory work obligation in the Act on Defence gives room for arbitrary determination of the dura-

84 Military service is not considered forced labour even when it last for a long time and there is no possibility for it to be shortened (See case *W, X, Y. and Z. v. United Kingdom*, ECmHR, 11 Yearbook 562 (1968)).

tion of compulsory work obligation during a state of war, which is a deviation from international standards. This Act should be harmonised with the ILO Convention No. 29 on Forced Labour, which in its Article 12 (1) describes the maximum period of 60 days over a 12-month period as time during which a person can be obliged to perform compulsory labour.[85]

In addition, Article 24 (2) of the Act on Defence prescribes the work obligation for all able-bodied citizens over 15 years of age. This provision is not in keeping with Article 11 (2) of the ILO Convention No. 29 on Forced Labour, which stipulates that only persons above 18 and under 45 years of age may be subjected to compulsory labour.

In terms of the usual civic obligations, free legal aid is prescribed by national legislation in Article 17 (2), Federal Act on Attorneys (*Sl. list SRJ*, 24/98, 26/98, 69/00, 11/02, 72/02), which is in keeping with the standard set in Article 8 (3c (iv)) of the ICCPR.[86]

4.5. Right to Liberty and Security of Person; Treatment of Persons Deprived of Their Liberty

Article 9, ICCPR:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

85 In para. 2 of that Article, the Convention indirectly indicates that labour defined in Article 1 shall be considered as an exception from the prohibition of forced labour, since it prescribes that each worker shall be issued a certificate on the period during which s/he was subjected to compulsory labour.

86 The obligation to provide free legal aid, as a part of attorney practice, is not considered forced labour (*Van der Mussele v. Belgium*, ECtHR, App. No. 8919/80 (1983)); neither is legal assistance with low remuneration (*X. and Y. v. Germany*, ECmHR, 10 DR 224 (1978)).

5. Anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 5, ECHR:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language that he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of para. 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

4.5.1. Right to Liberty and Security of Person

A new Criminal Procedure Code (hereinafter CPC) was adopted in Serbia in mid–2006 (*Sl. glasnik RS,* 46/06).[87] Moreover, the new Constitution devotes considerable attention to issues related to the right to liberty and security of person.

87 The implementation of the new CPC was put off until 1 June 2007.

4.5.1.1. Prohibition of Arbitrary Arrest and Detention. – The intent of the ICCPR Article 9 is to provide procedural guarantees against arbitrary arrest and detention. State parties have an obligation to define precisely when arrest is lawful, and to provide for judicial review to determine whether or not this is the case. The Human Rights Committee has interpreted the article as also guaranteeing the right to personal safety, under which states are obliged to take "reasonable and appropriate" measures to protect every individual from injury by others.[88]

The Constitution of Serbia guarantees all persons the right to personal liberty and security (Art. 27 (1)).

In addition to its immediate responsibility for the actions of its bodies, the state is also obliged to ensure that natural persons do not violate rights guaranteed by the ICCPR by their actions.[89] With regard to the right to liberty and security of person, the state is obliged to prohibit and adequately investigate and punish every instance of illegal deprivation of liberty, including such deprivation perpetrated by persons who are obviously not state agents. In that respect, the Criminal Code comprises the criminal offences of illegal deprivation of liberty (Art. 63), abduction (Art. 64) and trafficking in humans (Arts. 388 and 389).

The ICCPR requirement that arrest and detention be lawful and its prohibition of arbitrariness does not only relate to criminal proceedings; it includes all cases in which a person's freedom is restricted, e.g. due to mental illness, vagrancy, alcohol or drug addiction, and the like.

The Constitution of Serbia does not include a useful provision that existed in the Charter, under which "no one may be deprived of liberty arbitrarily" and merely formulates that the deprivation of liberty "shall be allowed only on the grounds and in a procedure stipulated by the law" (Art. 27 (1)).

The CPC sets the rule that only a competent court can decide on detention and only in cases prescribed by the law and under reservation envisaged by the general provision that this could be done only if the same purpose cannot be achieved by other means (Arts. 173–175). The decision on detention during investigation is served to the person concerned at the time of deprivation of liberty or at the latest 24 hours from the moment of deprivation of liberty or appearance before the investigating judge. The detained person can appeal against this decision. Appeal does not stay enforcement (Art. 175 (3)). The appeal must be dealt with within 48 hours. The duration of detention must be restricted to the shortest possible time. The problem in this regard arises in relation to the right of the person deprived of liberty to be promptly informed about the reasons for detention and grounds for charges against him (Art. 5 (2), ECHR). Whether the 24-hour deadline is in keeping with the requirement of "promptness" depends primarily on whether information

88 See *Delgado Paéz v. Columbia*, No. 195/85, para. 5.5.

89 UN Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (2004).

given to the person deprived of liberty at the time of detention suffices for him to understand the reasons for which he has been deprived of liberty.[90]

The CPC allows the police and prosecutor to detain a suspect but only in exceptional cases (Art. 264). The suspect against whom this measure is applied enjoys the full scope of rights belonging to defendants, especially the right to legal counsel. The body of the Ministry of Interior or prosecutor must immediately or within maximum 2 hours issue and serve the decision on detention. Duration of detention is limited to 48 hours *maximum*. The investigating judge must be informed about this immediately, with the possibility to request that the detained person be brought to him promptly (Art. 264 (4)). The detained person can lodge a complaint against the decision on detention. The complaint does not stay enforcement of detention. The investigating judge must decide on this appeal within 4 hours. Nevertheless, the most important guarantee in this situation is the impossibility of interrogation without the presence of counsel. Namely, the questioning shall be postponed until the arrival of counsel, up to six hours maximum. If the presence of counsel has not been ensured by then, police shall either release the detainee immediately or bring him/her before the competent investigating judge.

A new Act on Misdemeanours was adopted in Serbia in November 2005 (*Sl. glasnik RS*, 101/05).[91] As per the right to liberty and security of person, the provision in Article 166 of the Act on Misdemeanours is of special relevance. The Article prescribes that an accused may be detained by a court order in a misdemeanour procedure in the following cases:

1. In the event his/her identity or permanent i.e. temporary residence cannot be established and there is reasonable suspicion s/he will abscond;
2. In the event s/he can avoid responsibility for a misdemeanour warranting imprisonment by leaving the country;
3. In the event s/he was caught in the commission of the misdemeanour and detention is required to prevent further commission of the misdemeanour.

However, detention cannot be ordered by a body of the state administration conducting the proceeding, but only by the court.[92] The new Act, too, however, has provisions on detention that are not in keeping with international standards. Article 168 prescribes "compulsory detention of inebriated persons, drivers of motor vehicles with minimum 1.2 g/kg of alcohol in the blood or under the influence of opiates, as well as of persons who refuse to undergo alcohol or drug tests." The general standard is that deprivation of liberty must always be justified as necessary and the justification needs to be assessed by the court in each specific case.

90 See *Compatibility of Yugoslav Law and Practice with the Requirements of the ECHR,* CoE, October 2002, p. 107.

91 The new Act on Misdemeanours will be implemented as of 1 January 2007.

92 A body of the state administration has the option of asking the court to order this measure (Art. 166 (2)).

4.5.1.2. Right to Be Informed of Reasons for Arrest and Charges. – Para. 2 of the ICCPR Article 9 states that a person who is arrested shall be informed, at "the time of his arrest", of the reasons for his arrest and "promptly" informed of the charges against him. Under Article 27 (2) of the Constitution, "All persons deprived of liberty by a state body shall be informed promptly in a language they understand about the grounds for arrest or detention, charges brought against them, and their rights to inform any person of their choice about their arrest or detention without delay."

With regard to the right of an arrested person to be informed promptly of the charges against him, the provisions of the CPC are in accordance with international standards as they prescribe that the investigating judge must inform the arrested person of the charges and evidence against him before proceeding to question him for the first time (Art. 5 (2)), which means that the investigating judge is obliged to inform the defendant before the questioning "what he has been charged with, grounds for suspicion against him, as well as that he is not obliged to state his own defence or respond to questions, after which he shall be asked to state his own defence if he so wishes" (Art. 95 (2)). If the detainee should request, he shall be allowed to read the criminal charges filed against him, as well as the petition for inquiry, before the first questioning (Art. 95 (4)). A person deprived of liberty may institute proceedings in which the competent investigating judge will urgently investigate whether she/he was deprived of liberty lawfully and order release in the event of wrongful deprivation of liberty (Art. 7 (3)). This provision satisfies the requirements in ICCPR and ECHR.

4.5.1.3. Right to Be Brought Promptly Before a Judge and to Trial within Reasonable Time. – This right applies only in criminal cases and guarantees that an arrested person will be brought promptly before "a judge or other officer authorised by law to exercise judicial power" and that he will be tried within a reasonable time or be released. Though it is hard to determine what "promptly" means, it would seem that this period should not exceed four days even in exceptional circumstances, and should be much shorter in normal circumstances.[93] "Other officer authorised by law to exercise judicial power" means an impartial organ which is also independent, primarily with respect to executive bodies and the prosecutor, and which is empowered to either release the arrested person or order him remanded to custody.[94]

Under Serbian law, custody may be ordered by an investigating judge or a judicial panel, at the request of the prosecutor. An investigating judge may be taken to mean a judge or other officer authorised by law to exercise judicial power.[95]

During the pre-trial proceedings, authorised police officers can deprive a person of liberty if there are reasons for ordering his or her custody, but nevertheless have the obligation to promptly bring this person before an investigating judge. If

93 See *Brogan v. United Kingdom*, ECtHR, A 145, 1978, p. 33.

94 See *Schiesser v. Switzerland*, ECtHR, A 34, 1991, p. 31.

95 See *mutatis mutandis Bezicheri v. Italy*, ECtHR, A 164, 1989, p. 20.

the bringing of person before the investigating judge has taken longer than eight hours, this delay must be explained to the judge and the investigating judge shall make official record thereof. The record shall contain the statement of the person deprived of liberty about the time and venue of arrest (Art. 262 (3)).

The Constitution prescribes that detention can last for maximum three months on the basis of a decision by competent first instance court and that it can be extended by a decision of a superior court by another three months. The period starts running on the day of arrest and, if by the end of this period charges have not been brought, the suspect shall be released (Art. 31 (1)). The length of custody in regular proceedings is regulated in much the same way, only in more detail, by the CPC (Art. 31 (1)), while the period of custody pending indictment in summary proceedings is limited to eight days without the possibility of extension, and after the indictment has been filed general rules apply.

A person taken into custody has the right to stand trial within a reasonable period of time or otherwise be released. The duration of detention is limited in the following way: on the basis of a decision of an investigating judge detention may last for a maximum of one month, and on the basis of a decision by judicial panel it can be extended another two months at most. The Supreme Court's judicial panel (in cases of criminal offences carrying a penalty over 5 years in prison or longer) can extend this period for another three months at most. If no indictment is issued by the end of these deadlines, the detained person shall be released (Art. 176 CPC).

4.5.1.4. Right to Appeal to Court Against Deprivation of Liberty. – This right is envisaged in cases when a person has been ordered taken into custody by a non-judicial body.[96] The Human Rights Committee took the stand that judicial control must be provided immediately, not after the decision by the second-instance administrative body.[97]

The Constitution of Serbia guarantees the rights of all persons deprived of liberty to address the court, which is to urgently review the lawfulness of the deprivation of liberty and order his or her release if the person was unlawfully deprived of liberty (Art. 27 (3)).

The Act on Non-Contentious Procedure (ANCP) provides the measure of detention in a closed psychiatric institution. It is applied to persons who due to the nature of their illness need to be restricted freedom of movement and communication with the outside world (Art. 45 (1)).

As concerns the proceedings in this non-contentious matter, the courts can issue a decision ordering that a person against whom the proceedings are conducted for deprivation of civil capacity can be placed in an appropriate medical institution temporarily but no longer than three months, if according to the doctor's opinion this would be necessary in order to determine his/her mental state,

96 See *De Wilde, Ooms and Versyp v. Belgium*, ECtHR, A 12, 1971, p. 76.

97 See *Mario Inés Torres v. Finland*, No. 291/1988 (1990).

unless by doing so harmful consequences for the person's health could ensue (Art. 38 (3)). A complaint against such a court decision can be filed by the person against whom the proceedings are being conducted, as well as his/her guardian or temporary representative within three days of the receipt of a copy of the decision (Art. 39 (1 and 2)).

The new Serbian Act on Misdemeanours rectifies the shortcoming in the previous law, that did not provide court protection in misdemeanour appeal proceedings.[98] Under the rules that will apply in misdemeanour proceedings as of 2007, a Higher Misdemeanour Court will rule on all appeals of misdemeanour court decisions.

4.5.1.5. Right to Compensation for Unlawful Deprivation of Liberty. – A person unlawfully deprived of liberty has the right to rehabilitation, compensation of damages from the state, as well as other rights prescribed by law (Chapter XXXVI, CPC).[99] The right to compensation of damages and rehabilitation is explicitly guaranteed also by the new Constitution (Art. 35).

4.5.1.6. Right to Security of Person. – In addition to responsibility for persons who are deprived of liberty in any manner and thus within the immediate competence of the state bodies, the state is also obliged to protect persons at liberty whose security is under serious threat. In that respect, it needs to investigate the threats and undertake all measures required by the "objective need" i.e. "gravity of the case".[100] In keeping with this requirement, the CC includes the crime of endangerment of security (Art. 138).

4.5.2. Treatment of Persons Deprived of Their Liberty

Article 10, ICCPR:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders

98 The Higher Misdemeanour Court will sit in three-member judicial panels; its judges will be appointed in accordance with general rules and under conditions applicable to the appointment of judges working in courts with general jurisdiction.

99 See *Report 2005,* I.4.5.1.5. for details on compensation of damages procedures.

100 See HRC, *Jimenez Vaca v. Colombia*, CCPR/C/74/D/859/1999.

shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

4.5.2.1. Humane Treatment and Respect for Dignity. – All restrictions that are not inherent in the very nature of the deprivation of liberty and of life in a restricted environment are prohibited. Article 10 of the ICCPR complements Article 7, which prohibits torture, cruel or inhuman or degrading treatment or punishment (See I.4.3).

Under the Constitution, persons deprived of liberty must be treated humanely and with respect of their dignity of person. Any violence against and extortion of statements are prohibited (Art. 28). In criminal proceedings, it is prohibited to "use violence against a person deprived of liberty and person whose liberty has been restricted, as well as to extort a confession or another statement from the defendant or another person taking part in the proceedings" (Art. 9, CPC). During detention, it is prohibited to offend the person and dignity of the defendant.

The new PSEA regulates the status of prisoners, including the respect of their rights to liberty and security of person much better.[101] It explicitly prohibits any endangering of the mental or physical health of the prisoners (Art. 65 (2)). The prisoner may complain against the prison warden if this right is violated. The prison warden or a person s/he authorises is obliged to "carefully consider" the grievance and pass a decision on it within 15 days. If s/he fails to do so or the prisoner is dissatisfied with the decision, the latter may appeal to the prison warden, who shall reach a decision on the grievance within 15 days (Art. 114). In a separate section on court protection, the PSEA guarantees the prisoner the right to seek protection in an administrative dispute against a final decision limiting or violating his/her right. The complaint is adjudicated by the competent court within 15 days. The complaint has suspensive effect, with the exception of cases explicitly envisaged by the Act (Arts. 165 and 166).

4.5.2.2. Segregation of Accused and Convicted Persons, Juveniles and Adults. – In its Article 10 (2), the ICCPR prescribes that accused persons must be segregated from convicted persons "save in exceptional circumstances", while juveniles must always be separated from adults "and brought as speedily as possible for adjudication."

The CPC lays down that convicted and accused persons must "as a rule" be segregated, while the PSEA allows no exceptions, which is in accordance with international standards. The PSEA, however, contains the general rule that accused and convicted persons are held "in the same conditions" unless otherwise prescribed by the CPC which is not in line with Article 10 (2.a.) of the ICCPR, which states

101 More on the relevant provisions and main shortcomings of the previous PSEA in *Report 2004*, I.4.5.2.1.

that accused persons "shall be subject to separate treatment appropriate to their status as unconvicted persons."

4.5.3. Special Provisions in Cases of Suppressing Organised Crime

In June 2002, the Parliament adopted the Act on Organisation and Jurisdiction of State Bodies in Suppressing Organised Crime (*Sl. glasnik RS,* 42/02, 27/03, 39/03, 67/03, 29/04, 58/04).

The Act introduced the institute of preventive detention. With the aim of gathering information on and evidence of organised crime, an authorised officer does not need a court warrant to bring in and preventively detain a person, who can provide information or indicate possible evidence. Such custody may last a maximum of 24 hours (Art. 15b (1)). The officer is obliged to inform the person who is preventively detained immediately of the reasons for the detention, the right to notify his family and other persons and the right to an attorney (Art. 15b (2)). A person held in preventive detention may not be interrogated or asked to provide information that does not pertain to the reasons for the preventive detention (Art. 15b (3)). Exceptionally, in matters of urgency, a preventively detained person may be interrogated pursuant to the CPC but only in the presence of his counsel. Consent envisaged by the provisions of the CPC is unnecessary for interrogation (Art. 15b (4)). The reason for detention in Article 15b may be considered arbitrary as the purpose of "prevention" remains unclear; the whole provision deviates from CPC provisions on gathering information from citizens and envisaging shorter deadlines and other anti-harassment guarantees. Although the Committee does not prohibit so-called "preventive detention", this form of custody must be subjected to all guarantees in Article 9 of the ICCPR.

4.6. Right to a Fair Trial

Article 14, ICCPR:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 6, ECHR:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7, ECHR:

1. No one shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

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

Protocol No. 7 to the ECHR:

Article 2

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Article 3

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Article 4

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.

4.6.1. Judicial System

Serbia has courts of general jurisdiction and specialised courts. The Act on Organisation of Courts (*Sl. glasnik RS*, 63/01, 42/02, 17/03, 27/03, 29/04, 101/05, 46/06) reorganised the judiciary and introduced the Appellate Court as a court of general jurisdiction, in addition to the existing municipal and district courts. Apart from the specialised commercial courts that had already existed, the Act envisages the establishment of an Administrative Court as a specialised court (Art. 10). The Act amending the Act on Organisation of Courts (*Sl. glasnik RS*, 48/05) introduces another type of specialised courts – misdemeanour courts and the second instance Higher Misdemeanour Court with four departments (Arts. 1 and 36a). Under the new Constitution, the Supreme Court of Cassation shall be the highest court in Serbia (Art. 143 (3)). It remains unclear why the authors opted for the court of "cassation" as the highest judicial instance. The impression is that it will actually take the place of the Supreme Court, but it remains to be seen whether the change in name will also entail change in jurisdiction. Under the Act on Organisation of Courts, which establishes a new system of courts in Serbia, the Appellate Court is to be a court of second instance hearing appeals of municipal and district court decisions; therefore, before the new Constitution was adopted, the intention had been to limit the appellate jurisdiction of the Supreme Court.

The appellate and administrative courts were initially to have been set up by 1 October 2001. The amendments to the Act on Organisation of Courts adopted in March 2004 moved the deadline for the constitution of these courts to 1 January 2007 when the misdemeanour courts were also to start operating (Art. 15). Although it was clear that the new courts could not be established by that deadline, the Act Amending the Act on Organisation of Courts and moving the deadline to June 2007 was not adopted by the Serbian National Assembly by the end of 2006 although the draft had been submitted to parliament for adoption in July. Therefore, Serbia found itself entering 2007 with a network of courts in contravention of the law. The unclear and general provisions of the Constitutional Act allow for yet another delay in

establishing the new courts. The deferment will additionally prolong the reform of the judiciary which is prerequisite for improving court protection of human rights.

Organised crime, war crime and high technology crime proceedings are conducted before special departments of the Belgrade District Court.[102]

4.6.2. Independence and Impartiality of Courts

Article 4 of the Constitution comprises provisions on the separation of powers and independence of the judiciary. The Act on Organisation of Courts includes a provision explicitly prohibiting any use of public office, media or any public appearance to affect the outcome of court proceedings or any other influence on the court (Art. 6). Judicial independence, however, does not depend so much on legal provisions; it hinges much more on court practice.

4.6.2.1. Election of Judges. – Under the Constitution, the powers of the hitherto High Judicial Council shall hereinafter be exercised by two bodies.[103] The High Judicial Council shall be charged with the election of judges and the State Council of Prosecutors with the election of deputy public prosecutors.[104]

The new High Judicial Council shall enjoy greater powers regarding judicial appointments than the outgoing one. Under Article 147 of the Constitution, judges shall now be elected to their first (probationary) three-year terms in office by the National Assembly at the proposal of the High Judicial Council, while their appointment until the age of retirement shall be decided on by the High Judicial Council. The National Assembly, however, will still play the crucial role in the appointment of new judges, which is perhaps the most important step in the recruitment of judges.

Moreover, provisions on the appointment of High Judicial Council members are highly debatable. Although judges shall account for the majority of the Council members, the crucial role will again be played by the National Assembly which is to elect them. The High Judicial Council shall comprise the Justice Minister, the chair of the Assembly committee charged with the judiciary, the President of the Supreme Court of Cassation shall be members *ex officio*, while the National Assembly shall elect the remaining eight members – six judges and two eminent legal professionals (one lawyer and one law professor) with at least 15 years of professional experience (Art. 153). Such membership and appointment procedure raises concerns about judicial independence from the legislative and executive branches.

The Constitution does not envisage the re-appointment of judges. Moreover, it can be concluded that the authors of the new Constitution aspired to ensure its continuity with the previous Constitution. This conclusion is corroborated by the

102 See *Report 2005*, I.4.6.1.1.

103 More on the High Judicial Council in *Report 2005*, I.4.6.2.1.

104 Public prosecutors are elected by the National Assembly at the proposal of the Government.

fact that maximum efforts were invested to adopt the new Constitution in accordance with the procedure set out in its predecessor. Article 7 of the Constitutional Act, however, envisages the election of all judges within a year from the day the High Judicial Council is established, which may raise issues regarding acquired rights as the judges now working had been appointed on permanent tenures.

4.6.2.2. Judicial Tenure. – Under the new Constitution, judges are first elected to three-year terms in office and then on permanent tenures. This provision, which was taken from the Government Draft Constitution, may bring into question the independence of judges who have not yet been bestowed permanent tenures. The Venice Commission, which was asked by the Serbian Justice Minister to give an assessment of the chapter on the judiciary in the Draft Constitution, criticised the provision and underlined that additional safeguards for the independence of judges appointed to definite terms in office needed to be provided to if the authors of the Constitution decided to preserve probationary appointments. Notwithstanding the negative opinion of the Venice Commission, this solution was included in the new Constitution,[105] but the authors failed to provide any the additional safeguards for judicial independence.

4.6.2.3. – Termination of Judicial Tenure. – Under the Constitution, the tenure of a judge shall terminate at his or her own request, on meeting legal conditions of retirement, by dismissal or non-appointment on permanent tenure (Art. 148 (1). As opposed to the old Constitution, the new one does not list grounds for the dismissal of judges, leaving the regulation of this issue to law, whereby it reduces the protection of judges from the legislative branch.

The dismissal of judges is regulated by the Judges Act.[106]

4.6.2.4. Principle of Non-Transferability. – The Constitution guarantees the so-called principle of non-transferability of judges (Art. 150 of the Constitution; Arts. 2 (2) and 16 of the Judges Act).

A judge may be assigned or seconded to another court only if s/he agrees to the transfer. Exceptionally, the consent of the judge shall not be required if the court s/he has been appointed to or most of its jurisdiction has ceased to exist.

4.6.2.5. Exemption. – Judicial impartiality is guaranteed by Serbian law in provisions specifying a number of reasons when a judge can be exempted from a proceeding. These reasons focus on conflict of interest or regard his prior involvement in the case. Exemption may be requested by the judge or the parties in the proceeding. The court president decides on the request for exemption.

105 Venice Commission Opinion No. 349/2005, http://www.venice.coe.int/docs/2005/CDL-AD(2005)023-e.asp.

106 More on dismissal of judges in *Report 2005*, I.4.6.2.2.

The new Civil Procedure Act (CPA) distinguishes between exemption and exclusion (Art. 66). A judge shall always be excluded for reasons specified by the Act and clearly bringing into question his impartiality. Reasons for exemption relate to "circumstances bringing into doubt" the impartiality of the judge and are at the discretion of the court president; they, however, pertain to a greater extent to the judge's personal attitude to the parties (Art. 66 (2)). These provisions are meant to prevent the parties from abusing the institute of exemption, a recourse applied in national judicial practice to prolong a trial.

4.6.2.6. Supervision and Protection. – The 2004 amendments to the Judges Act prescribe the founding of a Supervisory Board within the Supreme Court of Serbia to monitor court cases and assess both the efficiency and quality of judicial performance. The Supervisory Board shall launch the dismissal procedure if it establishes a judge has been performing his duty unconscientiously or unprofessionally. The Supervisory Board comprises five Supreme Court judges appointed to four-year terms in office.

The Judges Act introduces also the institute of judicial *complaint* which may be filed by a judge who believes his/her right has been violated in the absence of other forums for recourse. The complaint is submitted to the High Personnel Council.[107]

Under the Constitution, a judge may appeal a High Judicial Council decision with the Constitutional Court in cases stipulated by the law (Art. 155).

The Justice Ministry has excessive influence on the administration of the judiciary. Under the Government National Judicial Reform Strategy,[108] the courts' are to become administratively independent from the Justice Ministry. However, this segment of the reform has not been implemented yet.

4.6.2.7. Incompatibility. – Judges are forbidden involvement in political activities. Other offices, activities or private interests incompatible with judgeship shall be stipulated by the law (Art. 152 of the Constitution). The formulation "involvement in political activities" is much too general and leaves ample room for interpretation and, thus, abuse.

Article 27 of the Judges Act prohibits judges from holding office in executive or legislative bodies, membership in a political party, engagement in any remunerated public or private work or from offering legal services or advice for a fee. Other offices, engagements or activities undermining judicial dignity or independence or the reputation of the court, assessed as such by the Supreme Court of Serbia, shall also be prohibited. A judge need not seek approval for remunerated engagement in scientific or professional activities.

107 More on High Personnel Council in *Report 2005*, I.4.6.2.2.

108 See the National Assembly Decision on National Judicial Reform Strategy, 25 May 2006.

4.6.2.8. Right to Case Assignment on a Random Basis. – The right to a randomly selected judge i.e. case assignment on a random basis was introduced in laws regulating the judiciary in keeping with the Recommendation of the CoE Committee of Ministers.[109] According to the Judges Act, cases are assigned solely on the basis of the designation and case file number in an order set in advance for each calendar year. The Act explicitly prescribes that the order of the files shall not depend on who the parties to the proceeding are or what the case concerns (Art. 21).

4.6.3. Fairness

Fairness entails different guarantees, notably the right of access to court, that a trial must be oral and adversary in nature and that a judgement be delivered within reasonable time.

The right of access to a court is not explicitly envisaged either by ECHR or ICCPR, but is incorporated in the provisions guaranteeing the right to a fair trial.[110]

The Constitution guarantees everyone the right to equal protection of his rights in the proceedings before a court of law, other state bodies, agencies exercising public powers and provincial or local self-government authorities, and the right to appeal or to apply another legal remedy against a decision concerning his right, obligation or lawful interest (Art. 36). However, a mere declaration of the right of access to a court is insufficient; this right must also be effective as well. For instance, when a person needs legal assistance to actually exercise the right of access to a court, the state is obliged to provide such assistance.[111] An additional problem concerning the right of access to a court regards the issue of immunity of certain individuals, which may on occasion lead to the violation of the right of access to a court.[112]

The right of access to a court may be rendered difficult or even impossible if it is conditioned by excessively high court taxes. Although the court taxes fixed in Serbia are not high in comparison with those in other countries in the region, even such low taxes in the current dire economic circumstances may undermine the citizens' right of access to a court.[113] This problem could be addressed by resort to the institute of indigence.

The new CPA expands the institute of indigence. In addition to exemption from payment of court taxes and deposits for witnesses, on-site inspections and court notices, the Code introduces the right to free legal aid if it is necessary to protect the rights of the party (Art. 166, CPA).

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109 Council of Europe Committee of Ministers Recommendation on the independence, efficiency and role of judges, No. R (94) 12.

110 See *Golder v. UK* (ECHR, App. No. 4451/70 (1975).

111 See *Airey v. Ireland*, ECtHR, App. No. 6289/73 (1979), para. 26.

112 See *Osman v. United Kingdom*, ECtHR, App. No. 23452/94 (1998) and *Ashingdane v. United Kingdom*, ECtHR, App. No. 8225/78 (1985).

113 See *Compatibility of Yugoslav Law and Practice with the Requirements of the ECHR,* CoE, Federal Ministry of Justice, 2002, p. 128.

Respect of the right to access a court must also be ensured in a civil proceeding, by restricting the arbitrariness of courts and judges to discontinue proceedings. The new CPA no longer allows the court to order the discontinuance of the proceedings if the ruling on the claim depends on whether a commercial offence or a criminal offence prosecuted *ex officio* was committed, on who the perpetrator is and whether he is responsible. In practice, the courts as a rule discontinued civil suits if criminal proceedings on the same factual grounds were conducted simultaneously. The discontinuances would last several years, preventing efficient completion of the civil proceedings.

One of the most important requirements for a fair trial is that the court must hear both opposing parties. Under the CPC, the defendant has the right "to respond to all the facts and evidence against him, and to present evidence and facts in his favour" (Art. 5 (4)). The principle is further elaborated in a series of provisions.

A properly composed indictment must be served upon the accused without delay; a remanded accused must be served the indictment within 24 hours upon detention (Art. 292 (1) CPC). The provision in Article 397 of the CPC similarly prescribes that a copy of the appeal must be delivered on the opposing party to respond. Disrespect of these provisions constitutes a grave violation of due process.

The new Act on Misdemeanours also envisages the principle of adversariness (Art. 81).

In the Civil Procedure Act, this principle is laid down in Article 5, which says that the court shall give each party the opportunity to make declarations on the claims, proposals and allegations of the other party. Only exceptionally, in cases specified by the law, the court is authorised to rule on a claim if the other party was not provided with the opportunity to declare itself on the claim. This above all pertains to decisions on temporary measures where the principle of urgency has precedence over the principle of adversariness.

4.6.4. Trial within Reasonable Time

Reaching a judgement within a reasonable time is one of the key elements of the right to a fair trail. Assessment of whether a proceeding was completed within a reasonable time takes into account the complexity of the case, the conduct of the defendant i.e. party in the proceeding (whether the party in the proceeding caused the delay) and the interest of the submitter that the proceeding is completed as soon as possible. Expedition is especially expected in criminal proceedings, but also in civil proceedings on child custody, employment disputes, disputes regarding physical injury and, in general, in cases where speed is of the essence, as, for instance, if a person infected by the HIV by blood transfusion has instituted proceedings seeking compensation of damages.[114]

Under the new Constitution, everyone shall have the right to a public hearing *within reasonable time* before an independent and impartial tribunal already estab-

114 See *X v. France*, ECtHR, App. No. 18020/91 (1992), paras. 47–49.

lished by the law which shall hear and pronounce judgment on their rights and obligations, grounds for suspicion that brought about the initiated procedure and accusations brought against them (Art. 32 (1)).

Under the CPC, an accused person has the right to be brought before a court as soon as possible and to a trial without any undue delay (Art. 12 (1)). CPC (Art. 12 (2)), CPA (Art. 10) and Article 83 of the Act on Misdemeanours prescribe that the court is obliged to strive to conduct a trial without undue delay and prevent any abuse of the rights belonging to parties in the proceedings. This principle is elaborated in a number of CPC provisions. The Judges Act obliges judges to notify the court president of how the trial is proceeding in terms of statutory deadlines.

The new CPA was passed with the aim of ensuring and improving judicial efficiency and it introduces many new provisions needed to rationalise the procedure. The CPA, *inter alia*, reduces the number of hearings, specifies deadlines for filing counterclaims, replies to claims and for scheduling pre-trial hearings; it prescribes submission of all evidence with the claim i.e. until the end of the pre-trial hearing. The CPA envisages high fines for disobeying of procedural discipline, not only for the parties, legal representatives, counsels and forensic experts, but also for third persons interfering with the litigious acts, out of the hearing (Art. 181).

All new procedural laws in Serbia envisage instructive deadlines binding on both the judges and court administration.

The Family Act adopted in Serbia in 2005 also envisages urgent procedures in disputes regarding a child or parents exercising parental rights; the action is not delivered to the defendant for reply, the proceedings as a rule comprise a maximum of two hearings, the first hearing is scheduled to take place within 15 days from the day the motion or action was filed in court and the second-instance court is under the obligation to decide on an appeal within 30 days from the day it was filed (Art. 204).

The Peaceful Resolution of Labour Disputes Acts (*Sl. glasnik RS*, 125/04) and the Act on Mediation (*Sl. glasnik RS*, 18/05) regulating peaceful settlement of other forms of disputes, will also help address problems regarding trials within reasonable time. The purpose of these laws is to enable parties to resolve their disputes in an informal procedure, without going to court and costing less money and much less time. The parties themselves agree on the settlement in negotiations mediated by a third, neutral person. The legislators drafted the law with the intention of reducing the number of cases taken to court to help increase judicial efficiency.

4.6.5. Public Character of Hearings and Judgements

Like the 1990 Constitution, the new Constitution of Serbia guarantees the public character of court hearings (Art. 32), but, as opposed to the Human Rights Charter, it does not explicitly guarantee the public pronouncement of court judgements.

The Constitution lists cases in which the public may be excluded from all or part of court proceedings in accordance with the law only to protect the interests of national security, public order and morals in a democratic society, the interests of minors or privacy of the parties to the proceedings. The question therefore arises whether the valid laws are in this respect in compliance with the Constitution, as some envisage the exclusion of the public from court proceedings *inter alia* to ensure the non-disclosure of a secret.

Civil and criminal proceedings are guided by the general rule that hearings and trials are public and may be attended by adults (Art. 291 CPC; Art. 307 CPA; Art. 209 of the Act on Misdemeanours). Under the CPC, a court may *ex officio* or at the proposal of the parties exclude the public from the main hearing in order to protect classified information, public order, morals, interests of a minor or to protect the private or family life of the defendant or the injured party; the new CPC introduces additional grounds for excluding the public – to forestall a serious threat to the lives or bodies of the parties to the proceedings, the injured parties, the defence attorneys, witnesses or other persons (Art. 317). These grounds are generally in keeping with international standards. The public is always excluded from a trial of a minor (Art. 75 of the Juvenile Justice Act, *Sl. glasnik RS*, 85/05); this provision is not in contravention of international standards. The new Act on Misdemeanours excludes the public from trials if that is necessary in public interest or for moral reasons and from trials of minors (Art. 209). Exclusion of the public from a main hearing is in contravention of the law, constitutes a serious violation of due process and grounds for appeal (Art. 392 (1.4) CPC; Art. 361 (2.11) CPA).

The CPA envisages that the public may be excluded from civil proceedings "during the entire hearing or part of it if so required by interests of preserving an official, business or personal secret, or by interest of public order or morality" (Art. 308 (1) CPA). The public may also be excluded if the usual security measures are insufficient to ensure order in the court (Art. 308 (2) CPA).

In accordance with Article 6 (1) of the ECHR, the CPC and CPA prescribe that a judgement must always be pronounced publicly, notwithstanding whether the public was excluded from the proceeding (Art. 381 (4) CPC; Art. 340 (3) CPA). The new Constitution does not provide for the public pronouncement of sentences at all, which is an incomprehensible omission given the fact the ECHR envisages absolutely no exceptions in this respect.[115] The CPC and CPA prescribe that the panel decision whether to state the reasons for the judgement publicly depends on wheth-

115 Apart from the Convention, which does not envisage exceptions to public pronouncement of judgements, ECtHR practice needs to be taken into account with regard to exceptions to the rule on public sentencing. In several cases, the Court underlined that the circumstances of the case were crucial and that in each case, the form of publicity given to the judgement must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 (1) – the ensurance of a fair trial (See *Sutter v. Switzerland,* ECtHR, App. No. 8209/78 (1984), para. 33; for trials of minors, see *B. and P. v. United Kingdom*, ECtHR, App. No. 36337/97 and 35974/97 (2001)). If there were no exceptions to the

er the public had been excluded from the proceeding; if the public had been excluded, the panel will decide whether to exclude the public from the pronouncement of the reasons for the judgement (Art. 381 (4) CPC; Art. 340 (3) CPA).

The CPC specifies another exception to the rule of the defendant's right to a public trial. In cases of minor criminal offences (for which a fine is principal punishment or maximum 3 years' imprisonment), a judge may render a decision without holding a trial upon the request of the state prosecutor (Art. 460 CPC). The accused may appeal the decision and in the event his complaint is upheld, a public trial shall be scheduled. This norm is in keeping with the CoE 1983 Recommendation Concerning the Simplification of Criminal Justice.[116]

Under national regulations, administrative proceedings are held in closed sessions and are only exceptionally public (Art. 32 Act on Administrative Proceedings (*Sl. list SRJ*, 46/96)). This is not in keeping with the right to a public hearing envisaged by Article 6 (1) of the ECHR. Upon ratification of the ECHR, Serbia and Montenegro made a reservation with regards to this provision.

4.6.6. Guarantees to Defendants in Criminal Cases[117]

The ECtHR has in its practice set certain criteria by which it can be determined whether a charge is "criminal".[118] First, Article 6 of the ECHR shall apply automatically if the charge is classified as 'criminal' by national law. However, this does not mean the state can avoid obligations arising from Article 6 by simply deciding that its national law will not qualify certain offences as criminal.[119] Determination of a charge as criminal also depends on the nature of the offence and the severity of the penalty.[120]

There are three forms of punishable offences in Serbian law: criminal offences, misdemeanours and economic offences.

While there is no doubt that criminal offences constitute criminal charges in terms of international standards, misdemeanours are a special institute in Serbian

obligation of public sentencing, the purpose of Article 6 would not be fulfilled in those cases where the public was excluded from the court hearings.

116 See *Compatibility of Yugoslav Law and Practice with the Requirements of the ECHR,* CoE, October 2002, p. 139.

117 More on the protection of minors in criminal proceedings and the Juvenile Justice Act in I.4.15.3.3.

118 These criteria were first set in the case of *Engel et al v. The Netherlands,* ECtHR, App. No. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72 (1974), and were later confirmed in court practice.

119 *Ibid.*, para. 81.

120 For a norm to be considered to belong to criminal law, it must have general effect and the penalty prescribed must have both a punitive and correctional purpose. See *Compatibility of Yugoslav Law and Practice with the Requirements of the ECHR,* CoE, October 2002, p. 130, and Right to a Fair Trial Nuala Mole and Catharina Harby, CoE, Belgrade, 2003, pp. 30–35, V. Dimitrijević, "What International Human Rights Tribunals Teach Us", *Reč,* 2004, p. 85 ff.

legislation, partly punitive and partly administrative in nature. Due to the non-conformity with international standards, Serbia and Montenegro made a reservation with regard to the implementation of the Acts on Misdemeanours during ratification of the ECHR.

The new Act on Misdemeanours eliminates most of the shortcomings of the Act still in force, notably by prescribing court jurisdiction over misdemeanour cases in the future. Specific misdemeanours will still be ruled by administrative bodies; this solution is justified, as it is unnecessary to put the court machinery into motion over every single misdemeanour, even those posing a negligible risk to society. It is therefore justified to give the administrative body jurisdiction over offences falling within the field of administration, while courts ought to have competence for offences that are criminal rather than administrative in character. The problem, however, lies in the fact that the Act prescribes administrative bodies shall have jurisdiction over misdemeanours warranting only fines. As the purpose of fining perpetrators of misdemeanours is to penalise them and not to compensate material damage and the range of fines in the Act is similar to that in the Criminal Code, according to ECtHR criteria, at least some of the misdemeanours warranting only fines should be qualified as criminal rather than administrative felonies and ought to be under the jurisdiction of courts.

The same problems exist in terms of economic offences. Economic offences are violations of regulations regarding economic and financial affairs that may cause serious consequences. Although these offences are by nature punishable offences, they are tried by commercial and not criminal, courts in keeping with the Act on Economic Offences (*Sl. list SFRJ*, 4/77, 36/77, 14/85, 10/86, 74/87, 57/89, 3/90; *Sl. list SRJ*, 27/92, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96, 64/01) and not the CPC. The Act on Economic Offences envisages the application of specific CPC provisions; however, they cannot provide full protection under Article 6 of ECHR.

4.6.6.1. Presumption of Innocence. – The legal consequences of the presumption of innocence are that the defendant does not need to prove s/he is not guilty and that the court is obliged to act *in dubio pro reo* – give the accused the benefit of the doubt if his guilt has not been proven beyond all doubt. The Constitution and the CPC are in keeping with international standards. Both prescribe that everyone shall be presumed innocent until proven guilty by a final decision of a competent court (Art. 34 (3) of the Constitution, Art. 3 (1) of the CPC). The *in dubio pro reo* principle is listed within the CPC chapter on general principles (Art. 4).

In keeping with European standards,[121] the CPC obliges not only the court to respect the presumption of innocence; but also all state authorities, media, citizens' associations, public figures and other persons not to violate the rights of the accused by their public statements (Art. 3 (2) CPC). The new CPC, as opposed to the one still in force, also prescribes penalties for violations of this obligation (Art. 3, paras. 3–6, of the new CPC).

121 See *Allenet de Ribemont v. France,* ECtHR, App. No. 15175/89 (1995).

4.6.6.2. Prompt Notification of Charges, in Language Understood by the Defendant. – Under Article 33 of the Constitution, all persons accused of crimes shall have the right to be notified promptly, in detail and in a language they understand of the nature and reasons for the charges laid against them and the evidence against them.

According to the CPC, which regulates this right in detail, the accused must be informed of the criminal offence she/he is being charged with and the evidence on which the charges are based already at the first hearing. The CPC classifies the right within general principles (Art. 5 (2)), but also reiterates it in the provision addressing the interrogation of the accused, prescribing that the accused shall be informed of the charges brought against him, the crime s/he is accused of and the facts giving rise to reasonable suspicion that s/he committed the crime (Art. 95 (2)). Moreover, if the police assess during the inquiry that a person they are questioning may be a suspect, they are obliged to inform him or her thereof, of the crime s/he is suspected of having committed and the grounds for the suspicion (Art. 260 (1)).

In the event the public prosecutor reaches a decision on conducting an investigation, the decision shall include elements of the criminal offence, the legal term for the crime and evidence on which the suspicions are grounded (Art. 273 (4)).

The indictment shall be "served to an accused at liberty without delay and within 24 hours to a defendant in custody" (Art. 292 (1)). The indictment must include, *inter alia*, a description of the committed criminal offence and the circumstances of the offence in greater detail and the proposed evidence to be presented at the main hearing (Art. 289 (1)).

Notice of indictment is also guaranteed in misdemeanour proceedings (Arts. 85 (2), 86, Serbian Act on Misdemeanours).

4.6.6.3. Sufficient Time and Facilities for Preparation of Defence and Right to Communicate with Legal Counsel. – Affording a defendant sufficient time to prepare his defence is one of the basic principles of the CPC (Art. 5 (5)). However, the minimum time periods it envisages are too short – "sufficient time" in regular proceedings (...) at least eight days" i.e. at least fifteen days for serious crimes (Art. 311 (3)), "sufficient time, at least eight days" in summary proceedings – (Art. 453 (3)). If the prosecutor filed another indictment during the hearing, the judicial panel is obliged to leave sufficient time for the defendant and his counsel to prepare appropriate defence (Art. 365 (2)). On the other hand, the court is not obliged to give the defence time in the event the prosecution orally amends the indictment during the trial. It should also be noted that the adequate-time provision is not applied to a defendant when he is questioned during the pre-trial proceedings, where no interval is envisaged between the time he is informed of the charges and evidence against him and his interrogation. Namely, pursuant to the CPC, the defendant has the right to read the criminal charges *immediately* prior to first questioning (Art. 95 (4) CPC).

In second-instance proceedings and though there is no specific CPC provision regulating the matter, the practice of appeal courts is that "when giving notice of a session of the panel... account must be taken to afford the parties sufficient time to prepare for the session". This defect is in part alleviated by Article 397 of the CPC, which requires delivering a copy of the appeal to the opposing party and giving it eight days to respond.

The above guarantees exist also in the new Act on Misdemeanours (Arts. 85 (1, 3, 4), 108, 109).

4.6.6.4. Prohibition of Trials in absentia *and the Right to Defence*. – Under the Constitution, any person accused of a crime and available to the court shall be entitled to attend his or her own trial and may not be sentenced unless s/he has been given the opportunity to a hearing and defence (Art. 33 (4)).

Pursuant to the CPC, trial *in absentia* is allowed only exceptionally, in cases when the defendant is absent though his own fault, e.g. if the defendant is a fugitive or otherwise inaccessible to government agencies and there are compelling reasons for trying him despite his absence (Art. 328 (1)); for the summary procedure, see Article 456. Furthermore, the defendant tried *in absentia* must have a defence counsel from the moment the decision is taken to try him in his absence (Art. 71 (3)). It is strictly prohibited to conduct *in absentia* trials of juveniles (Art. 48 (1) Juvenile Justice Act). At the request of the person convicted *in absentia* or his defence counsel, a new trial can be scheduled (Art. 432 (1) CPC). These provisions of Serbian law are in keeping with international standards.

The Constitution guarantees the right to defence (Art. 33), which is more closely regulated by the CPC. The essence of the constitutionally guaranteed right to defence lies in providing the accused with the possibility of receiving appropriate legal aid throughout the proceeding. The right of an accused to defend himself is not an absolute right.[122] The defendant may undertake his own defence only in cases when the law does not make defence counsel mandatory. In any case, the court should inform him/her on his/her right to have a counsel (Arts. 5, 260 (1), 263 (1) CPC).

The court is obliged to assign an accused a defence counsel in two cases: when counsel is mandatory and the defendant has not retained his own attorney and when the defendant pleads indigence. The law stipulates cases in which defence counsel is mandatory: when the defendant is deaf, mute or both, incapable of defending himself, or is tried for a criminal offence warranting over 10-year imprisonment, the defendant must have a counsel at the first questioning; this also applies to a defendant *in absentia*, as soon as the decision is taken to conduct trial *in absentia*; if the defendant is taken into custody he must have a defence counsel appointed by court as soon as he is remanded in custody and as long as he is custody. (Art. 71 (1–3) CPC). The accused may take on another counsel instead of the one assigned

122 See *Croissant v. Germany*, ECtHR, App. No. 13611/88 (1992).

ex officio (Art. 73 (1), CPC). Moreover, a court president may dismiss an assigned legal counsel who is not fulfilling his duties.[123] As per indigence, as opposed to the 1990 Constitution, the new Constitution explicitly guarantees the right to free legal aid to the accused who cannot afford a lawyer, when the interests of justice so require and in compliance with the law (Art. 33 (3)).

The CPC envisages that an accused, who cannot bear the costs of defence, shall at his request be assigned a defence counsel in the event he is charged with a criminal offence carrying a minimum three-year sentence or when the interests of justice so require (Art. 72).

The CPC extends to the defendant the right to engage defence counsel. Thus, the defendant, who has been called by the police for questioning (Arts. 260 (1)), has the right to be informed about his rights, including the right to legal counsel.

After passing the decision to initiate the investigation or immediately after the filing of the indictment, as well as beforehand, if the suspect has been questioned pursuant to regulations on questioning of defendants, the defence counsel has the right to review records and collected evidence (Art. 74 (1)). The CPC allows the defence counsel to read the filed criminal charges and the request an inquiry immediately prior to first interrogation (Art. 74 (3)).

At the defendant's request, the defendant will be allowed to read the criminal charges against him i.e. notification of the crime immediately before the first questioning (Art. 95 (4)), but, upon reading it, s/he may not talk to his/her defence counsel until the hearing, whereby this provision restricts the right to defence of the accused.

Supervision of discussions conducted between the suspect/defendant with his defence counsel is especially regulated. Defence counsel has the right to a confidential discussion with the suspect deprived of liberty even before he has been interrogated, as well as with the defendant held in custody. Control over this discussion before the first interrogation and during the investigation is allowed only by observation, but not by listening (Art. 75 (2) CPC). When the investigation is completed or when the indictment is issued without prior investigation, the defendant cannot be denied free and unsupervised correspondence and discussion with his defence counsel (Art. 75 (5) CPC).

Since they quite well regulate the right of defence counsel to access all material evidence and prosecutor's unconditional obligation to disclose all evidence to the defence, as well as contacts between the accused and the counsel, these provisions are in keeping with the ECHR standards.[124]

123 This is in keeping with ECtHR practice, which determined that the authorities are not only obliged to provide a defence counsel, but that the legal aid counsel must be effective as well and that the authorities intervene if a failure by legal aid counsel to provide effective representation is manifest. See *Kamasinski v. Austria*, ECtHR, App. No. 9783/82 (1989), and *Artico v. Italy*, ECtHR, App. No. 6694/74 (1980).

124 See *Edwards v. United Kingdom*, ECtHR, A 247 B, 1992, para. 36.

The new Act on Misdemeanours guarantees the right to defence in Article 85. Defence may be presented in written form (Art. 177) if the court or administrative body conducting the misdemeanour proceeding finds immediate oral interrogation is unnecessary in view of the importance of the misdemeanour and the data it already possesses. The court may decide to hold the hearing in the absence of a duly summoned defendant if he has already been questioned and the court finds his presence is unnecessary (Art. 208). The right to defence counsel is guaranteed by the provisions in Articles 109 and 167 of the Serbian Act on Misdemeanours.

4.6.6.5. Right to Call and Examine Witnesses. – The accused must be allowed to call and examine witnesses s/he considers relevant to his/her defence. Also the accused must be allowed to question the prosecution's witnesses. The CPC allows the defendant to make motions to call new witnesses and expert witnesses and to present new evidence during the entire proceeding (Arts. 353 (3), 364 (1), 312 CPC; Art. 211 Act on Misdemeanours).

If a witness is questioned outside the courthouse, the parties to the proceedings and the injured parties shall be notified of the time and place of the questioning (Art. 359 (3), CPC). As per the questioning of witnesses during the preparations for the main hearing, the CPC stipulates that parties shall have the right to be notified of the time and place of questioning provided such notification is possible given the "urgency of the proceedings" (Art. 313 (4)).

The CPC also lists instances in which the main hearing may be limited only to the reading of records on the statements by witnesses, co-defendants or the already convicted parties to the crime (Art. 362).

The right to call and examine witnesses is not an absolute right. International standards allow restrictions of this right by permitting specific persons e.g. family members not to testify. Such exceptions are envisaged also by the CPC. Article 103 of the CPC prohibits testimonies of persons whose statements would violate confidentiality, unless the competent body waives the duty, nor the defence counsel of the accused whose testimony would reveal what the accused confided to him as his defence counsel. Moreover, the CPC prohibits calling to the witness stand minors unable to understand the importance of their right not to testify or of persons unable to testify because of their state of health or age.

Some of the defendant's relations are exempted from the duty to testify (Art. 104 (1)). The CPC also prescribes that witnesses may refuse to answer certain questions if their answers are likely to expose them or relatives to a certain degree of kinship to severe humiliation, considerable material loss or criminal prosecution (Art. 106). Witness collaborators may not withhold replies to questions during examination (Arts. 157 (1)).

Persons giving a statement in court are obliged to tell the truth. Perjury is a criminal offence (Art. 206 CC).

The CPC includes witness protection measures, including the exclusion of the public and other ways of concealing the identity of a witness if circumstances "obvi-

ously indicate" that the questioning of a witness would result in a serious threat to the life, health, physical integrity or property of considerable value to the witness or persons close to him or her. These measures are applied in trials for crimes warranting minimum ten-year imprisonment and exceptionally for crimes warranting minimum four-year imprisonment if it is impossible or very difficult to protect the witness in another fashion (Art. 117). Exceptionally, data on the identity of the protected witness may be denied both the accused and the defence attorney, but only temporarily, until the time the main hearing is scheduled at the latest (if the body conducting the proceedings assesses that the life, health or freedom of the witness would be seriously endangered and that the witness is convincing) (Art. 119 (5)).

4.6.6.6. Right to an Interpreter. – Under Article 32 (2) of the Constitution, everyone who does not understand the language officially used in court shall have the right to free interpretation, as will deaf, mute or blind persons.

Pursuant to the CPC, parties, witnesses and others parties to the proceedings have the right to use their own language and for that purpose interpretation shall be provided (Art. 8). The court must inform such persons of their right to interpretation and they may waive that right if they understand and speak the language in which the proceedings are held (Art. 8 (8)).

When "the defendant, his counsel... contrary to their request have been denied the right to use their own language during trial and to follow the course of the trial in their language" this constitutes a serious violation of criminal proceedings (Arts. 392 (1.3) CPC; Art. 86 new Act on Misdemeanours).

4.6.6.7. Prohibition of Self-Incrimination. – Under the Constitution, a person accused of or standing trial for a crime is not obliged to make statements incriminating himself or herself or persons close to him or her or to confess guilt (Art. 33 (7)).

The defendant has the right to remain silent and shall be warned that anything s/he says may be used against him or her before the first questioning. The accused may not be forced to testify against himself or herself or confess guilt (Art. 5 (1 and 3) of the CPC). Defendants also have the right not to enter a plea in response to the indictment and not to state their defence (Art. 346 (4) CPC, Art. 176 Act on Misdemeanours). If the defendant has not been duly informed about his rights, court judgement cannot be based on his statement (Art. 95 (11) CPC).

The CPC prohibits the use of force, threat, deceit, promise, extortion, exhaustion and similar means during the interrogation of an accused (Art. 95 (9)).[125] Also, the judgement cannot be based on the statement of the accused that has been obtained in contravention of this prohibition (Art. 392 (1.9)).

4.6.6.8. Right to Appeal. – Under Article 36 (2) of the Constitution, all persons shall have the right of appeal or to another legal remedy against a decision on their rights, obligations or legally vested interests.

125 See I.4.3.

The two-instance principle is an absolute rule – an appeal of a decision of a lower court is always allowed, and in some cases may be pursued to the third instance (Arts. 387 (1) and 418 (1) CPC).

In addition to the right of appeal as a regular remedy, a convicted person also has recourse to several extraordinary remedies and may file motions for retrial, extraordinary mitigation of penalty or request the protection of legality (Chapter XXVII CPC).

4.6.6.9. Right to Compensation. – Under Article 35 (1) of the Constitution, a person groundlessly or unlawfully convicted for a punishable offence shall have the right to rehabilitation and compensation of damages by the state and other rights stipulated by the law.

The CPC specifies cases and procedure for exercising these rights (Chapter XXXVI CPC). Hence, compensation shall be awarded a person who has been wrongly convicted or has been found guilty but not convicted and subsequently new proceedings were dismissed by extraordinary legal remedy or the person was acquitted by court or if the charges have been dismissed. However, the convicted person shall not have the right to compensation if the proceedings were dismissed or decision rendered to dismiss the charges as the result of the injured party as a prosecutor abandoning the case, or if the injured party withdrew charges after a settlement with the defendant, or because the accused has been exempted from criminal prosecution by an act of amnesty or pardon, or if in the new proceedings the decision was rendered to dismiss the charges due to lack of jurisdiction of the court if the authorised prosecutor has initiated proceedings before a competent court or if the defendant has wilfully brought about the judgement by false confession or in other manner, unless under duress exerted by a person employed in a state authority (Art. 533).

This right is also envisaged by the new Act on Misdemeanours (Arts. 280–284).

4.6.6.10. Ne bis in idem. – International standards (Art. 14 (7), ICCPR; Art. 4 (1), Protocol No. 7 to the ECHR) envisage that "nobody... can be tried again nor can he be punished again... for an offence for which he had already been legally acquitted or convicted". The ECHR, unlike the ICCPR, allows departure from this rule – procedure can be re-opened if "there is evidence about new or newly discovered facts or if in earlier procedure there has been a serious violation that could affect its outcome" (Art. 4 (2), Protocol No. 7 to the ECHR).

The Constitution also includes the *ne bis in idem* principle in Article 34 (4), according to which no one may be prosecuted or sentenced for a crime for which s/he has been acquitted or convicted by a final judgment, for which the charges have been irrevocably dismissed or criminal proceedings discontinued, nor may a court decision be modified to the detriment of the accused in proceedings instituted by an extraordinary legal remedy.

The CPC comprises the norm according to which "nobody shall be prosecuted and punished for a criminal offence for which he had already been acquitted or convicted by final judgement, or when criminal proceedings have been terminated by final decision or the charges have been dropped by final judgement" (Art. 6 (1)). Besides, it is prohibited to render decisions that are less favourable for the defendant in the proceedings upon filing the relevant legal remedy (Art. 6 (2)). The Act on Misdemeanours in Article 8 envisages that no-one may be punished in a misdemeanour procedure two or more times for the same misdemeanour offence and that a person found irrevocably guilty of an offence having the trait of a misdemeanour in a criminal or commercial court trial may not be punished for a misdemeanour.

4.7. Protection of Privacy, Family, Home and Correspondence

Article 17, ICCPR:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 8, ECHR:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is 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 or morals, or for the protection of the rights and freedoms of others.

4.7.1. General

According to the usual understanding, the right to privacy serves to ensure protection from undesired publicity but, according to the wider concept, the right to privacy is identified with personal autonomy of an individual, or his general freedom to choose his own lifestyle without interference by state or other persons. In this respect, the right to privacy is discussed in case of free determination of personal preferences of an individual. The European Court of Human Rights accepts the wider interpretation of the concept of privacy and considers that the content of this right cannot be predetermined in an exhaustive manner.[126] According to the

126 See *Costello – Robert v. United Kingdom*, ECtHR, 19 EHRR 112, (1993).

jurisprudence of this Court, privacy encompasses, *inter alia*, the physical and the moral integrity of a person, sexual orientation,[127] relationships with other people, including both business and professional relationships.[128]

The Constitution prescribes the inviolability of physical and mental integrity (Art. 25 (1)), of home (Art. 40), of letters and other means of communication (Art. 41).

4.7.2. Personal Data – Access and Collection

4.7.2.1. General Regulations. – The collection, storage and use of personal data[129] and the possibility of an individual to access data are protected by Article 8 of the ECHR.[130]

The Constitution includes a general provision guaranteeing the protection of personal data and prescribing that the collecting, keeping, processing and use of personal data shall be regulated by the law (Art. 42 (1 and 2)).

The Constitution explicitly prescribes that the use of personal data for any other purpose save the one they were collected for shall be prohibited and punishable as stipulated by the law, unless such use is necessary to conduct criminal proceedings or protect the security of the Republic of Serbia, (Art. 42 (3)).

Under the Constitution, everyone shall have the right to be informed of personal data collected about him, in accordance with the law, and the right to court protection in case they are abused (Art. 42 (4)).

The Personal Data Protection Act (*Sl. list SRJ*, 24/98, 26/98) states that personal data may be collected, processed and used only for the purposes specified by the Act, and for other purposes only with the consent in writing of the individual concerned (Art. 13). The report on *Compatibility of Yugoslav Law and Practice with the Requirements of the ECHR* states that this provision does not meet the condition that the purpose of collecting, processing and using personal data must not only be lawful, but also specified before the collection of data even begins.[131]

It also prescribes that individuals may request data about themselves, or may request to see such data, the deletion from records of data that is not in accordance with the law, and prohibition of the use of erroneous data (Art. 12). These rights, however, do not apply to data collected in accordance with the regulations on criminal and national security records (Art. 13). The grounds upon which access to per-

127 See *Dugeon v. United Kingdom*, ECtHR, 4 EHRR 149 (1981).

128 See *Niemitz v. Germany*, ECtHR, 16 EHRR 97 (1992).

129 See *Leander v. Sweden*, ECtHR, 9 EHRR 36, (1987); *Hewitt and Harman v. United Kingdom*, ECtHR, 14 EHRR 657 (1992).

130 See *Gaskin v. United Kingdom*, ECtHR, 12 EHRR 36 (1989).

131 See *Compatibility of Yugoslav Law and Practice with the Requirements of the ECHR*, CoE, October 2002, p. 190.

sonal data may be denied are very broadly defined and, consequently, give government agencies too much latitude to withhold information.

The Serbian Assembly in 2005 enacted the Police Act, which allows the police to collect, process and use personal data and in general envisages the application of the principle of proportionality (Art. 75). The Act does not comprise a provision detailing the manner in which data are collected. The Act prohibits collection of personal data immaterial for the purpose (Art. 78). However, the Act does not contain a provision which states that data gathered in contravention of the law will be deleted from the records. It only envisages deletion of data established to be untrue or upon termination of the reasons for or conditions under which the data were entered in the records (Art. 78).

As per the right to access data kept by the police, the Act obliges the police to provide the person whose personal data they are keeping with notification thereof within sixty days from the day of receipt of the person's request. It does, however, give the police the discretionary power to assess whether access to the data could "endanger the discharge of police duties, a legal proceeding, safety of people or property, or damage the interests of third parties" and to refuse to impart the data to the person if they maintain that one of the mentioned conditions is fulfilled (Art. 78). If the person the data refer to demonstrates they are inaccurate, the police shall amend the data (Art. 79).

The Criminal Code incriminates unauthorised collection, attainment, imparting and abuse of personal data collected, processed and used in accordance with the law (Art. 146). The Code restrictively regulates issuance of data in criminal records to competent judicial bodies and bans, although they does not punish, requests to citizens to submit proof of prior convictions or a clean record (Art. 102).

The Labour Act (*Sl. glasnik RS*, 24/05) for the first time regulates the processing of and access to employee personal data that are kept by the employer. The Act prescribes the right of an employee to insight in documents containing personal data and kept by the employer and to request the deletion of data not of immediate relevance to the duties s/he is performing and of incorrect data. The Act also prescribes that personal data cannot be accessible to a third party, except under conditions and in situations stipulated by the law or necessary to establish employment relations and rights. Personal data of employees may be collected, processed, used and shared with third parties only by an employee authorised therewith by the director (Art. 83). The Labour Act also prohibits an employer from asking a job applicant for data on his/her family i.e. marital status and family plans or to submit documents and other evidence not of immediate relevance to the duties the job entails (Art. 26 (2)). Employment may not be conditioned by a pregnancy test, unless the applicant is applying for a job which a competent health authority qualified as posing significant health risk to a woman and child (Art. 26 (3)).

The Tax Procedure and Tax Administration Act (*Sl. glasnik RS*, 80/02) prescribes that all information about a tax payer is confidential, apart from strictly

prescribed exceptions. They oblige the tax authorities to treat such information as confidential and allow their communication to other state bodies only in case of suspicion that a misdemeanour or crime has been committed (Arts. 7 and 24). The Act explicitly envisages the tax payer's right to court protection and compensation of damages if his/her right in Article 24, which *inter alia* guarantees the right to privacy of tax payers, is violated.

The State Administration Act (*Sl. glasnik RS*, 79/05) does not include separate provisions on the rights of citizens to access data; it only prescribes that state administration bodies are obliged to enable the *public* insight in its work and refers to the Access to Information Act (Art. 11). However, the latter law regulates only access to information of public importance (i.e. information which the "public has a justified interest to know") but does not mention the rights of individuals to have insight in information regarding them personally. On the other hand, the Act protects the privacy of individuals by envisaging that an authority will not disclose the requested information if it would thus violate the privacy of the person the information regards, but it does envisage exceptions: if the person gave his/her consent, if a person of public interest is at issue (this above all pertains to holders of state or political offices), if the information is relevant in terms of the office the person is discharging, and if a person gave rise to the request for disclosure of information by his conduct (Art. 14).

The new Constitution guarantees the right „to be informed" in Article 51, which prescribes that everyone shall have the right to access data in the possession of the state authorities and organisations exercising public powers. The Constitution does not explicitly restrict this right by invoking the right to privacy, but it does envisage that it shall be exercised „in compliance with the law", which means that the provisions of the Act on the Protection of Personal Data must be respected. It would, however, be better had the authors of the Constitution explicitly provided for the protection of the right to privacy in this context.

4.7.2.2. Opening of State Security Files. – Especially significant from the viewpoint of the right to privacy is the sensitive issue of opening files of the state security services. Two specific issues come to the fore – the right of an individual to review his/her file and the protection of privacy of those persons of whom records were kept from any abuse. The Government of Serbia had passed two decrees in May 2002 – Decree on Opening State Security Service Secret Files which declassified files kept on Serbian citizens (*Sl. glasnik RS*, 30/01), and, a week later, the Decree amending the previous one (*Sl. glasnik RS*, 31/01). According to the first Decree, the above-mentioned files had ceased to be secret, and citizens, whom these files had been kept on, had the right to see their contents, as well as to impart to others what they had learned. The second Decree, however, altered the title and Article 1 of the previous Decree, which meant that the text related to removal of the status of secret had been changed, so that the new changes allowed only "the inspection" of files by the persons concerned. This regulation entered into force only

after the files had already ceased to be confidential on the basis of the first Decree, so that it was insufficient to alter the text of the regulation to renew the status of state secret and it was necessary to enact another decision on restoring the status of confidentiality.[132] The Constitutional Court of the Republic of Serbia declared both decrees unconstitutional (*Sl. glasnik RS*, 84/03). According to the Constitutional Court, declassifying files, publishing a list of all citizens on whom files were kept, enabling those citizens to review their files etc. represent diverse ways of using personal data, which, according to Article 20 (2) of the Constitution of Serbia have to be dealt with by a law, and not by a decree or similar subsidiary legislation.

4.7.2.3. Powers of the State Security Services. – The functioning of security services and their powers to collect information are covered by the FRY Security Services Act (*Sl. list SRJ*, 37/02; *Sl. list SCG,* 17/04), which regulates the activities and powers of security services that had previously operated at the State Union level, by the Act on the Security and Information Agency (*Sl. glasnik RS*, 42/02).

Under certain provisions of these Acts, security services are authorised to have insight in personal data of individuals, contained in the documentation of various institutions. Namely, according to the Security Services Act, within their jurisdiction, security services may gather information they need through access to registers and other databases (Art. 24). State administration bodies, courts and legal entities which keep such registers and databases, are obliged to allow access to the security services on the basis of written requests by Service officials or the Minister in charge, if the data in question represent a state, official or military secret (Art. 26 (1)). The Security and Information Agency Act contains less clear rules. In the performance of their duties the Agency officials are authorised to seek and receive information and data from state and other bodies, legal and natural persons. The Act prescribes that such persons cannot be compelled to disclose information, but the refusal must be based on valid reasons established by law (Art. 10). The Act does not define what these reasons are.

The Act on the Security and Information Agency prescribes the duty of all members of the Agency to keep as secret all information which represent a state, military, official or business secret, as well as those whose publication would damage the interests of legal or natural persons (Art. 23). This duty is also prescribed for those persons which participate in the control and oversight of the Agency (Art. 19).

The Security Services Act stipulates that registers, personal and other databases and documents on the data constitute a state, official and military secret. The Act also envisages the duty of keeping classified information for the members of

132 Therefore the Ministry of the Interior acts inappropriately when it reminds citizens, before they read their files, that they are not allowed to disclose to others the contents of the file, because these files are no longer confidential and there are no grounds for restricting circulation of information contained in them. Another problem arose with opening secret files. Namely, the people who went to see the contents of their files noted that many of them contain only the material until the early nineties.

the Commission which performs the oversight of these services and for all persons which in any way participate in the work of the Commission (Art. 54).

From the viewpoint of personal data protection, another objection can be raised in relation to these laws. Access, control and protection of records and data in the registers and databases kept in the services themselves are not to be regulated by these laws, but by decrees (Art. 35, Act on the Security Services; Art. 11, the Security and Information Agency Act).[133]

Nevertheless, the federal Act on the Security Services does prescribe that security services are bound by the Constitution and laws in performing their duties, that they are obliged to respect human rights and freedoms, professionalism and proportionality in exercising their powers (Art. 4). Furthermore, the Act deals with the means of obtaining information as well as the instances in which information can be collected covertly (Arts. 24–32).

Article 34 stipulates that, upon receipt of a written request of a citizen, the services are obliged to inform him/her whether data on him/her were collected and whether the services keep records of his/her personal data; they are also obliged to allow the citizen insight in the documents on collected data.

The Act includes provisions on the right to complain to the Commission of the Federal Assembly and on oversight of the work of the security services by the Federal Assembly; the Act should in that respect be adjusted to the new circumstances that ensued after the dissolution of the SaM, i.e. these powers need to be transferred to the National Assembly of Serbia.

A much smaller degree of protection is provided by the Act on the Security and Information Agency. This Act does not give citizens the right to obtain information on the measures for the collection of data which the Agency has carried out against them, nor does it provide the right to review the collected data. The Act does not set up precise rules in respect of the authorisation required to collect data, nor does it specify instances in which the Agency can use special operational measures and means. The control of the Agency is set up at a much lower level – the Director of the Agency is appointed by the Government and no standing committee to monitor its work is set up. The only form of parliamentary control is the duty to submit a report on the activities of the Agency and on the security situation in Serbia to Parliament, twice a year (Art. 17). The ECtHR established in the *Rotaru v. Romania*[134] case that the Romanian law on security services did not meet the condition of specificity because it did not contain precise rules on the means of collecting data nor corresponding guarantees in respect of the supervision over the legality of such activities.

133 The Government of Serbia passed a Decree on the Means of Recording, Processing, Keeping, Using, Protecting and Supplying other State Authorities with Information and Documents on the Activity of the Security and Information Agency (*Sl. glasnik RS*, 68/02).

134 *Rotaru v. Romania,* App. No. 28341/95 (2000).

4.7.2.4. Protection of Privacy by Criminal Law. – The CC envisages punishment for the invasion of privacy. Thus unauthorised photographing (Art. 144), publication of another's personal papers, as well as of portraits, photographs, film or audio recordings of a personal nature (Art. 145), unauthorised wiretapping and audio recording (Art. 143), violation of the privacy of correspondence (Art. 142), and disclosure of privileged information (Art. 141), are criminal offences.

4.7.3. Home

In terms of the ECHR, the home encompasses all places of residence. The ECtHR expanded the concept of home to include certain business premises.[135]

The Constitution prescribes that the home is inviolate, and that the home or other premises of others may be entered and searched against their will if so authorised by a written court order. The search must be conducted in the presence of two witnesses. Exceptionally, the home or other premises of another may be entered and searched without a court order if it is necessary to apprehend a perpetrator of a crime or to eliminate a direct and grave threat to people and property (Art. 40).

The search of an apartment in order to apprehend the perpetrator of a criminal offence or to find evidence of an offence or objects of relevance to the criminal proceedings under way is allowed (Art. 77). The CPC envisages greater restrictions on the search of attorney's offices. These premises may be searched only in relation to a specific proceeding, file or document (Art. 77 (2)). The search must be ordered by the court by a reasoned warrant in writing. If the person whom the search warrant regards requests the presence of a legal counsel or defence counsel, the search shall be postponed until the arrival of such a person, for a maximum of three hours. A person subjected to search must be specifically informed about the right to have an attorney present during the search (Art. 78 (2)). Search can be conducted without prior serving of the warrant, as well as without prior notice to hand over persons or objects, or the information about the right to defence counsel or attorney, if there is possibility of armed resistance or other form of violence, or if there is obvious preparation or action to destroy evidence of a criminal offence or object of importance to criminal proceedings (Art. 78 (3), Serbian CPC).

Entry into a home and search in the absence of witnesses is allowed only under strictly defined circumstances (Art. 81). However, the provision allowing entry and search without a warrant or witnesses if "someone is calling for help" (Art. 81 (1)) is controversial. Such grounds are difficult to prove, and the burden of proof rests on the complainant, i.e. the owner of the apartment.

The person in posession of the apartment, who is present during the search, is entitled to lodge a complaint against the conduct of the internal affairs bodies (Art. 81 (2)). Internal affairs bodies are obliged to submit a report to the investigating judge about search undertaken without the appropriate court order (Art. 81 (6)).

135 See *Niemietz v. Germany*, ECtHR, 16 EHRR 97 (1992).

The CPC also allows authorised police or BIA officers secret entry into a home or other premises in specific circumstances, for the purpose of installing surveillance and wiretapping devices (Art. 146). The law stipulates that surveillance and wiretapping measures must be ordered in writing by an investigating judge, but does not require such warrants for entry into a home. Under the CPC, the investigating judge may order the application of surveillance and wiretapping measures (and thus allowing the police and BIA entry into a home) against persons suspected of having committed specific crimes. The list of these crimes is too broad and allows the entry of the BIA and the police into a home even of persons suspected of tax evasion.

Article 146 prohibits authorised officers, who have been allowed entry into a home, from searching it unless the above-mentioned requirements in Article 81 (1) are fulfilled, but does not stipulate the fulfilment of these special requirements for entry into a home.

The Criminal Code incriminates the violation of the home: violation of the inviolability of the home (Art. 139) and illegal search (Art. 140).

The term "home" is broadly constructed in Serbian jurisprudence as any enclosed space which serves as a dwelling either permanently or occasionally. Any premises legally owned by an individual, regardless of where he actually resides, are also considered a home.

4.7.4. Correspondence

In terms of Article 8 of the ECHR, the concept of correspondence encompasses both written correspondence and telephone conversations,[136] telex,[137] telegraphic and other forms of electronic communication.

The Constitution guarantees that the confidentiality of letters and other means of communication shall be inviolable and allows for derogation from this right only for a specified period of time if such derogation is necessary to conduct criminal proceedings or protect the security of the state and if it has been ordered by the court (Art. 41).

The CPC restricts circumstances in which an investigating judge can have insight in letters, telegrams or other means of communication addressed to a suspect or the defendant or sent by him; this is allowed only if there are circumstances on the bases of which it can be expected that these would serve as evidence in the proceedings (Art. 85 (1)). If the interests of the proceedings allow, the content of the consignment can be communicated in its entirety or partly to the suspect or the defendant or the person it had been addressed to, or can be delivered to him. If the defendant is absent, the consignment shall be returned to the sender if this is not contrary to the interests of the proceedings (Art. 85 (3)).

136 See *Klass v. Germany*, Series A No. 28, (1979–1980) 2 EHRR 214.

137 See *Campbell Christie v. UK*, 27 June 1994, 21482/93 DR 78A.

In circumstances listed in Article 146 of the CPC, an investigating judge may issue a reasoned order allowing for secret surveillance and recording of telephone and other conversations or communication by other technical means. This order shall be executed by the police or the BIA. In specific circumstances and if so provided by the order of the investigating judge, undercover investigators may use technical devices to record conversations, photograph or make video and audio recordings in accordance with the requirements in Article 146.

The PSEA allows no restrictions on the right of correspondence of persons serving prison sentences (Art. 75).

Pursuant to the above mentioned Security Services Act, these services are also authorised to secretly collect necessary information. In case this cannot be done in the usual way (Art. 28) or in a way that would not require a disproportionate risk or endangering lives of others, the Military Security Service can use special means and methods that temporarily restrict human rights and freedoms generally guaranteed by the Constitution and law (Art. 30 (1)). Special means and measures, including monitoring i.e. following and surveillance of persons, as well as surveillance of mail packages and other means of communication (Art. 30 (2.1 and 2.2)), can be used only upon approval of the competent court (Art. 31 (1)). The motion for their enforcement must contain basic suspicions, grounds and need for such measures, as well as their duration (Art. 31 (3)).

Pursuant to the Act on Security and Information Agency, the Agency Director can, if in the security interests of Serbia, issue an order based on a prior court decision, requesting measures against specific natural or legal persons that deviate from the principle of inviolability of the privacy of correspondence and other means of communication (Art. 13).

The Act prescribes the following procedure for taking measures to restrict someone's privacy: the Agency Director motion to undertake measures must be approved by the President of the Supreme Court of Serbia, or another authorised judge, within 72 hours from submission. The approved measures can be enforced for a maximum of six months, and can be extended for another six months at most on the basis of a new motion (Art. 14).

Some concern arises over the provision of Article 15, pursuant to which the Director of the Agency may decide to order privacy restriction measures, even without a decision by the Supreme Court of Serbia, when they are necessary for reasons of urgency, and a typical example of this includes internal and external terrorist acts. In this case, the Director only needs "prior written consent to initiate adequate measures of the President of the Supreme Court or an authorised judge". It is unclear on the basis of which data is a judge of the Supreme Court supposed to issue such authorisation. In such a case, the Agency Director must then initiate the usual proceedings before the Supreme Court only 24 hours after receiving the written consent, by submitting a written motion, which the Court must decide on within 72 hours. The Court then decides either to approve the extension of the already under-

taken measures or suspend them. Therefore, in this particular "case of emergency" it is imaginable that the Agency Director may himself restrict the privacy of an individual for the duration of 96 hours, without an appropriate decision by the Supreme Court based on relevant facts and data.

4.7.5. Family and Domestic Relations

According to the ECtHR, family life is interpreted in terms of the actual existence of close personal ties.[138] It comprises a series of relationships, such as marriage, children, parent-child relationships,[139] and unmarried couples living with their children.[140] Even the possibility of establishing a family life may be sufficient to invoke protection under Article 8.[141] Other relationships that have been found to be protected by Article 8 include relationships between brothers and sisters, uncles/aunts and nieces/nephews,[142] parents and adopted children, grandparents and grandchildren.[143] Moreover, a family relationship may also exist in situations where there is no blood kinship, as was the case in *X., Y. and Z. v. United Kingdom* (relationship between a transsexual and his child conceived by artificial insemination).

As opposed to the Charter, the Constitution does not include a provision protecting the family within the right to privacy and merely deals with the family from the aspect of the society as a whole. Under Article 66 (1), "the family, mothers, single parents and children (...) shall enjoy special protection."

Article 63 of the Constitution guarantees the right to freely decide whether to have children or not. The fact that this right is guaranteed "to all" is disputable. The question arises how one can guarantee this right to a man, if the mother decides not to have the baby (a right she is guaranteed under this Article).

The Constitution guarantees everyone the right to freely enter and dissolve a marriage and prescribes that the entry into, the duration and the dissolution of marriage are based on spousal equality (Art. 62). The Constitution also envisages that a marriage is valid only with the freely given consent of a man and woman, whereby it effectively renders any legislation allowing homosexual marriages unconstitutional. Article 12 of the ECHR also gives the right to marry and have a family only to "men and women".

A new Family Act was passed in Serbia in 2005 which is in accordance with international standards in terms of the right to privacy. The new Act introduces major improvements in that respect. The Act for the first time envisages that everyone has the right to the respect of family life (Art. 2 (1)). It also guarantees the right of the child to maintain a personal relationship with the parent she/he is not living

138 See *K v. United Kingdom* (1986) 50 DR 199, ECtHR.

139 See *Marckx v. Belgium* (1979) 13 EHRR 330, ECtHR.

140 See *Johnston v. Ireland,* No. 6/1985/92/139.

141 See *Keegan v. Ireland* (1994) 18 EHRR 342, ECtHR.

142 See *Boyle v. United Kingdom* (1994) 19 EHRR 179, ECtHR.

143 See *Bronda v. Italy* (9 June 1998) ECtHR.

with, unless there are reasons for partly or fully depriving that parent of the right of parenthood or in case of domestic violence (Art. 61). The child also has the right to maintain personal relationships with other relatives she/he is particularly close to (Art. 61 (5)). Provisions regarding the child's education take into account also the interests of the parents. The Act envisages the right of parents to provide their child with education in keeping with their ethical and religious convictions (Art. 71).

4.7.6. Sexual Autonomy

Sexual autonomy is also covered by Article 8 of the ECHR.[144] According to the jurisprudence of the European Court of Human Rights any restriction of sexual autonomy must be prescribed by law, necessary and proportionate. A restriction is easy to justify when it concerns the abuse of minors,[145] and relatively difficult to justify when it concerns consensual intercourse between adults.[146]

The right to express one's sexual orientation is not explicitly granted in the legal system of Serbia, including the new Constitution; the authors of the latter have also failed to explicitly list sexual orientation as grounds on which discrimination is prohibited. The Labour Act expressly prohibits discrimination on grounds of sexual orientation (Art. 18).

4.8. Freedom of Thought, Conscience and Religion

Article 18, ICCPR:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such restrictions as are prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to ensure the religious and moral education of their children in conformity with their own convictions.

144 See *Dugeon v. United Kingdom*, ECtHR, 4 EHRR 149 (1981); *Norris v. Ireland*, ECtHR, 13 EHRR 186, (1988); *Lusting-Prean and Beckett v. United Kingdom*, ECtHR, 29 EHRR 548 (1999); *Sutherland v. United Kingdom*, ECtHR, EHRR 117 (1 July 1997) [1998].

145 See *MK v. Austria*, ECtHR, 24 EHRR CD 59 (1997).

146 See *Dudgeon v. UK; Norris v. Ireland.*

Article 9, ECHR:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

4.8.1. General

The new Constitution of Serbia devotes four articles to issues of relevance to the realisation of the freedom of thought, conscience and religion. Article 11 states that Serbia is a secular state and prohibits the establishment of a state religion.[147] Article 43 regulates the issue of individual religious freedoms and freedom of thought and explicitly guarantees the right to change one's religion or belief. Under the Constitution, no one is obliged to declare his or her religion or beliefs. The Constitution also guarantees the right to manifest one's religion in religious in worship, observance, practice and teaching and to manifest religious beliefs in private or public. The Constitution correctly provides for restrictions only of the freedom to manifest religious beliefs and does not allow for the restriction of the freedom of religion. Restrictions must be determined by law and may be imposed only if they are necessary in a democratic society to protect the lives and health of people, other rights enshrined in the Constitution, public safety and public order or to prevent incitement to racial, ethnic or religious hatred. Limitations are allowed also for the protection of the "morals of democratic society", a newly coined phrase which, if correctly interpreted, ought to indicate a higher degree of acceptance of diverse moral beliefs in a heterogeneous society. The Constitution explicitly guarantees parents the right to freely decide on their children's religious education and upbringing. Article 44 regulates collective religious freedoms, i.e. the freedom of religious organisation,[148] while Article 45 guarantees the right to conscientious objection.[149]

The following two laws relevant to the realisation of the freedom of thought, conscience and religion were adopted in 2006: the Act on Churches and Religious Communities[150] and the Act on Restitution of Property to Churches and Religious Communities.[151]

147 See I.4.8.2.

148 See I.4.8.3.

149 See I.4.8.5.

150 *Sl. glasnik RS*, 36/06.

151 *Sl. glasnik RS*, 46/06.

4.8.2. Separation of Church and State

The Constitution explicitly defines the Republic of Serbia as a secular state and prohibits state religion. The principle of separating the state from the church is dual and implies both the autonomy of religious communities vis-à-vis the state institutions and the state authorities' independence from religious communities. The Act on Churches and Religious Communities provides the religious communities with an extremely high degree of autonomy but a number of its provisions undermine the principle of secularity.

Under Article 7 (2) of the Act, the state is obliged to assist in the enforcement of final decisions and convictions of competent ecclesiastical bodies. As the obligation to assist enforcement is automatic, i.e. the decision need not be upheld by state courts, this provision allows state bodies to help enforce decisions that may also violate the public order or specific human rights instead of neutralise such decisions.[152] Court proceedings held in accordance with the regulations of most religious communities do not comply with the international standards on fair trial in Article 6 of the ECHR or in Article 14 of the ICCPR.[153] Human rights and public order can be violated in the field of material law as well.[154] The scope of Article 7 (2) remains uncertain as the law does not specify which ecclesiastical court decisions need to be enforced by the state. Finally, the law does not set out a procedure under which the religious communities are to seek the assistance of state bodies in the enforcement of their court decisions nor how the state bodies are to provide such assistance.

Many other provisions, however, bring into question the principle of separation of the state and the church. Under Article 9 (3), for instance, churches and religious communities are entitled to change and abolish their organisational units, bodies and institutions that have the status of a legal person. This Article, however, does not explicitly oblige them to notify the state bodies of such changes in terms of registration. As para. 2 of the Article establishes the obligation of a religious community to register an organisational unit which is to have the status of a legal person under autonomous regulations, the correct interpretation of this provision would imply that this obligation also applies to every change in the status of the organisational units. However, according to the text in Article 9, the organisational

152 In its judgment in the case *Pellegrini v. Italy* (submission 30882/96), the ECtHR found that states ensuring the enforcement of decisions of religious community bodies are obliged to review the decisions and the procedures in which such decisions were reached.

153 Under Serbian Orthodox Church (SPC) procedural law, diocesal tribunals may pass convictions in the absence of the accused. Their lawyers are not entitled to appear before the tribunal. Under church criminal law, the burden of proving innocence rests on the accused i.e. there is no presumption of innocence (more in 1933 SPC *Tribunal Procedures* and 1961 SPC *Criminal Regulations*).

154 Some religious communities, for instance, allow polygamy, prohibit participation of women in public life or divorce, etc.

units of religious communities acquire legal personality on the basis of autonomous regulations of the religious communities, which is impossible as the state bodies are the ones that must assess whether the requirements for acquiring legal personality have been fulfilled.

Provisions conferring upon priests extremely broad immunity in the fulfilment of their duties are also disputable (Art. 8 (4)).

4.8.3. Religious Organisation and Equality of Religious Communities

Article 44 of the Constitution guarantees the equality of all religious communities, the freedom of religious organisation and collective manifestation of religion. The Constitution also guarantees the autonomy of religious communities. Under Article 44 (3), the Constitutional Court may ban a religious community only if its actions violate the right to life, the right to physical and mental health, the rights of the child, the right to personal and family integrity, right to property, public safety and order or if it incites and foments religious, ethnic or racial intolerance. The provision appears to narrow down the possibility of banning the work of religious organisations, as the Constitution does not provide for the prohibition of religious organisations violating all human rights and freedoms enshrined in the Constitution and international documents. For instance, it would be impossible to ban a religious organisation violating the freedom of expression of its believers or denying another community the freedom of religious association.

The Act on Churches and Religious Communities is largely not in compliance with constitutional provisions and international standards on the freedom of religious association and equality of religious communities. Although Article 6 guarantees the equality of all religious communities before the law, it, however, differently treats four types of religious communities. The first group comprises the traditional churches and religious communities granted that status under various laws passed in the Kingdom of Serbia (Kingdom of Serbs, Croats and Slovenes, later Kingdom of Yugoslavia): the Serbian Orthodox Church, the Roman Catholic Church, the Slovak Lutheran Church, Reformed Church, Evangelical Christian Church and the Islamic and Jewish communities. The second group comprises confessional communities, the legal status of which was regulated by application submitted in accordance with the federal Act on the Legal Status of Religious Communities[155] and the republican Act on Legal Status of Religious Communities.[156] The third group includes new religious organisations. The fourth group, which the Act does not mention but establishes implicitly, comprises all those unregistered religious communities which are in an extremely unfavourable position because it is uncertain whether such communities are allowed to perform any religious activities, although it is fully certain that they cannot possess property or enjoy the ben-

155 *Sl. list FNRJ*, 22/53.

156 *Sl. glasnik SRS*, 44/77.

efits other religious organisations can.[157] Any interpretation that would deprive these organisations of the right to perform religious activities would be in contravention of the Constitution and international practice.

Traditional churches and religious communities enjoy a privileged status. To re-register, they need only to submit an application including the name of the church or religious community, its seat, the name and function of the person authorised to act for and on behalf of the church or religious community, while other religious organisations, including confessional communities, also need to submit the decision on founding the organisation with the names, ID numbers and signatures of at least 0.001% of Serbia's citizens of age with permanent residence in Serbia according to the latest official census or foreign nationals with permanent residence in Serbia. This threshold (of 70 signatures) is much too high and difficult to reconcile with the provision in the Constitution under which no one may be forced to declare his or her religious beliefs. Moreover, all religious organisations apart from traditional ones must also submit their statutes or other written documents describing their organisational and management structure, rights and obligations of their members, procedures for founding and dissolving the organisational units, a list of organisational units with the status of legal person and other relevant data. The obligation to submit an outline of religious teachings, religious rites, religious goals and basic activities is especially problematic as the Act allows administrative authorities to assess the quality of religious teaching and goals, which is absolutely impermissible from the viewpoint of freedom of thought and religion. Under Article 20 (4) of the Act, a religious community's application may be rejected if the state finds its religious teaching or goals are inadequate. The Act also obliges communities to submit data on their regular sources of income. A religious organisation acquires the status of a legal person by entry in the registry.

The provisions in Article 22 (4) in conjunction with Article 20 (4) of the Act empowering the Ministry of Religion (administrative authority) to delete an organisation from the registry if it assesses its goals, teaching, rites or activities are in contravention of the Constitution or public order or threaten the lives, health, rights and freedoms of others, the rights of the child, the right to personal and family integrity and the right to property without the prior decision thereto of the Constitutional Court (as stipulated by Article 44 (3) of the Constitution) are not in compliance with the Constitution and international standards.

The equality of religious institutions is also violated by the provisions giving state bodies broad discretion in deciding on various forms of cooperation between the state and religious communities. For instance, Article 29 (2) allows for the payment of health and pension insurance of priests from the republican budget; Article 28 allows the state to financially aid churches and church communities, while Article 30

157 The European Commission for Democracy through Law (Venice Commission) came to this conclusion as well in its Second Report on the Draft Law on Churches and Religious Organisations in Serbia, April 2006. www.venice.coe.int/docs/2006/CDL(2006)029-e.pdf.

allows for granting churches and religious communities tax deductions; Article 32 allows for budget allocations for the construction of churches. The Act does not set out any criteria for the use of these benefits and practice has shown they are used in a discriminatory fashion and solely to the advantage of traditional churches and religious communities. Article 55 of the VAT Act entitles only traditional churches and religious communities to VAT refunds. Article 20 of the Act on Elementary Schools and Article 24 of the Act on Secondary Education allow only traditional churches and religious communities to hold religious instruction in public schools. These provisions seriously violate the principle of equality of religious communities.

4.8.4. Religious Instruction

Under the ICCPR, freedom of religion includes the right to manifest religion or belief in worship, observance, practice and teaching. The Serbian Constitution explicitly guarantees the right to religious instruction and the right of parents to provide their children with religious and moral education in accordance with their convictions (Art. 43 (3 and 5)).

The Act on Amendments and Changes to the Act on Elementary Schools (*Sl. glasnik RS*, 22/02) and the Act on Amendments and Changes to the Act on Secondary Schools (*Sl. glasnik RS,* 23/02) regulate religious education and teaching of an alternative subject in Serbian schools.

Pupils are not forced to attend religious instruction. They are entitled to choose between religious instruction and civic education. The decision on attendance of religious or alternative subject classes in elementary schools is taken by parents or, if applicable, legal guardians. In secondary schools, students choose the subject themselves, with the obligation to inform their parents or legal guardians about their decision. Classes in these subjects are held in all eight grades of elementary school and all four grades of secondary school. Parents or legal guardians (in primary schools) and students (in secondary schools) have to decide on one of the proposed subjects.

Amendments to the Acts on Elementary (Art. 20 (2)) and Secondary Schools (Art. 24 (2)) contain the provision stating that religious instruction in schools is organised only for the traditional churches and religious communities.

4.8.5. Conscientious Objection

Conscientious objection is not explicitly mentioned in international instruments, but it originates from the freedom of thought, conscience and religion. The right to conscientious objection is contained in and recognised by the recommendations and resolutions of the Parliamentary Assembly and the CoE Committee of

Ministers.[158] However, the jurisprudence of the European Commission of Human Rights established that conscientious objection is not protected by the Convention. Since Article 4 (3b) provides that "*in case of conscientious objectors in countries where they are recognised* (italics added), service exacted instead of compulsory military service" is not considered to be forced or compulsory labour, which clearly shows that it is upon member states to decide whether they will provide conscientious objection in their legal system.[159]

The right to conscientious objection is explicitly guaranteed as a fundamental human right by Article 45 of the Constitution of Serbia. The Constitution, however, does not guarantee conscientious objectors the right to serve civilian service instead of military service, but only the right to serve military service without arms.

The Act on Changes and Amendments of the Yugoslav Army Act (*Sl. list SRJ*, 44/05) envisages reduction of civilian service from 13 to 9 months, i.e. that it lasts three months longer than military service served in Army units under arms. The longer duration of civilian service itself is not contrary to human rights standards, as long as this difference in duration does not have a punitive, discriminatory character which *de facto* prevents the exercise of the right to conscientious objection. The European Court of Human Rights established in its jurisprudence on Articles 9 and 14 of the Convention that even twice as long civilian service can be justified.[160]

The Yugoslav Army Act regulates the conditions under which the right to conscientious objection can be enjoyed (Arts. 296–300). Recruits can invoke this right only at the time of drafting. Article 9 (1) of the ECHR reads: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief". Likewise, Article 18 of the Universal Declaration on Human Rights guarantees the freedom to change religion or beliefs, as does the Human Rights Committee in its 1993 General Comment 22 (48). The conscript should be given the possibility to invoke conscientious objection during the drafting period, during military service and as a member of the army reserve. This position appears to be in accordance with international standards as it recognises the right to change religion and beliefs, which is now also recognised by the Constitution of Serbia (Art. 43).

158 Instruments of the CoE relating to the right to conscientious objection are the following: Resolution 337 (1967); Recommendation No. 478 (1967) on the Right to Conscientious Objection; Recommendation No. 816 (1977) and Recommendation No. 1518 (2001) on the Right to Conscientious Objection in the Military Service of Member States, Recommendation No. R (87) 8, of the CoE Committee of Ministers to Member States on the Right to Conscientious Objection to Mandatory Military Service of 9 April 1987.

159 See *Autio v. Finland*, ECmHR, 72 DR 241 (1991); *X v. Austria*, App. No. 5591/72, 43 Coll 161.

160 See *G v. The Netherlands*, ECtHR, App. No. 11850/85 (1987) and *Autio v. Finland*, 72 DR 241, ECmHR, App. No. 17086/90 (1991).

The draft board decides on the possibility of performing military service without bearing arms. If the board renders a negative decision, the recruit can lodge an appeal within 15 days to the respective army body of the second instance (Art. 300 (2), Yugoslav Army Act). The decision of the second instance commission is final and there is no administrative procedure against it. The possibility of judicial protection has not been envisaged.

Pursuant to the Article 297 (1) of the Yugoslav Army Act, civilian service is performed in the units and institutions of the Army and the Federal Ministry of Defence. Civilian service entails the possibility of serving in civilian institutions (humanitarian organisations, health and cultural institutions, social welfare institutions, etc...) and not in the institutions of the army. Legislators have failed to establish the difference between performing military service without arms (which can be done in the institutions of the army) and civilian service. This is a very unusual omission, given that the previous legal provision had correctly interpreted the issue of the civilian service.[161]

Amendments to the Decree on Military Service (*Sl. list SCG*, 37/03) elaborate the provisions in the Yugoslav Army Act, thus allowing the implementation of the Act in keeping with international standards.[162]

A request for civilian service must be filed within eight days from the day of receipt of the draft letter. The conscientious objector is obliged to list the reasons why he would like to serve civilian service. A commission is authorised to examine the accuracy of the reasons. The objector is also to name the institution outside the Army or Ministry of Defence in which he would like to serve. The commission is not obliged to take into account the professional qualifications of the conscientious objector when selecting the institution to which it will send him to perform civilian service. The list of organisations is drafted by the defence minister and, as a rule, they are in the place of residence of the objector (Art. 27).

A person who possesses a licence to bear or have arms, or who has been irrevocably sentenced for a crime with elements of violence; who had in the past three years been convicted of a misdemeanour with elements of violence or who had applied for a licence to bear or have arms in the past three years cannot invoke conscientious objection. Members of hunting or sharp shooting associations and persons selling or repairing arms and ammunition are no longer ineligible for civilian service (Art. 27a).

Performance of military service without bearing arms or in civilian service will be halted if the conscript commits an act incongruous with the reasons why he was allowed service without weapons or civilian service (fight, use of firearms or other weapons, violent conduct, *et al*.) or if he fails to fulfil his work obligations. That conscript will be sent to serve military service under arms, which is an unpropitious provision as such a recruit could be sent to serve his military service in an

161 See *Reports 2003 and 2004*, I.4.8.3.

162 More on Decree in *Report 2005*, I.4.8.3.

army unit but without arms. The decision on suspending civilian service or service without bearing arms is reached by the military district that drafted the conscript.

A conscript who during civilian service submits a request to continue performing military service under arms in the Army will be sent to a military unit and each day he spent in civilian service will be calculated as half a day of service under arms. This provision can be interpreted as a form of punitive measure (see above).

The 2005 amendments also prescribe the obligation of the institutions in which conscripts are serving civilian service to refund the Defence Ministry for its expenses.

The Decree itself is a temporary solution, which is sometimes even contradictory to the very Act it supposes to implement.

4.8.6. Restitution of Property of Religious Organisations[163]

The Serbian Assembly adopted the Act on the Restitution of Property to Churches and Religious Organisations in April 2006. The Act regulates the restitution of the property in Serbia to the churches and religious organisations and their foundations and societies that had been taken away from them in accordance with agrarian reform, nationalisation, sequestration and other regulations passed and adopted since 1945 and any other legislation and for which they had not received compensation reflecting the market value of such property. Although the equal treatment of all churches and religious communities is listed as a fundamental principle in Article 2 of the Act, the application of this Act to the Jewish Community will be very problematic in view of the fact that its property was taken away from it before or during the W.W.II. occupation of Yugoslavia, a period not included in the timeframe set by the Act.

The right to restitution is afforded churches and religious communities, i.e. their legal successors in accordance with the valid enactments of churches and religious communities. If this provision is interpreted in accordance with the Act on Churches and Religious Communities, then this right is limited only to registered churches and religious communities in view of the fact that only they have the status of legal persons i.e. may exercise the right to property. The interpretation of this provision leads to the conclusion that if a religious organisation fails to re-register pursuant to the provisions in the Act on Churches and Religious Communities, its property will primarily to be restituted to its legal successors, i.e. the natural and legal persons listed in their statutes as their legal successors. As the constituent enactments of religious communities rarely contain such provisions, it appears that the state will practically have no obligation to restitute property to a religious community that has lost the status of a legal person.

The Act provides for the restitution of real estate and movable property of cultural, historical or artistic relevance that had been in the possession of the church-

163 This section will focus only on issues relevant to the freedom of religion. More on restitution in I.4.12.4.

es and religious communities at the time it was taken away. The Act does not explicitly list the restitution of temples, as the vast majority were never nationalised, although there were some cases in which monastery property, synagogues, et al. had been taken over by the state.

4.9. Freedom of Expression

Article 19, ICCPR:

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in para. 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health and morals.

Article 10, ECHR:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

4.9.1. General

Serbian legislation guarantees the right to hold opinions and freedom of expression. The right to freedom of expression of opinion is guaranteed by the Constitution (Art. 46).

Freedom of expression may be restricted by law if necessary to protect the rights and reputation of others, uphold the authority and impartiality of the courts

and protect public health, morals of a democratic society and the national security of the Republic of Serbia (Art. 46 (2)).

These provisions are in keeping with the ICCPR, although they mention public security rather than public order. An additional reason for restriction – preservation of independence and impartiality of courts – has been taken from the ECHR.

All the highest legal enactments in Serbia include separate provisions on freedom of the press and other media. Freedom of the press is guaranteed; publication of newspapers is possible without prior authorisation and subject to registration (Art. 50 of the Constitution). Television and radio stations can be established in accordance with law (Art. 50 (2)). Censorship of the press and other media is prohibited (Art. 50 (3)). The competent court may prevent the dissemination of information only if that is "necessary in a democratic society to prevent incitement to the violent overthrow of the constitutional order or the violation of the territorial integrity of the Republic of Serbia, to prevent propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Art. 50 (3)).

The right to correction is guaranteed by the Constitution (Art. 50 (4)), which leaves its detailed regulation to the law.

4.9.2. Public Information Act

This Act governs the right to public information, as well as the right to express opinion and the rights and obligations of all stakeholders in the process. This right particularly encompasses freedom to express opinion, freedom to gather, publish and disseminate ideas, information and opinions, freedom to print and distribute newspapers, freedom to produce and broadcast radio and television programmes, freedom to receive ideas, information and opinions, as well as the freedom to establish legal entities engaged in public information (Art. 1). The Act forbids censorship and indirect ways of restricting the freedom of expression, promotes information about issues of public interest, protects the interests of national and ethnic minorities and persons with special needs, treats equally foreign and national legal and natural persons, forbids monopoly in the field of establishing and maintaining public information services and narrows the field of privacy for the holders of state and public functions (Arts. 2–10).[164]

The Act regulates in detail the concept, procedure and deadlines for exercising the rights to correction and reply (Arts. 47–70) and the failure to publish information on outcomes of criminal proceedings (Arts. 71–78). The right to compensation of damages, material and non-material, can be exercised under this Act, independently of other available legal remedies. The responsibility of journalists, editors-in-chief and the legal entity that is the founder of the public information service is excluded if false or incomplete information was literally conveyed from a

164 See *Report 2004,* I.4.9.2 for a detailed analysis of the Public Information Act.

public parliamentary debate, a public parliamentary body debate, the court proceedings or from a document of a competent state body. On the other hand, they now have greater responsibility if they could have established the falsity or incompleteness of information with due diligence (Arts. 79–90).

4.9.3. Establishment and Operation of Electronic Media

The Broadcasting Act (*Sl. glasnik RS*, 42/02, 97/04, 76/05), regulates the conditions and ways of performing broadcasting activities, establishes the Republic Agency for Broadcasting and public broadcasting institutions, stipulates the conditions and procedure for issuing licences for broadcasting radio and television programmes and regulates other important issues regarding the broadcasting sector (Art. 1). In keeping with international legal standards, the Telecommunications Act (*Sl. glasnik RS,* 44/03) regulates *inter alia* the conditions and methods of operation in the field of telecommunications and establishes the Republican Telecommunications Agency.

4.9.3.1. Broadcasting Act. – The Act provides for the establishing of a Republican Broadcasting Agency (Agency) as an independent and self-governed organisation performing a public office and having the status of a legal person. The decision-making body is the Council and the Agency is represented by the Council Chairperson. The Agency has a number of competencies, from formulating the broadcasting development strategy to issuing broadcasting licences, monitoring the implementation of the Act and deciding on submissions and requests of broadcasters and other persons.

The Council's credibility was undermined by irregularities during the initial appointment of some members and resignations of two other members; this prompted the National Assembly to adopt an Act on Amendments to the Broadcasting Act (*Sl. glasnik RS*, 97/04) in mid–2004.

A separate provision prescribes who shall not be eligible for Council membership in keeping with the principles of conflict of interest and preserving the independence of the Agency's operations (Art. 25). The Act regulates in detail the reasons and notably the procedure for dismissing Council members; a decision on dismissal is taken based on a reasoned proposal and following a procedure allowing the Council member concerned to state his/her case.

4.9.3.2. Broadcasting Licences and the Broadcasting Licence Issuance Procedure. – The applicant must first obtain a radio station licence, which is issued by the telecommunications regulatory body in accordance with a separate law on telecommunications and the Radio Frequency Allocation Plan adopted by the competent telecommunications ministry. The body is duty bound to issue the licence if it is in keeping with the Act and the Plan (Art. 39).

Only a domestic natural or legal person, registered or residing in Serbia can become a licence holder. A domestic legal person, whose founders are foreign legal

persons registered in countries, the internal regulations of which do not allow or where it is impossible to determine the origin of the founding capital, may not take part in the public broadcasting licence tender. A foreign legal or natural person may have a share of a maximum 49% in the overall founding capital of the broadcasting licence holder unless otherwise envisaged by ratified international agreements. A foreign natural or legal person may not possess a share in the capital of public broadcasting services. (Art. 41).

Political parties, as well as organisations and legal persons established by them cannot become licence holders; the same applies to companies, institutions and other legal persons established by the Republic of Serbia, with the exception of the public broadcasting services (Art. 42).

Licences are issued by way of a public tender. The Act stipulates the reasons why a licence can be revoked before expiry of validity.[165] In such a case, the Agency conducts a procedure in which the broadcaster concerned must be given an opportunity to state his case and be present at the session debating the revocation of the licence, after which a reasoned decision is made. The broadcaster has the right to appeal the decision, as well as the right to initiate a judicial review and administrative proceeding against the decision of the Agency with regard to this appeal (Art. 62).

The public broadcasting services in the Republic shall comprise the Broadcasting Institution of Serbia (former Serbian Radio and Television) and provincial broadcasting institutions. Public broadcasting services produce and broadcast programmes of general interest.[166]

The Management Board of the Broadcasting Institution of Serbia, which together with the General Manager represents the management structure, is nominated by the Agency from the ranks of eminent experts in the fields of journalism, media, management, law and other prominent individuals (Art. 87). The Broadcasting Institution of Serbia and the Broadcasting Institution of Vojvodina are to be financed from the revenue collected by way of subscription.[167] The Broadcasting Act stipulates payment of a licence fee on a monthly basis. It also envisages that 70% of the revenue from licence fees in the territory of the Autonomous Province of Vojvodina shall belong to the Vojvodina broadcasting institution.

165 A broadcasting licence is revoked if: a broadcaster notifies the Agency in writing it no longer intends to broadcast its programme; if it is established that a broadcaster presented untrue data in the application for the public tender; if a broadcaster has not commenced programme broadcasts within the prescribed deadline; if a broadcaster has not conducted a technical inspection of the radio station within the prescribed timeframe; if a broadcaster has for no justifiable reason ceased broadcasting programme for more than 30 (thirty) consecutive days or for 60 (sixty) days intermittently in one calendar year; if a broadcaster has violated the provisions on prohibited concentration of media ownership envisaged by this Law; if the broadcaster has not paid the broadcasting licence fee despite a prior written warning.

166 See *Report 2004,* I.4.9.

167 Charging of licence fees in Serbia began in December 2005. After many disagreements on the implementation of this legal obligation, the fee was set at 300 dinars and is paid into a special account included in the electricity bill.

The Act also contains provisions prohibiting media concentration,[168] provisions on advertising and sponsorship, adapted to the intention to preserve independence, impartiality and variety of the media scene.

4.9.4. Criminal Law

The crimes of libel and defamation warrant only fines as of 1 January 2006 (Arts. 170 and 171 of the CC). However, the Criminal Code envisages imprisonment as a sanction for the criminal offence of "disclosing information about someone's personal and family circumstances". The position of the Human Rights Committee and the European Court of Human Rights is that permitted restriction of any human right is to be construed as undertaking only those measures that are absolutely necessary to achieve the legitimate aim – in such a way that the same aim is not achievable in a less restrictive way. It is deemed that a prison sentence or criminal liability in general are not necessary for the protection of honour and reputation, and that apart from the right to correction and other extra-judicial procedures it is enough to ensure civil liability in the form of indemnity in a corresponding amount.[169]

Serbian criminal law does not discriminate between the injured parties, whereas European Court jurisprudence distinguishes between a private citizen, public servant and a politician. The politicians have to withstand a lot more criticism, even insults. Graver forms of slander are defined in Serbian legislation as acts committed via the media and where "the stated or spread false statement is of such importance that it could have incurred graver consequences to the injured party" (Art. 170 (2) of the CC). The courts interpreted this provision in favour of injured parties – public office holders, arguing that their reputation had suffered graver consequences precisely because they are known by a large number of people.[170] In sharp contrast to this, the European Court holds firmly that politicians and other people in public office need to withstand much more criticism than the others.[171]

Exclusion of responsibility for acts against honour and reputation is also provided for in Serbian laws, *inter alia*, in the case of serious criticism, scientific or literary work and works of art, in journalism, etc., *if it can be determined from the manner of expression that it had not been done with the intent of contempt*. Contrary to this, the European Court of Human Rights articulated a clear view that

168 Media concentration, in other words the prevailing influence on public opinion, can arise when the broadcaster violates the principle of pluralism of thought by way of participating in the founding capital of another broadcaster, press and publishing company or a news agency.

169 See Conclusion of the Report by Special Rapporteur of the UN Committee for Human Rights on the Freedom of Expression, E/CN.4/2000/63, para. 205; for the view that criminal responsibility for slander does not represent a proportionate measure to protect reputation, see the ECtHR judgement in *Dalban v. Romania*, 1999; for the amount of reparation see *Tolstoy Miloslavsky v. United Kingdom*, ECHR, App. No. 18139/91 (1995).

170 See *Report 2000*, II.2.8.1.

171 See *Lingens v. Austria*, ECtHR, App. No. 9815/82 (1986). For a different interpretation, see *Prager and Obershlink v. Austria*, ECtHR, App. No. 15974/90 (1995).

freedom of expression also includes the right to disclose information and opinions that are *insulting* and *shocking*, if it is the matter of public interest, as well that freedom of the press includes the right to exaggerate and be provocative to a certain extent.[172]

National law also excludes responsibility if the accused *proved the authenticity of his claims* or if there had been sufficient grounds for him/her to believe in their authenticity.[173] However, the burden of proof set in such a manner deviates from the guaranteed presumption of innocence and is not in accordance with international standards.[174]

Serbian CC prescribes punishment both for "stating" and "spreading false rumours". In the case of *Thoma v. Luxemburg*, (App. No. 38432/97 (2001)), the ECtHR found that a journalist must not be held responsible for quoting or conveying the text.

4.9.5. Prohibition of Propaganda for War and Advocacy of National, Racial or Religious Hatred

Article 20, ICCPR:

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The Serbian law contains provisions meeting the requirements of this ICCPR article (prosecution for incitement of national, racial or religious hatred), but the Constitution does not include a separate provision explicitly prohibiting propaganda for war, which would have placed special emphasis on the importance of the prohibition. The Constitution merely mentions propaganda for war as grounds for restricting the freedom of expression. Article 49 of the Constitution prohibits incitement to national, racial or religious hatred.

In practice, however, criminal prosecution of incitement to national, racial hatred or propaganda for war is very rare. Article 386 of the new CC sets a harsher prison sentence of minimum 2 and maximum 12 years for this crime. However, the Code also includes a provision incriminating order to wage a war of aggression, which marks an improvement over the previous Code. This act warrants imprisonment between 10 and 40 years.

Article 317 of the CC explicitly banning incitement to national, racial and religious hate, dissension or intolerance (almost identically as the old Code) can also be criticised.

172 See *Prager and Oberschlick v. Austria.*

173 Applicable only to slander, however, but one can always be punished for the offence of insult and reproach by contempt (see Art. 92 (4) of the CC).

174 See *Lingens v. Austria.*

Para. 1 falls considerably short of the standards called for by the ICCPR since it prohibits incitement of national hate only with regard to the "nations and ethnic communities living" in Serbia, while the ICCPR forbids "any" incitement of national hatred, i.e. against any national group irrespective of where that group lives.

Two other provisions also prohibit incitement of national, racial and religious hatred. The new Serbian CC in Article 174 incriminates ridicule of nations, national minorities and groups, but only of those living in Serbia. Article 375 of the new Serbian CC defines the criminal offence of inciting genocide and other war crimes, the commission of which usually entails aggravated forms of activities prohibited by Article 20 of the ICCPR.

The Public Information Act regulates in more detail the issue of hate speech. It is forbidden to publish ideas, information and opinions that incite to discrimination, hatred or violence against persons or groups of persons on the grounds of their race, religion, nationality, ethnic group, gender or sexual preference (Art. 38). Responsibility is excluded if such information is a part of a scientific or journalistic or other authorised work dealing with a public matter and was published (1) without intent to incite to discrimination, hatred or violence, (2) is a part of an objective journalistic report or intends to critically review such occurrences (Art. 40).

The Broadcasting Act provides for the jurisdiction of the Agency for Broadcasting to prevent broadcasting of programmes that incite to discrimination, hatred or violence against certain individuals or groups of individuals on the grounds of their sex, religion, race, nationality or ethnicity (Art. 8 (2.3)), and only the public broadcasting services have the obligation "to prevent any form of racial, religious, national, ethnic or other intolerance or hatred, or hatred with regard to sexual orientation" in the production and broadcasting of their programmes (Art. 79).

4.10. Freedom of Peaceful Assembly

Article 21, ICCPR:

> The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 11, ECHR:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

4.10.1. Limitations of the Freedom of Assembly

The Constitution envisages in Article 54 that "(C)itizens may assemble freely." The Serbian Act on Assembly of Citizens (*Sl. glasnik RS*, 51/92) regulates the exercise of this right in greater detail.

The Constitution mentions free "peaceful" assembly, the formulation also used in international treaties and the Charter. The 1990 Serbian Constitution guaranteed the freedom of "public assembly".[175] The Act on Assembly of Citizens uses the term "public gathering".

Constitutional provisions on limitations of the freedom of peaceful assembly are in conformity with international standards. In Article 54 (4), the Constitution provides that the freedom of assembly may be restricted by law and "if it is necessary for the protection of public health, morals, rights of others or the security of the Republic of Serbia." The allowed grounds for restriction prescribed by the Constitution substantially correspond to the grounds prescribed by the ICCPR and the ECHR, though the Constitution does not list specific grounds such as "public order" (ICCPR) or "the prevention of disorder or crime" (ECHR).

The Constitution prescribes that the restriction must be "necessary in a democratic society" (Art. 20), in accordance with the ICCPR and the ECHR.

The Constitution does not mention the "disruption of public traffic" as grounds for restricting the right to public assembly that had been envisaged in the 1990 Serbian Constitiution and still is in the Serbian Act on Assembly of Citizens.[176]

The Constitution guarantees the freedom of peaceful assembly only to "citizens" but not to everyone, as envisaged by international standards. An additional problem arises from the provision in the new Constitution, under which the international treaties ratified by Serbia are applied as part of its legal system only if they are in accordance with the Constitution (Art. 194 (4)).[177]

The ECHR, namely Article 16, allows states to restrict political activity of aliens; this, however, does not *per se* justify restrictions on the right of aliens to

175 See *Report 2005*. I. 4.10.

176 See *Report 2005*, I.4.10.2 and *Report 2003*, I.4.10.

177 The HR Charter had guaranteed this right to everyone (Art. 31)..

peaceful assembly if their goals are not political in nature. The ICCPR does not contain a similar provision. Thus, the Constitution, which guarantees a right to peaceful assembly only to "citizens", is in part in conflict with European standards.

The Serbian Act states that public gatherings may be at a venue or along a specified route (Art. 3 (1)). This is in accordance with the practice of the European Court of Human Rights.[178]

The Serbian Act defines a public gathering as "convening and holding a meeting or other gathering at an *appropriate venue*" (Art. 2 (1), (italics added) and goes on to define appropriate venue (Art. 2, paras. 2 and 3).

The statute envisages prior designation by municipal or city authorities of "appropriate" locations for public assembly. This provision is too restrictive and creates a potential for abuse as it allows for banning gatherings at any unlisted venue, even when they do not constitute a threat to any of the interests cited in the Constitution.[179]

The Serbian Act on Assembly of Citizens provides that a public gathering cannot be held in the vicinity of the Federal (State Union) or Serbian Parliament buildings, immediately prior to or during the sessions (Art. 2 (4)). One may bring into question the justification of this general prohibition because the existence of constitutional grounds for restricting the right must be established in each particular case. Bearing in mind that the Act gives the competent bodies to which the gathering is reported (police) the discretion to determine what is considered a venue "in the vicinity" of the Parliament and what is considered "immediately prior to the session" and in respect of Serbian Constitution definitions of regular parliament sessions as the periods during which sessions are being held (two regular sessions lasting several months each with the possibility of convoking emergency sessions), one could reach the legitimate conclusion that the freedom of public assembly can be completely denied in particular cases.

The same objection is valid with regard to the possibility of denying the freedom of assembly pursuant to the Act on Strikes (*Sl. list SRJ*, 29/96). This Act allows strikers to assemble only on their company's premises or grounds (Art. 5 (3)) and, consequently, prevents them from staging public demonstrations.[180]

The ECHR allows for lawful restrictions of the right to free assembly of members of the armed forces, of the police or of the administration of the State (Art. 11 (2)), while the ICCPR allows restrictions of this right with respect to the members of police and army forces only under the general conditions that apply to

178 See *Christians against Racism and Fascism v. United Kingdom*, ECmHR, 21 DR 138 (1980).

179 See, for instance, the Decision on Venues for Assemblies of Citizens, *Sl. glasnik grada Beograda*, 13/97.

180 See *Report 2004*, I.4.10.1.

all others as well. Pursuant to the Police Act (*Službeni glasnik Srbije,* 101/05), police officers may not attend party or other political gatherings in uniform, unless they are on duty (Art. 134 (3)).

Organisers of public meetings are duty-bound to notify the police at least 48 hours in advance of the gathering (Art. 6 (1), Serbian Act on Assembly of Citizens). If the gathering is to be held at a venue reserved for public traffic and the traffic regimen has to be changed, the Act requires notification five days in advance (Art. 6 (2)). The Act also states that police will disperse a gathering that is being held without prior notification of the authorities and "take measures to restore public order and peace" (Art. 14).

4.10.2. Prohibition of Public Assembly

The Serbian Act makes it possible for the police to ban a public assembly for lawful reasons (threat to public health, morals or to the safety of human life and property, as well as disruption of public traffic[181]) (Art. 11 (1)). The organisers must be informed of the ban at least 12 hours before the gathering is scheduled to start. An appeal against the decision is possible but does not stay its execution, and the final decision may be challenged by instituting administrative proceedings.

The police authorities may *temporarily* prohibit a public assembly if it is aimed at a forcible overthrow of the constitutional order, violation of the territorial integrity of Serbia, violation of human rights, or incitement of racial, religious or ethnic intolerance and hate (Art. 9 (1)). The organisers must be notified of the ban at least 12 hours before the gathering is due to start. The difference between such a provisional ban and the permanent ban envisaged by Article 11 is that the former can be pronounced permanent only by a court decision. If the police authorities seek to impose a permanent ban, they must file a request to that effect with the competent district court within 12 hours, and the court has 24 hours from the receipt of the request to hand down its decision. The organiser may appeal to the Serbian Supreme Court within 24 hours of receiving the court's decision, and the Supreme Court must rule within 24 hours of receiving the appeal (Art. 10).

It is unclear why the law provides better legal protection by prescribing time periods and the involvement of courts in the case of the provisional ban envisaged by Article 9, while in the case of a permanent ban under Article 11 the organiser is directed to institute administrative proceedings. The preferable solution would be to apply the better legal protection under Article 9 in both cases, especially since the law does not oblige the police authorities to take into account proportionality when imposing permanent bans, which gives them broad discretionary powers.

181 The same grounds were envisaged by the 1990 Constitution.

4.11. Freedom of Association

Article 22, ICCPR:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protections of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this Article shall authorise States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in that Convention.

Article 11, ECHR:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

4.11.1. General

Article 55 of the Constitution of Serbia guarantees the freedom of political, trade union and all other forms of association. The Constitution also guarantees the right not to join any association. It in this way affords protection from forcible association, in accordance with the ECtHR view that states must guarantee everyone the right not to associate with others i.e. not to join an association.[182]

Serbia has two laws: the Act on Social Organisations and Citizens' Associations (*Sl. glasnik SRS*, 24/82, 39/83, 17/84, 50/84, 45/85, 12/89; *Sl. glasnik RS*, 53/93, 67/93, 48/94; hereinafter ASO) regulating the establishment and activities of social organisations and citizens' associations, and the Act on Political Organisations (*Sl. glasnik RS*, 37/90, 30/92, 53/93, 67/93, 48/94).

182 See *Sigurour A. Sigurjonsson v. Iceland*, 30 June 1993, A–264.

A public debate on the Draft Act on Associations drafted by the Ministry of Local Self-Government was held in 2005 and the draft was submitted to the Assembly for adoption in June 2006. It was the subject of much criticism, notably that it excessively regulated the matter, that it imprecisely defined the terms it used and restricted the right to free disposal of private property because it prescribes that the association statutes envisage that only national non-profit legal persons gain the property of an association that has ceased operating. The power awarded to the legislator to set the regime of state ownership of socially-owned real property which social organisations are entitled to use is impermissible, especially since the provision is in collision with other property laws. The draft envisages that an association may be prohibited by a Supreme Court of Serbia decision, but does not allow appeal, i.e. two-instance procedure, and only allows for submission of a request for the protection of legality. If this provision is adopted, it will be in contravention of Article 55 of the Constitution, under which only the Constitutional Court may ban an association.

4.11.2. Registration and Dissolution of Associations

The Constitution of Serbia does not require obtaining prior consent for founding an association, which is established merely by entry in a registry kept by the state in accordance with the law (Art. 55 (2)).

In Serbia, political organisations are registered with the competent Ministry of Justice (Art. 7, Act on Political Organisations in Serbia). Under Article 10 of the Act, the registration procedure is initiated by an application to the competent authority, which is obliged to enter the organisation in the registry within 30 days if it has been established in keeping with the law, or to issue a decision rejecting the application (if the decision is not issued, it shall be deemed that the political organisation has been entered in the registry). Trade union organisations are registered with the Labour Ministries (217 and 238 of the Labour Act; Art. 4, Rules on Entry of Trade Union Organisations in Register). An organisation acquires the status of a legal person on the day of registration.

Citizens' organisations in Serbia are registered with the republican Ministry of Interior pursuant to the procedure prescribed by the Act on Social Organisations and Citizens' Associations. The Ministry must decide on entry into the register within 30 days of receiving the application, whereupon the organisation acquires the status of a legal person and may commence its activities (Arts. 34 and 35).

Article 65 of the Act on Social Organisations and Article 11 of the Serbian Act on Political Organisations prescribe that an organisation ceases to exist: a) by a decision of the organisation; b) when its membership falls below the number required for its establishment; c) if an organisation has been banned; and d) if it is established that an organisation ceased operating (except for political organisations).

Decisions on banning political organisations are taken by the Supreme Court, at the proposal of the Public Prosecutor (Art. 12 (5), Serbian Act on Political Organisations). An appeal may be lodged against a decision of the Supreme Court; an appeal will be decided on by the chamber of the same court (Art. 13 (6)). As only the Constitutional Court may reach a decision to ban an association under the Constitution, this provision is not in compliance with the new Constitution of Serbia.

4.11.3. Association of Aliens

The right of aliens to association is not completely denied by statute. The ASO allows such associations on condition that their aims are not political, trade union or similar. Aliens' associations are subject to a regimen laid down by the Federal Act on Movement and Residence of Aliens. Article 68 (1) states that "associations of aliens are established on the basis of permissions issued by the administrative body competent for internal affairs." The same provision is laid down in the ASO (Art. 69 (2)). Furthermore, both acts define precisely that this right is enjoyed only by aliens who reside in the country, taking into account the special conditions required for that by the Act on Movement and Residence of Aliens (Arts. 31–60).[183]

Besides being subject to a very restrictive permit system, no court protection is envisaged in exercising the freedom of association of aliens. Under the ASO, an appeal may be lodged with the Government against a decision on rejecting a request for approval required for establishing an association of aliens, or a decision on banning the work of an association of aliens. No administrative litigation is envisaged in case the government brings a decision on the rejection of an appeal (Art. 70). Therefore, there is no effective judicial protection. The same provision is contained in the Movement and Residence of Aliens Act (Art. 73).

There is still no legislation specifically treating foreign NGOs.

4.11.4. Restrictions

4.11.4.1. Banning of Organisations. – The Constitution of the Republic of Serbia prohibits the founding and activities of secret and paramilitary associations. It also allows for prohibiting associations the activities of which are directed at the violent overthrow of the constitutional order, violation of guaranteed human and minority rights or incitement to racial, ethnic or religious hatred. The decision to ban an association may be reached only by the Constitutional Court (Art. 55 (4) of the Constitution.

183 Article 27 of the Act on Asylum (*Sl. list SCG*, 12/05 adopted on 25 March 2005) envisages that the provisions in Articles 44–60 of the Movement and Residence of Aliens Act shall cease to be effective on the day the member state laws (on asylum) come into force. Neither member-state passed its own act on asylum by the end of 2005.

ILO Convention 87 on Freedom of Association and Protection of the Right to Organise explicitly envisages in Article 4 that administrative authorities may not dissolve or suspend trade union organisations.[184]

The legal system in Serbia does not recognise the principle of proportionality with respect to restrictions on human rights and fails to take into account that they must "be necessary in a democratic society," as laid down by the ICCPR and ECHR with respect to the freedom of association.

The present legislation impermissibly expands the possibility of banning organisations and associations. The Serbian Act on Political Organisations states in Article 12 (2) that a political organisation may be banned if it admits minors to membership "and/or abuses them for political purposes." Though the aim obviously is to protect minors, the wording of the provision should be far more specific.

4.11.4.2. Financing of Political Parties. – The financing of political parties is regulated by a specific law.

Restrictions of sources of funding are much more stringent compared with the previous laws in this area. It is now forbidden to receive assistance not only from other states, but also from all foreign legal and natural persons, anonymous donors, trade unions, religious communities, organisers of games of chance, public institutions and companies, companies and firms with state capital shares, private firms that have contracted the performance of public services with state bodies and public services for the duration of the contractual relationship, humanitarian organisations, importers and exporters, producers and retailers of excised goods and legal entities and entrepreneurs that have not paid their tax dues. These provisions are aimed at preventing influence on political developments. However this measure is excessively restrictive and therefore not in keeping with the interest it is protecting, wherefore it cannot be deemed necessary in a democratic society.

4.11.4.3. Other restrictions. – Serbia's Act on Political Organisations does not permit a person, who has been pronounced a security measure banning his public appearance, or who has been convicted for specific criminal offences, to found a political organisation for the duration of the measure i.e. in the five years following the day the sentence convicting person became final (Art. 5 (2)).

Associations are banned if their activity is directed at a violent overthrow of the constitutional order, incitement of racial or national hate, and the like. In this case, the punishment is for the consequence – banning an organisation is the extreme penalty for its unlawful activity.

184 See 4.18.5.

4.11.5. Restrictions on Association of Civil Servants

The ICCPR and ECHR allow states to impose restrictions on the right to association of members of the armed forces and police and, in the case of the Convention, on the administration of the state too (Art. 22 (2), ICCPR; Art. 11 (2)), ECHR). Under the Constitution of Serbia, judges, public prosecutors and army and police staff are prohibited from political association.

Because it excludes a significant proportion of the population from political affairs, prohibiting civil servants and judges and prosecutors from membership in a political party is debatable and constitutes a serious restriction on the freedoms of association and expression. In its report on human rights in Yugoslavia in 1998, the Belgrade Centre for Human Rights was of the opinion that the broad general prohibition was not in accordance with the ICCPR and ECHR. In *Rekvény v. Hungary* (ECtHR, App. No. 25390/94 (1999)), however, the European Court of Human Rights ruled in 1999 that prohibiting police officers from belonging to political parties and taking part in political activities was not in contravention of Article 10 (freedom of expression) and Article 11 (freedom of association) of the ECHR. In view of this judgement, it may be said that the relevant legal provisions in principle impose permissible restrictions.

For its part, the European Commission of Human Rights has found that prohibiting members of the armed forces, police and state administration from organising in trade unions is in accordance with the ECmHR.[185] The Commission considered that states should have a large measure of freedom in judging what measures are required to defend their national security.[186]

The Act on Police allows trade union, professional and other forms of organisation and activity of police employees. The Act prohibits party organisation and political activity in the Ministry and does not allow police staff to attend party and other political gatherings in uniform unless they are on duty (Art. 134).

Article 47 of the Serbian Act on the Public Prosecutor's Office and Article 27 of the Act on Judges envisage that a judge, a public prosecutor and his deputy cannot be members of a political party. However, judges, public prosecutors and deputies are expressly recognised the right to associate in their judicial capacity in order to protect their interests and in order to take measures to protect and maintain their independence (public prosecutors and deputies) or their independence and autonomy (judges).

The aim of these restrictions of the right of judges, prosecutors and deputies to belong to political organisations is legitimate – to ensure an impartial and independent judiciary and, furthermore, to protect the public order. Hence, and like the prohibition of political organising of members of the armed forces and police, it may be considered necessary in a democratic society.

185 See *Council of Civil Service Unions v. United Kingdom*, ECmHR, App. No. 1160/85 (1987).

186 See *Leander v. Sweden*, A–116, 1985.

4.12. Peaceful Enjoyment of Property

Article 1, Protocol No. 1 to the ECHR:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.

4.12.1. General

According to the jurisprudence of the European Court of Human Rights, Article 1 of the Protocol No. 1 to the ECHR in principle guarantees the right to property, namely the right to own and use the property and freely dispose with it. Right to property is comprised of three different rules. The first rule, expressed in the first sentence of Article 1 (1), general in nature, outlines the principle of peaceful enjoyment of property. The second rule, formulated in the second sentence of the same paragraph, regulates the deprivation of property and subjects it to certain conditions. The third one, in para. 2, recognises the right of state parties to control the use of property based on public interest. According to the European Court's jurisprudence, the second and third rules should be interpreted in light of the general principle expressed in the first rule.[187]

In its jurisprudence, the ECtHR has held that a balance between the public interest and the rights of individuals must be found in every case of interference in the right to peaceful enjoyment of property. The need to balance these interests, stated in Article 1 of the First Protocol, is characteristic of the Convention as a whole. The extent of state interference (expropriation or restrictions on the use of property) must be justified by the circumstances of the particular case and conditional on fair compensation. The question of monetary compensation does not arise only with respect to expropriation and may be sought also in the case of restrictions on the use of property.[188]

Article 58 of the Constitution of Serbia guarantees the right to property. The Constitution is mostly in compliance with international standards, especially with respect to seizure of property, which, as it explicitly prescribes, shall be allowed only in public interest and if the owners are fairly compensated for the property. However, the provision allowing for the restriction of the right to enjoy property does not include a provision on the proportionality of such a restriction, which is in

187 See *Holy Monasteries v. Greece*, ECtHR, A–301, 1994.

188 See *Sporrong and Lonnroth v. Sweden*, ECtHR, A–52, 1982.

contravention of international obligations Serbia has assumed. Under the Constitution, the seizure or restriction of property to collect taxes and other levies or fines shall be permitted only in accordance with the law.

4.12.2. Expropriation

Serbian legislation fulfils the requirement to achieve a balance between public and private interests and to prevent violations of the rights to property by setting the following two prerequisites: that expropriation is in public interest and that fair compensation is granted for expropriated property.

The Expropriation Act (*Sl. glasnik SRS*, 40/84, 53/87, 22/89; *Sl. glasnik RS*, 6/90, 15/90, 53/95, 23/01) regulates the restriction and deprivation of the right to real property constituting the most serious forms of interference in the peaceful enjoyment of property. Under the law, the Serbian government determines the existence of public interest by a decision; these individual decisions may be contested in an administrative dispute. When the decision becomes final, the expropriation is legitimate, as it is conducted on valid legal grounds in accordance with a procedure based on the law. However, the question arises whether the competent state bodies correctly assessed the general interest, i.e. whether the legislators took into account the right to property at all when they defined the main criteria for assessing general interest.

The Act does not bind the Serbian Government to take into account the interest of the owner of the real estate or examine whether his interest to keep the property and continue his activities overrides general interest (Art. 20). The manner in which the Serbian Government has decided on the existence of public interest has in practice proved that it really did not take into consideration individual interest.

Individual interest is also imperilled in the stage of the proceedings before municipal bodies passing the expropriation order. In most cases, the owners, whose case has reached this stage, are not allowed to build anything on the real estate and have greater difficulty in disposing of their property because the notice of expropriation is entered in the land registry books. The Act does not set a time limit within which this stage must be completed, nor does it envisage material compensation of damage to the owner if it lasts too long. Such inauspicious circumstances in practice could last more than a decade.

The situation is similar after an expropriation order is passed but before the compensation is set. The status of the (already former) owner of the expropriated real estate is even worse, because the beneficiary of the expropriated real property has acquired the right of ownership of the real estate while its owner only possesses it formally. Moreover, if Article 35 (1) of the Act is applied, the owner loses even that form of security and is not paid the compensation. In practice, the owner would finally receive much less than the market price prescribed by Article 44 of the Act because of the manner in which the compensation was set and the delays in paying it.

The administration of the municipality where the real property in question is located conducts the proceedings pursuant to the expropriation proposal and renders the appropriate order (Art. 29 (1)). Appeal against this order is heard by the Serbian Ministry of Finance (Art. 29 (5)).

Under the Act, the beneficiary of an expropriation may take possession before a decision on compensation for the property becomes final, i.e. before a contract on compensation is concluded, if the Ministry of Finance considers this necessary because of the urgency of the matter or construction work (Art. 35 (1)). The language of this provision is too broad and imprecise to meet European standards. Under the ECHR, the law must, *inter alia*, provide protection from arbitrary decision-making by state bodies.[189]

Article 36 of the Expropriation Act does not provide for any time limit within which the previous owner of the expropriated real property can file a request for annulment of the effective expropriation order, but only a time limit within which, if the beneficiary of the expropriated real property has not put the facilities into proper use, the effective expropriation order can be annulled.

Fair compensation is the other prerequisite that must be fulfilled to avoid violation of the right to property. The Serbian Act stipulates that fair compensation may not be lower than the market value of the real estate.

4.12.3. Transformation of Forms of Ownership in Favour of State Ownership

The Act on Assets Owned by the Republic of Serbia (*Sl. glasnik RS*, 54/96) defined these assets as all those acquired by government agencies, organs and organisations of units of territorial autonomy and local governments, public services and other organisations founded by the republic or the territorial units, and all other assets and revenues released on the basis of the investment of government funds. In addition, the Act restricted management and disposition of property by local governments by requiring the Serbian government's approval for the sale of real property used by public-service organisations (Art. 8).

4.12.4. Restitution of Unlawfully Taken Property and Indemnification of Former Owners

Although denationalisation and indemnification of former owners is an important component of transition, the issue has not yet been dealt with comprehensively. Absence of an appropriate legal framework in this field has a negative impact primarily on the privatisation process, since foreign investors are reluctant to place significant investments into the local economy due to the lack of legal cer-

189 See *Kokkiniakis v. Greece*, ECtHR, A–260 (1993); *Tolstoy Miloslavsky v. United Kingdom,* ECtHR, A–316 (1995).

tainty and safeguards with regard to intangibility of property. Restitution of land to its previous owners or their heirs is allowed under the Act on Recognition of Rights to and Restitution of Land Transformed into Socially Owned Property by Inclusion in the Farmland Fund or by Confiscation due to the Non-fulfilment of Obligations Arising from the Obligatory Sale of Farm Produce (*Sl. glasnik RS*, 18/91, 20/92, 42/98). Restitution is in kind: the former owners or their heirs are given their land back or are given land of the same size and quality. The Act prescribes financial compensation at the market rate if restitution is impossible. Only land that was socially owned at the time the Act was adopted may be restituted.

The overdue law on property restitution and indemnification still had not been passed in Serbia by the end of 2006.[190] A symbolic step towards denationalisation was, however, made in 2005 by the adoption of the Act on Registration of Arrogated Property (*Sl. glasnik RS*, 45/05). The Act regulates the reporting and registry of property arrogated in the Republic of Serbia pursuant to regulations and legislation on nationalisation, agrarian reform, confiscation, sequestration, expropriation and other regulations since 9 March 1945 without compensation of its market value or fair compensation. The deadline for reporting such property expired on 30 June 2006.

In 2006, the Serbian Assembly adopted the Act on the Restitution of Property to Churches and Church Communities (*Sl. glasnik RS*, 46/06). The main flaw of the law is that it gives religious communities an advantage over other, notably legal persons, whose property was confiscated during the Socialist era.[191]

Under the Act, churches and religious communities shall regain the real estate they had owned, notably farmland, forestland, urban building land, residential and business premises, apartments and offices, movable property of cultural, historical or artistic importance. Not only the Republic of Serbia, but natural and legal persons as well, who currently own the arrogated property and had not gained it by a legal contract and at real market value, are obliged to restitute property to churches and religious communities. The Act also affords protection to *bona fide* acquirers of arrogated property.

Under the Act, property shall be returned in kind and financial compensation shall be provided only if natural restitution is impossible.

The Act includes a provision under which it shall apply also to the property of churches and religious communities in the territory of Kosovo. This provision is clearly political in nature and inapplicable in practice, as the regulations adopted since 1999 are not binding either on the Kosovo authorities or UNMIK. This provision actually brings into question the very motives for the adoption of this law and not a general act on restitution.

190 More in www.cups.org.yu/projekti/html/denacionalizacija.html.

191 More on inequality of religious organisations in I.4.8.

4.12.5. Specially Protected Tenancy

Specially protected tenancy is a specific form of the right to housing created in the former Yugoslavia that applied both to socially and privately owned apartments.

After the socially-owned apartments were bought by their tenants and became private property (in accordance with two laws on housing passed in the early nineties entitling the holders of specially protected tenancy to buy the apartments at favourable prices), specially protected tenancy has in Serbia applied only in cases of privately owned apartments arrogated in an administrative procedure by 1973. The holders of specially protected tenancy in privately-owned apartments have not had the possibility to buy the apartments they have been living in and are thus in a less favourable position than the holders of tenancy rights in socially-owned apartments. A draft denationalisation law had provided for this possibility, envisaging that the state reimburse the owner the full value of the apartment. The draft was, however, never submitted to parliament for adoption.

Specially protected tenancy is essentially a specially protected form of tenure with elements of ownership. It however differs from ownership above all by restriction of the right to dispose of such property. A holder of a specially protected tenancy can use the apartment until s/he dies unless tenancy is terminated for a reason listed in the Act. The holder of the specially protected tenancy may use the apartment only to satisfy his/her housing needs and shall lose the tenancy if s/he uses it for other purposes. Specially protected tenancy may also be terminated if the tenant does not pay the rent, damages the apartment or common property or acquires ownership of another apartment. The social function of the institute is best exemplified by the provision envisaging termination of specially protected tenancy if the holder does not live in the apartment for more than a year, for a maximum of four years.

Under the Act, specially protected tenancy cannot be transferred *inter vivos* but only *mortis causa* and only to persons who are members of the family household of the deceased holder. Holders of specially protected tenancy shall have primacy in purchasing such apartments should their owners decide to sell them.

The Serbian Act on Housing (*Sl. glasnik RS*, 50/92) regulates for the most part the manner in which the institute will gradually disappear from the Serbian legal system.

The ECtHR has on a number of occasions refused to review the protection of specially protected tenancy on privately owned housing and the right of pre-emption of holders of specially protected tenancy.[192] The Court decided against the admissibility of the cases citing the fact that "there is a legitimate interest of owners to have their ownership protected."

192 See e.g. *Šorić et al v. Croatia,* application No. 43447/98, decision as to admissibility of 16 March 2000, *Strunjak et al v. Croatia*, Application No. 46934/99, decision as to admissibility of 5 October 2000.

4.13. Minority Rights

Article 27, ICCPR:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

4.13.1. General. – Serbia ratified many of the most significant universal and regional instruments guaranteeing, directly or indirectly, minority rights and freedoms,[193] including the Framework Convention for the Protection of National Minorities. Negotiations with neighbouring countries on concluding bilateral agreements on the protection of national minorities are under way.

Standards guaranteed by national law frequently had exceeded international ones, but the application of these commendable regulations had been hindered by various factors, such as the lack of conformity of republican and former state union regulations. Several factors accounted for the lack of conformity and implementation, notably: SaM and republican regulations were adopted at different times and in different circumstances; direct applicability of international agreements and constitutional acts was weak; the minority protection mechanisms lacked in efficiency. In view of the new circumstances, the state now has the chance to carry out a strategic reform of its legislation and harmonise regulations and minority protection at various levels. In addition to republican powers in the field, the Act Establishing Particular Jurisdiction of the Autonomous Province of Vojvodina (the so-called Omnibus Act, *Sl. glasnik RS*, 6/02) and the Local Self-Government Act (*Sl. glasnik RS*, 9/02) provide local governments and the Autonomous Province of Vojvodina with greater competencies in ensuring minority rights.[194]

The new Constitution of Serbia provides for extensive protection of minorities. Serbia does not have a separate law on minority protection; the authorities decided back in 2003 that the Act on the Protection of Rights and Freedoms of National Minorities adopted in 2002 (*Sl. list SRJ,* 11/02, hereinafter: Act on the Protection of Minorities) ought to be taken as a framework law[195] and that specific areas of minority protection be regulated in greater detail by separate laws. They have not, however, taken any measures to implement the recommendation of the CoE Advisory Committee to amend the definition of a national minority in the Act so that it does not pertain only to nationals and thus avoid the negative impact on the protection of those Roma or other persons whose citizenship status, following the break-up of Yugoslavia and conflict in Kosovo, has not been regularised, including

193 The FRY acceded to some agreements by succession (as the ex-SFRY was a party to them); others were acceded to by the State Union of Serbia and Montenegro.

194 See *Report 2005*, I.4.13.1.

195 See *Report 2005*, I.4.13.1.

those displaced persons from Kosovo who lack personal documentation and thus difficulties in obtaining confirmation of their citizenship.

4.13.2. Constitutional Protection. – The 1990 Serbian Constitution, which defined Serbia as a "democratic state of all citizens living in it" (Art. 1) did not devote a special chapter to the scope and protection of persons belonging to minorities, although it did guarantee specific human rights, and, for some of them, emphasised the guarantees that must be secured for the nations and nationalities.

The authors of the new Constitution opted for a different concept. The Constitution is adopted "considering the state tradition of the Serbian people and equality of all citizens and ethnic communities in Serbia" (Preamble), and defines Serbia as the „state of the Serbian people and all citizens who live in it, based on ...human and minority rights and freedoms..." (Art. 1). However, the articles in the section Constitutional Principles stipulate that the Republic of Serbia shall protect the rights of national minorities and guarantee special protection to national minorities so that they can realise full equality and preserve their identity (Art. 14). Alongside rights guaranteed to all citizens, the Constitution guarantees persons belonging to minorities „additional individual and collective rights" in a separate, third section of Chapter II. Apart from the general prohibition of discrimination, the Constitution includes a separate provision in Article 76 (2) and bans discrimination on the grounds of belonging to a national minority. It expressly allows for affirmative action measures i.e. the introduction of special regulations and interim economic, social, cultural and political measures for the achievement of the full equality of persons belonging to national minorities and the majority nation. However, these measures may be undertaken only "if they are aimed at eliminating *extremely* unfavourable living conditions which particularly affect them" (italics ours). The application of this provision needs to be monitored in view of the risk that it may be interpreted too narrowly.

4.13.3. Prohibition of Incitement to Racial, Ethnic, Religious or Other Inequality, Hatred or Intolerance. – The Constitution expressly prohibits the incitement to racial, ethnic, religious or other inequality, hatred or intolerance (Art. 49). Serbian criminal legislation treats as criminal offences and prescribes penalties for violations of minority rights, discrimination, and incitement to or fomenting of racial, ethnic or other forms of hatred in a number of provisions. The Serbian laws on primary and secondary schools (*Sl. glasnik RS*, 50/92) prohibit all activities and any incitement to activities endangering or disparaging groups or individuals on grounds of race, ethnicity, language, religion or sex, or political convictions. The laws prescribe fines for perpetrators of these activities.

4.13.4. Expression of Ethnic Affiliation. – The Constitution of Serbia guarantees the freedom of expression of ethnic affiliation (Art. 47). A similar provision exists in the Act on the Protection of Right and Freedoms of National Minorities. Namely, its Article 5 (1) stipulates that no one shall suffer damage or injury due to his/her affiliation or expression of national background or due to associating there-

tofore, which is certainly a more precise formulation.[196] Collection of ethnicity related data must be legally protected and the persons, whose data are gathered, must be informed that the imparting of such data is voluntary.[197] The Act on the Protection of Personal Data prescribes that personal data on racial origin, national belonging or religious or other beliefs may be gathered, processed and released for use only with the person's written consent (Art. 18). A violation of the freedom of expression of national or ethnic belonging shall carry a fine or maximum one-year imprisonment; in the event it is committed by a public official in the performance of duty, it shall carry a prison sentence of maximum three years (Art. 130, CC).

4.13.5. – Preservation of the Identity of Minorities. – The Constitution guarantees a large number of rights of relevance to the preservation of the identity of minorities, including the right to the expression, preservation, fostering, development and public expression of national, ethnic, cultural, religious specificities; the rights to use their symbols in public and their languages and scripts, including in specific administrative proceedings; the right to education in their own languages in public institutions and institutions of autonomous provinces; the right to full, timely and objective information in their languages and to establish their own media, in accordance with the law, etc (Art. 79 (1)). The Constitution explicitly allows autonomous provinces to guarantee additional rights (79 (2)). Article 80 (1) allows persons belonging to national minorities to establish educational and cultural associations funded on a voluntary basis with a view to preserving and developing national and cultural specificities. Under Article 13 (2) of the Framework Convention, the exercise of this right does not entail any financial obligation for the states. Under the Act on the Protection of Minorities, the state is to provide such assistance in accordance with its funding abilities. Under this Act, the state is to ensure public service broadcasts of cultural content in the languages of national minorities. State museums, archives and institutions charged with the protection of cultural heritage are obliged to ensure the exhibition and protection of the cultural and historical heritage of minorities in their territory and involve representatives of minority national councils in decisions on the manner of presenting minority cultural and historical heritage (Art. 12). The Serbian Act on General Interest Activities in Culture defines national minority culture programmes and protection of their cultural heritage as public interest.

4.13.6. Prohibition of Assimilation and Forced Change of the Ethnic Structure of the Population. – The new Constitution contains a provision that was not included in either the old Constitution or laws – Article 78 (3) prohibits forced assimilation and measures that may result in the artificial change of the ethnic composition of the population living in areas in which national minorities have been living traditionally and in large numbers. This provision is extremely important,

196 The Framework Convention deals with this issue identically (Art. 3 (1)).

197 *Advisory Committee Opinion on SaM*, *supra.* n. 4, para. 27.

especially in view of the recent past. The Constitution is in keeping with CoE Recommendation 1201, as Article 80 (3) guarantees persons belonging to national minorities the right to free and unimpeded contacts and cooperation with their ethnic kin living outside Serbia.

4.13.7. Administration of Public Affairs and National Councils. – Although the Constitution twice entitles all citizens to participate in the administration of public affairs and hold public office (Arts. 53 and 77 (1)), it nevertheless prescribes that the ethnic breakdown of the population and adequate representation of persons belonging to national minorities shall be taken into consideration during the recruitment of persons for offices in state bodies, public services, provincial and local self-government bodies (Art. 77 (2)). Under the Act on the Protection of Minorities, the ethnic composition of the population and knowledge of the language spoken in the territory in which the body or service is situated shall be taken account when recruiting staff for public services.

Collective minority rights mean that persons belonging to national minorities are entitled to decide on specific issues regarding their culture, education, informing and use of language and script either directly or via their elected representatives. The new Constitution guarantees persons belonging to national minorities the right to elect their national councils in keeping with the law in order to realise their right to self-governance in culture, education, informing and official use of language and script (Art. 75 (3)). National councils, as institutions of cultural autonomy with specific public and legal powers, were first introduced by the Act on the Protection of Minorities, which regulates their powers in general.[198] Individual laws or amendments to existing laws on education, culture, information and use of language are to specify their powers in greater detail. Under the Constitution, the election of national council members shall be regulated by law; under the Act on the Protection of Minorities, the initial members of the councils are elected at assemblies of electors under the D'Hondt election system,[199] while the long-term regulations on appointment of council members are to be provided for by a separate law. By the time this Report went into print, a law on the election of national councils, instrumental for the continued work of these important bodies of cultural autonomy, had not been adopted yet although the mandates of the initial members of many national councils were to expire soon.

198 Although highlighting the importance of introducing national councils in the SaM legal system, the Advisory Committee maintains it is important they are not perceived as the sole and exclusive interlocutor of the authorities in minority questions and that other relevant actors – including NGOs and associations of national minorities – are brought into the relevant decision-making processes; *Advisory Committee Opinion on SaM*, *supra* n. 4, para. 109.

199 An elector was any citizen who was: a member of a national minority and had collected 100 signatures of voters belonging to that minority and was nominated by a national organisation or an association of the minority, or a republican parliament deputy or municipal councillor belonging to the minority. See Rules on the Method of Operation of Assemblies of Electors for the Election of National Councils of National Minorities (*Sl. list SRJ*, 41/02).

4.13.8. Encouraging the Spirit of Tolerance and Intercultural Dialogue – Serbia committed itself to encouraging the spirit of tolerance and intercultural dialogue and taking efficient measures to promote mutual trust, understanding and cooperation amongst all people living in Serbia. Serbia has thus vowed to take positive measures to spread tolerance. It will be interesting to monitor how the authorities will formulate a policy and elaborate projects to actually fulfil these positive obligations in practice.

4.14. Political Rights

Article 25, ICCPR:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 3, Protocol No. 1 to the ECHR:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

4.14.1. General

The Constitution proclaims the sovereignty of the people, and that suffrage is universal and equal (Arts. 2 and 52). Every able-bodied citizen of age shall be entitled to vote and to be elected (Art. 52 (1)). In addition, the Constitution guarantees all citizens the right to participate in the administration of public affairs, to employment in public services and to hold public office under equal conditions (Art. 53)

4.14.2. Participation in the Conduct of Public Affairs

The Constitution gives concrete principal guarantees of direct democracy and prescribes the popular initiative for adoption of legislation and for change of constitutions. In Serbia, the right to propose a law, other regulation or general act belongs to 30,000 voters (Art. 107). The proposal to change the Serbian Constitution can be submitted by at least 150.000 voters.

The Constitution recognises the institute of referendum as a form of direct democracy. The new Constitution for the first time regulates which issues may not

be decided at referenda: obligations deriving from international treaties, laws relating to human and minority rights and freedoms, tax and other finance-related laws, budget and annual statements of accounts, introduction of a state of emergency, amnesty and issues related to the National Assembly powers related to elections (Art. 108 (2)).

4.14.2.1. Restrictions on Performing a Public Office. – In addition to the right to vote, the ICCPR and the ECHR acknowledge the rights of citizens to be elected.[200] ICCPR also acknowledges the rights of citizens to participate in the conduct of public affairs and to have access, on general terms of equality, to public service in their country. These rights may be restricted. The ICCPR insists the restrictions cannot be unreasonable, while the ECtHR found that the right of a citizen to be elected may be subjected to qualification requirements as long as they are not discriminatory.[201]

The National Assembly on 30 May 2003 adopted the Responsibility for Human Rights Violations Act, with the aim of temporarily preventing persons who had consciously violated human rights in the previous undemocratic regimes from performing a specific public service. Due to political disputes, however, the lustration commission charged with implementing the lustration procedure never began working.[202]

The Serbian Assembly in 2004 enacted the Act on Prevention of Conflict of Interest in Discharge of Public Offices (*Sl. glasnik RS*, 43/04). The act sets forth a series of regulations aimed at guaranteeing the impartiality of officials and preventing the use of public office for gain or privileges. The Act stipulates conflict of public and private interests when an official has a private interest that affects or may affect his discharge of a public office (Art. 1 (2)).[203] The Act elaborates in greater detail the provisions regarding the proceeding before the commission (the Republican Conflict of Interests Board) and distinguishes between appointed and elected officials. The penalties prescribed by the Act include: a non-public warning, a public declaration of the recommendation for dismissal, i.e. public declaration of the violation of the Act in case of elected officials (Art. 25).

4.14.3. Political Parties

The establishment of political parties and their activities are free. Funding of political parties is regulated by the Act on Financing of Political Parties. The Act foresees annual allocation of a proportion of the budget to parties, and additional financing of their campaigns in election years (Arts. 4, 9 and 10). The parties which

200 This right is deemed to be implicitly recognised by Article 1 of the First Protocol. *Blackstone's Human Rights Digest*, Blackstone Press Limited, UK, London 2001, p. 336.

201 *Gitonas v. Greece,* (1997) RJD 1997-IV No. 42, ECtHR; *Fryske Nasjonale Partij v. The Netherlands* (1985) 45 DR 240, ECtHR).

202 More about the Act in *Report 2004*, I.4.14.2.1.

203 See *Report 2005,* I.4.14.2.1 for a detailed analysis of this law.

have deputies or councillors (Art. 4 (1)) are entitled to finance their regular work from the budget. The Act foresees a fixed percentage of the budget allocated annually for funding the work of political parties. The Act sets only the minimum but not the maximum percentage of the budget that may be allocated for this purpose, so the parties can increase the percentage allocated to fund their regular work in parliament, when they vote on the budget. Under the Act, 30% of these resources are to be equally shared between the parties and the remainder (70%) is to be divided in proportion to the number of seats in the Assembly. Apart from the resources from the budget, parties may finance their regular work from private sources. The Act deals also with private funding sources and limits their amount with a view to controlling their impact on political parties. Private sources include membership fees, donations, income from promotional activities, income from property and legacies (Art. 3 (3)).[204] The Act limits not only the overall amount, but the amount of individual donations as well. Thus, the amount of donations in a calendar year is limited to ten average incomes of natural persons and one hundred average incomes of legal persons (Art. 5 (4)).

As for the election campaign expenses, the Act introduces restrictions on campaign spending in order to prevent disadvantage to parties with smaller funds at their disposal. Twenty percent of the allocated funds are divided equally amongst the submitters of the proclaimed election lists and 80% in proportion with the number of won seats.[205] The funds the parties themselves raised to cover election campaign costs are limited and may not exceed 20% of the budgetary allocation for this purpose (Art. 11 (2)).

4.14.4. The Right to Vote and to Stand for Elections

The electoral right primarily comprises a person's right to vote and be elected. In Serbia, these rights may be exercised by persons who are 1) SaM citizens with residence in Serbia; 2) are at least eighteen years of age and are able bodied (Art. 10 of the Act on the Election of Assembly Deputies (AEAD); Art. 7 of the Local Elections Act (LEA); Art. 2 of the Act on the Election of the President of the Republic, (*Sl. glasnik RS*, 1/90, 79/92, 73/02, 72/03, 93/03 and 18/04; Art. 3 of the Decision on the Election of AP Vojvodina Assembly Deputies (DEVD)). Only presidential candidates are required to fulfil a residence requirement; they must be residents of Serbia for a minimum of one year on the day of elections (Act on the Election of the President (Art. 3 (1)).

The amendments to the Act on the Election of Assembly Deputies allow the voting of hospitalised, bed-ridden (feeble or otherwise incapacitated) or imprisoned persons and of persons residing abroad (Arts. 72a, 72b, 73a).

204 A detailed analysis of the restrictions can be found in *Report 2005,* I.4.14.2.1.

205 This provision suits proportional elections, but not majority system elections such as the presidential elections. In the latter case, the winner receives the remaining 80% of the undistributed funds.

Besides provisions regulating the active and passive right to vote, election laws in Serbia also prescribe the *electoral right* of citizens. The electoral right is wider than the active and passive right to vote and encompasses also the right of citizens to run and be nominated for public office, to decide on proposed candidates and election lists, to pose questions to the candidates in public, to be timely, truthfully and objectively informed about programmes and activities of the sponsors of election lists and about the candidates on these lists, as well as to exercise other rights laid down by election laws (Art. 9 AEAD).

Whether or not a person may vote and be elected to a public office depends on whether he or she is entered in the electoral rolls. Regular updating of the rolls is a basic prerequisite for individuals to exercise their right to vote and for the regularity of elections in general. Previous elections brought out numerous irregularities and the rolls proved to have been improperly kept. Election laws do not define electoral rolls as public documents kept by duty. Voters are enlisted in the election rolls by their place of residence. IDPs are entered in the election roll in the municipality where they have registered with that status (Art. 13 (3) AEAD). The 2003 amendments, which introduced the possibility of voting abroad, prescribe the keeping of special records of voters residing abroad (Art. 13a).

Serbian election regulations are insufficiently precise and comprehensive in terms of responsibilities and penalties for keeping election rolls in a disorderly fashion. They do not envisage the possibility of distributing to submitters of election lists copies of the nation-wide election roll and of controlling whether they are correct themselves. Insight in the nation-wide election roll is of extreme importance for controlling election regularity: election rolls are kept by municipalities, wherefore it is possible that the same person appears on rolls in more than municipality. There is no single election roll at the republican level although the municipal rolls should be part of a single, conformed system under the Act (Art. 12 (1) of the AEAD).[206] The provision in the Serbian Act under which citizens may have insight into the election roll and demand changes (Art. 12 (3)) is insufficient to prevent potential abuse. It cannot be expected of citizens to tour all municipalities and check every municipal election roll.[207] The Serbian Act on the Election of Assembly Deputies partly resolves the problem – it introduced monitoring of voting by prescribing the marking of voters' fingers with a special spray and that the voters sign the election roll (Art. 68 (3 and 4)).

Under the Act, the submitter of the election list has the right of insight and to request changes in the election roll in an identical procedure as citizens (Art. 19 (2)).

206 OSCE/ODIHR Election Monitoring Mission Report, *Parliamentary Elections 28 December 2003, Republic of Serbia, February 2003 and* OSCE/ODIHR, *Presidential Elections 13 and 27 of June, Republic of Serbia*, 2004.

207 According to the Directive on Updating Election Rolls (*Sl. glasnik RS*, 42/00, 118/03), the ministry charged with administration affairs ensures insight in the election rolls by posting them on the Internet, which facilitates checks by citizens who have access to the Internet.

4.14.5. Electoral Procedure

4.14.5.1. Bodies Administering the Election Process. – In addition to the electoral statutes, rules governing the election procedure are to be found also in the decisions of the electoral commissions. These commissions supervise the legality of the election process and the uniform application of the electoral statutes, appointment of the permanent members of the electoral commissions in the election districts, the appointment of members of polling committees (bodies directly administering elections), and hand down instructions for the work of other permanent electoral commissions (if any)[208] and polling committees. The republican commission is also empowered to consider complaints in the first instance against decisions, actions or omissions by polling committees (under Art. 95 (2)) AEAD). Pursuant to the provisions of the election laws, bodies administering elections are independent. However, the legal provisions under which the bodies charged with conduct of elections are accountable to the body that appointed them (Art. 28 (2) AEAD; Art. 11 (3) LEA) are disputable. Since municipal election commission members are appointed by the municipal assemblies, the inclusion of representatives of political parties in some municipal commissions was seen as membership on the basis of the political balance in the respective municipality, and resulted in those commissions taking decisions along political lines.

4.14.5.2. Control of Ballot Printing and Safekeeping of Electoral Documentation. – The central electoral commissions decide on the manner, place and control of ballot printing. The AEAD prescribes that the ballots be printed at one site; on watermark-protected paper (Art. 60 (4)). According to the Directive on the Implementation of the Election of Assembly Deputies Act (*Sl. glasnik RS*, 113/03, 119/03, 126/03), the ballots are printed in Belgrade, in a printing shop selected by the Republican Election Commission (REC). In keeping with the Directive, the printing of ballots is monitored by the Commission; the submitters of the election list have the right to attend the printing, counting, packing and delivery of the ballots (Art. 60 (5) of the AEAD). Similar albeit not identical provisions are given in the laws on elections at other levels (Directive on the Implementation of the Act on the Election of the President of the Republic; Art. 28 of the LEA). It would be more expedient if this issue were regulated in a uniform manner in all election laws.

4.14.5.3. Determination of the Election Results. – The competent election board determines the election results. The election board determines the overall

208 The Republican Election Commission and the election boards are the authorities charged with implementing republican parliamentary elections, while the local government units election commissions and election boards are charged with implementing local elections (See Arts. 28–38 of the AEAD; Arts. 11–17 of the LEA). All three – the Republican Election Commission, the local government unit election commissions and election boards – are charged with the implementation of presidential elections (Art. 5 of the Act on the Election of the President of the Republic).

number of votes received by each election list (elections at all levels are conducted according to the proportional representation system except in Vojvodina, where a mixed system is applied) and, in proportion with the number of votes received, establishes the number of mandates belonging to each election list, on the basis of D'Hondt system. The distribution of mandates is shared only by the election lists that have won at least 5% of votes of the overall number of voters who have voted in the electoral district (Art. 81 AEAD and Art. 74 of the DEVD),[209] or 3% of the overall number of voters who have voted in the electoral district (Art. 40 (4) LEA). Half of the deputies in the Vojvodina Assembly are elected under a proportional and half under the majority election system (Art. 5 (3) DEVD).

Election laws contain various solutions with regard to the distribution of seats that have been won by the individual election lists. Different solutions with regard to the distribution of seats result in the different ways of exercising the passive right to vote at various election levels. At parliamentary elections the submitters of the election lists can distribute the seats won to the candidates of their own choosing (Art. 84 (1) AEAD). Under the Local Elections Act, one third of mandates is distributed according to the order on the list, whereas the remaining mandates are distributed in accordance with the decision of the bearer of the list (Art. 41 (4 and 5), the same provision exists in Article 76 of the DEVD). According to OSCE, the transparency of the system is restricted by the rule allowing parties and coalitions to arbitrarily decide which of their candidates on the list will be deputies; rather, the order of the candidates should be determined beforehand.[210]

4.14.5.4. Cessation of Terms in Office. – The Constitutional Court of the Republic of Serbia, acting at its own initiative, proclaimed that the provisions AEAD, under which the term of office of a deputy shall also cease if the political party or another organisation on whose election list s/he was elected is deleted from the register, were unconstitutional (*Sl. glasnik RS*, 57/03). In the opinion of the Constitutional Court, the right to stand for elections is an individual right exercised by citizens under the Constitution itself (Art. 42, of the then Serbian Constitution) and cannot be conditioned by membership in a political party, wherefore a deputy elected on a party list cannot lose his or her seat in Parliament if s/he is no longer a member of that party.[211] This Constitutional Court decision provoked much criticism that it encouraged horse trading as some non-parliamentary parties gained seats in parliament after it was passed. The new Constitution introduces a mechanism aimed at avoiding the application of this Constitutional Court decision. It allows a deputy to irrevocably place his or her mandate at the disposal of the political

209 The election threshold of 5% does not apply to national minority political parties in Vojvodina (Art. 74 (4) of the DEVD).

210 See e.g. the OSCE/ODIHR Report, *Parliamentary Elections, 28 December 2003, Republic of Serbia*, 27 February 2003.

211 See *Report 2005,* I. 4.14.5.4 for a more detailed explanation of the Constitutional Court decision.

party at the proposal of which s/he was elected a people's deputy in accordance with the law (Art. 102 (2)).

4.14.5.5. Grounds for Annulment. – Election laws prescribe various grounds for annulment of elections at particular polling stations. If there is reason to conclude that the elections at a particular polling station were null and void, the polling committee must be dissolved, a new one appointed and the balloting repeated. The AEAD prescribes that the polling committee must be dissolved and balloting repeated at a polling station where the breach has occurred of the secrecy of voting, of the legal provision of voting in person, or if there has been a violation of the prohibition to display political party symbols or other promotion material, etc. (Art. 55). On the other hand, when the irregularities are less serious, in considering complaints the electoral commission may decide whether the voting will be cancelled.

4.14.5.6. Legal Protection. – According to the European Court of Human Rights, electoral and political rights are not "civil rights" in the sense of the right to a fair trial in Article 6 of the European Convention,[212] and guarantees of a fair trial are not applied to the procedures following the revision of legality of the conduct of elections.[213]

Election laws provide for a basic legal remedy that ensures legal protection in the electoral process – the complaint that each voter or participant in the election can lodge with the competent election commission. The AEAD provides for the complaint to be lodged to the Republican Electoral Commission "*on the ground of violation of the electoral right during the elections or on the grounds of irregularities in the procedure of nomination or election*") (italics added) (Art. 95; Art. 48 of the LEA[214]). The amendments suggested link the legal protection to the period in which the elections are being held and solely apply to the protection of the right to vote in this process. They do not include the protection of the right to vote outside the election process, like the protection of the passive right to vote in case of the early termination of mandates.

The 24-hour deadline for submitting complaints on an election board decision is calculated from the moment the decision is reached (Art. 95 AEAD; Art. 48 LEA). Such a short deadline gives rise to concern as the right of complaint may easily be lost in the event the complainant is not informed of the decision on time.

Neither law, however, lays down the rules according to which election boards are to deal with complaints. This results in a lack of uniformity with regard to establishing the facts, use of evidence and, in particular, observance of the adversarial principle. This is in contravention of the rule of law and creates legal insecurity.

212 See *Priorello v. Italy*, ECtHR, 43 DR 195 (1985).

213 See *X v. France*, ECtHR, 82-B DR 56 (1995); *Pierre-Bloch v. France*, ECtHR, (1996).

214 Provisions of the Election of Parliamentary Deputies Act are accordingly applied to the presidential election procedure (Art. 1 Act on the Election of the President of the Republic).

The electoral statutes provide also for the possibility of appeal against the decisions of the competent electoral commissions by which a complaint has been rejected or disallowed: to municipal courts in the case of local elections (Art. 50 LEA) and to the Supreme Court in the case of parliamentary and presidential elections (Art. 97 AEAD). Appeals to the highest court instances of the regular judicial system are lodged through competent electoral commissions. Serbian laws prescribe that procedures before courts are urgent – decisions are taken within 48 hours since the receipt of an appeal (Art. 97 (5) AEAD; Art. 50 (5) LEA). The AEAD prescribes that the Supreme Court shall decide on the appeal by applying provisions of the law regulating administrative proceedings (Art. 97 (4)).

4.15. Special Protection of the Family and the Child

Article 23, ICCPR:

1. The family is the natural and fundamental grouping of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognised.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24, ICCPR:

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 12, ECHR:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 5, Protocol No. 7 to the ECHR:

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

4.15.1. Protection of the Family

Article 66 of the Constitution affords protection to families, mothers, single parents and children in the Republic of Serbia. The protection of these categories of the population is elaborated in detail by other laws, notably the Family Act (*Sl. glasnik RS*, 18/05).

Under the Family Act (FA), the family enjoys special protection of the state and everyone is entitled to the respect of his/her family life. These principles are elaborated in detail by a number of provisions. The Act also regulates marriage and marital relations, extra-marital relations, the parent-child relationships, adoption, foster care, guardianship, child support, property relations in the family, protection from domestic violence, proceedings related to family relationships and personal names (Art. 1).

The Family Act does not define family. This approach is not in keeping with the interpretations of the Convention on the Rights of the Child by the Committee for the Rights of the Child.[215]

The Act devotes special attention to protection from domestic violence. Under Article 197, domestic violence entails conduct of a family member endangering the physical integrity, mental health or tranquillity of another family member. The Act details the actions and conduct especially qualified as domestic violence and lists those considered family within the meaning of this Article.

Violence protection measures are set by the competent court which may pronounce one or more measures temporarily prohibiting or restricting personal relationships between family members (Art. 198 (1)).

Marriage, the family and family relations are also protected by the Criminal Code,[216] which incriminates both violations of family duties, such as the non-payment of child support (Art. 195) and desertion or leaving of a family member who is unable to care for himself in dire circumstances (Art. 196).

The crime of domestic violence (Art. 194) includes insolent and ruthless behaviour, as well as the tranquillity of the family member, which is definitely a commendable provision. However, the maximum penalty of one-year imprisonment is definitely not a good solution in view of the incidence of domestic violence in Serbia in the past few years.

Aggravated forms of this offence exist if weapons or dangerous tools have been used or if grave bodily harm or serious health damage has occurred, as well as if the act was committed against a minor, or if it has resulted in death of a family member (paras. 2, 3 and 4).

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215 Committee on the Rights of the Child Report, 5th session, January 1994, CRC/C/24, Annex V, p. 63.

216 Chapter XII, *Offences Relating to Marriage and Family*, Arts. 187–197..

The Criminal Code is compatible with the FA and incriminates violations of the protective measures pronounced against the perpetrator of domestic violence by the court in accordance with the FA. The question, however, arises who may be the object and who the perpetrator of the crime, as the Criminal Code does not specify who is considered a family member; this is why problems may arise in court proceedings on these grounds.

4.15.2. Marriage

The Constitution guarantees the right to marriage, the equality of spouses and the equality of children born in and out of wedlock (Art. 62).

The Constitution and the FA stipulate that the future spouses need to be of different sex and prescribe marriage of people of the same sex as a reason for the absolute nullity of a marriage.[217] ECtHR practice and its rulings on marriages of homosexuals and transsexuals are not uniform.[218] However, although it has not once ruled that homosexuals had the right to marry, the Court has been interpreting Article 12 provisions with increasing flexibility, tending to allow marriages of transsexuals.

The BCHR filed a motion with the Constitutional Court of Serbia to review the constitutionality of Article 4 (1) of the FA, which defines extramarital unions only as longer-lasting unions of persons of different gender. This definition of an extra-marital union places partners of the same sex living in such unions at a much greater disadvantage because they do not have access to many of the rights guaranteed to extra-marital partners, including the rights to alimony, joint property and protection from domestic violence. Partners of the same sex have thus become victims of discrimination. In the case *Karner v. Austria* (40016/98) [2003] ECHR 395), the ECtHR took the stand that partners of the same sex must be enabled enjoyment of specific spousal rights.

In the eyes of the Serbian law, spouses are equal. The obstacles to marriage are listed in the relevant law.[219] As a rule, persons over the age of 18 may enter into marriage though persons over the age of 16 may be permitted to do so with a court dispensation.

Divorce is allowed and may be by mutual consent of the spouses (Art. 40 FA) or by one party suing on the grounds of irretrievable breakdown of the marriage, irreconcilable differences or other grounds such as desertion, mental illness and the like (Art. 41 FA).

217 The Human Rights Charter in Article 25 mentioned free conclusion of marriage without mentioning the sex of the spouses. The European Court of Human Rights protects the right to privacy of individuals of the same sex, but not their right to family life (X, Y, Z *v. United Kingdom*, ECtHR, 24 EHRR 143 (1997); *Soberback v. Sweden*, ECmHR, EHRLR 342 (1998)).

218 See *Van Oösterwijck v. Belgium*, App. No. 7654/76; *Cossey v. Great Britain*, App. No. 10843/84.

219 See FA, Arts. 17–24.

The FA includes provisions on the property relations between the spouses, who may regulate these relations themselves by a nuptial contract in accordance with the law (Art. 29, FA).

Although the CC does not explicitly mention spousal rape, judging by the descriptions of crimes in Article 194, it is included in the crimes against marriage and family. Spousal rape should have been explicitly defined or highlighted in the provisions on domestic violence.

Articles 201–341 of the FA focus on family and marital relations.

4.15.3. Special Protection of the Child

4.15.3.1. General. – Serbia (SFRY at the time) ratified the Convention on the Rights of the Child of 1990 (Act on Ratification of the UN Convention on the Rights of the Child, *Sl. list SFRJ* (*Međunarodni ugovori*), 15/90, 4/96 (withdrawing reservations given at the signing); *Sl. list SRJ*, 2/97).[220] In July 2002, FRY adopted two optional protocols to the Convention on the Rights of the Child. These are: the Optional Protocol on the Sale of Children, the Child Prostitution and Child Pornography and the Protocol on Participation of Children in Armed Conflicts (*Sl. list SRJ, (Međunarodni ugovori)*, 7/02).

There is no definition of a child in Serbian legislation. The FA lacks both the definition of a child and provisions on the status of children. Under the Constitution, adulthood is attained at the age of 18 (Art. 37).

Ratification of two optional protocols to the Convention on the Rights of the Child is an important step towards the improvement of the legal position of children, especially bearing in mind the disturbing rise in violation of children's rights in Serbia during the recent years.[221]

The Protocol on the Sale of Children, Child Prostitution and Child Pornography requires the state parties to undertake measures for the protection of children, given the increasing international trafficking of children, sex tourism and the ever-greater availability of child pornography on the Internet.

Obligations of states laid down by the Protocol include, *inter alia*, the need to encompass the offences of prohibited sale of children, child prostitution and child pornography in their respective criminal and penal codes (Arts. 3 (1), 4 (1, 2, 3)).

220 Implementing the obligation undertaken by the ratification of the Convention, the FRY authorities in 1994 submitted to the Committee for the Rights of the Child a *Report on the Implementation of the Convention on the Rights of the Child in FRY for the Period 1990–1993*. Committee on the Rights of the Child posed additional 32 questions to the FRY Government, to which the Government responded in writing, refusing to address them orally according to the usual procedure. The following report was due in 1998, but had not submitted by the end of 2005.

221 See *Report 2003*, II.2.15.1. for more on violations of the rights of the child during the wars in the former SFRY.

Article 2 contains the definitions of these crimes, and Article 3 (1a) explains the actions of perpetration of these offences. Attempt to perpetrate these offences is also punishable, and the state parties should apply adequate sanctions for these offences taking into account their serious nature (Art. 3 (3)). In accordance with the special protection of children guaranteed by the Convention on the Rights of the Child, the Protocol also prescribes special measures for protection of children victims of these offences in all stages of criminal proceedings, security and discretion for children victims and ensuring the best interest of the child (Art. 8).

Serbia has started harmonising its criminal legislation with the Protocol. The CC elaborates the crime in Articles 184 and 185 (mediation in prostitution) and envisages stricter punishment if the victim is a minor or for showing pornographic material or using children for pornography. The CC envisages two crimes related to trafficking in humans,[222] notably trafficking in humans (Art. 388) and trafficking in children for adoption purposes (Art. 389).

The Optional Protocol on Participation of Children in Armed Conflicts guarantees the protection of children in international and non-international armed conflicts, prohibits compulsory recruitment of persons with child status and binds states parties to raise the minimal age limit for voluntary recruitment of persons into their armed forces (Arts. 1, 2 and 3).[223]

The Yugoslav Army Act is in accordance with the Protocol in the part that relates to compulsory recruitment, prescribing that the person, recruit, shall be sent to his military service after 21 years of age (Art. 301), or at the explicit request of the recruit himself once he is 18 years old (Art. 302).

4.15.3.2. "Measures of Protection ... Required by the Status of Minors". – Under Article 24 (1) of the ICCPR, "every child shall have without any discrimination ... the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." Besides prohibiting discrimination in general, the Constitution of Serbia in Article 64 stipulates that children born out of wedlock shall have the same rights as legitimate children. This provision exists also in the FA (Art. 6 (4)).

The Family Act regulates the parent-child relationships, notably the family status of the child, determination of paternity and maternity (Arts. 42–59) and elaborates the rights of children under parental care (Arts. 59–66). The rights of the child are elaborated in Chapter 3 of the Act, independently of parental rights and duties detailed in other provisions. The rights of the child comprise: right to know who his/her parents are, the right to live with his/her parents, the right to personal relationships, the rights to development and education and right to opinion. These

222 See I.4.4.

223 Since Article 38 of the Convention on the Rights of the Child sets the minimal age limit for participation in the armed conflicts at 15 years of age, the Protocol demands that states parties should raise the age limit given in this article of the Convention related to voluntary recruitment, leaving to the states to set this limit themselves.

provisions allow the child to take an active part in proceedings on his/her rights (Art. 65 (4)). Parental rights are defined through their obligations to the child and they have the right and duty to care for the personality, rights and interests of their child.

The general rule is that parents exercise their rights regarding children together and in agreement (Art. 75 (1)). The agreement on joint exercise of parental rights (Art. 76) shall be concluded in writing. The agreement must include a statement on what is considered the child's residence (para. 2).

One parent shall alone exercise parental rights if the other parent is unknown, deceased or totally deprived of parental rights or legal capacity (Art. 77 (1)) and in all other cases determined by the court (paras. 3–5) and if the child lives only with that parent and the court has not yet taken a decision on the exercise of parental rights (para. 2).

The Family Act also envisages preventive and corrective supervision over how parents exercise their parental rights (Arts. 79–80).

Adoption and foster care are the main forms of protection of children without parental care (Parts Four and Five of the Act). Adoption and foster care are permitted if they are in the best interest of the child (Arts. 89 and 111).

A child who has not turned fourteen yet may own property acquired through inheritance, gifts or in another manner and by conducting legal operations of small relevance. A child above 14 years of age may undertake all other legal operations with the prior or subsequent consent of the parents i.e. guardian (Art. 64).

The Family Act expands the volume of the rights of the child. It entitles the child to institute a dispute to protect his rights and in disputes over the exercise i.e. deprivation of parental rights (Art. 261). In addition to the child, the dispute may also be initiated by the child's parents, public prosecutor or guardianship authority. All the rights of the child that are recognised by the Family Act are protected (para. 2). Also, Article 263 helpfully allows all child, health and educational institutions, social aid institutions, judicial bodies, associations and citizens to notify the public prosecutor of reasons for the protection of the rights of the child (para. 3).

4.15.3.3. Protection of Minors in Criminal Law and Procedure. – A Juvenile Justice Act (*Sl. glasnik RS*, 85/05) came into force on 1 January 2006. The Act comprises criminal law provisions on underage perpetrators of crime and legal protection of minors, i.e. substantive and procedural criminal law, including the relevant implementing bodies, criminal proceedings and enforcement of criminal sanctions against these offenders.

Criminal penalties may not be pronounced against a child who was under the age of 14 at the time the criminal offence was committed. Children older than 14 but younger than 16 (younger juveniles) are subject only to correctional measures, as is the case also with offenders between the ages of 16 and 18 (older juveniles) who, however, may as an exception be sentenced to terms of imprisonment in the

case of extremely serious crimes. The purpose of these measures is to protect and aid juvenile delinquents and ensure their development and upbringing (Arts. 2,3, and 9 Juvenile Justice Act).

The Act envisages the following disciplinary measures: warning and guidance, court admonition, increased supervision, increased supervision by parents, adoptive parents or guardians, increased supervision in the foster family, increased supervision by the social welfare agency, increased supervision with daily attendance in a juvenile rehabilitation and educational institution, remand to a rehabilitation or correctional institution, or a special institution for treatment.

Criminal proceedings against children are regulated by the Juvenile Justice Act (Arts. 46–85). Detention of a juvenile is an exceptional measure (Arts. 67–68 Juvenile Justice Act), to prevent escape, commission of a criminal offence, destruction of evidence or influencing of witnesses or accomplices. In the preparatory procedure detention can last up to one month. However, a juvenile court panel can extend the detention for a maximum of another two months for justified reasons. After the preparatory procedure, detention can last for one year maximum. Each month the juvenile court panel is obliged to review the grounds for detention. As regards the conditions in detention, the minor is separated from the adult prisoners on remand, but the juvenile magistrate can rule that the minor can be held in custody with adult prisoners on remand in case of prolonged isolation and if there is a possibility to place the minor with an adult that would not have a harmful influence on the minor (Art. 68 Juvenile Justice Act). However, this provision is not in keeping with the ICCPR, which does not allow exceptions with regard to isolation of detained minors from adults in detention facilities (Art. 10, ICCPR).

As criminal law in Serbia forbids the enforcement of criminal sanctions against a minor under 14 years of age, the Juvenile Justice Act stipulates dismissal of criminal proceedings against a child who had not yet been 14 years of age at the time the crime was committed; the custodial agency shall be informed thereof (Art. 47). The Act explicitly prohibits that a child be tried *in absentio*. The agencies undertaking actions in the presence of a child, especially those the questioning of the child, are obliged to take into account the child's mental development, sensitivity and personal qualities so that the proceedings do not affect the child's development (Art. 48). A child must have a defence counsel from the onset of the proceedings if the proceeding pertains to a criminal offence warranting a jail sentence exceeding three years, and in other cases if the judge assesses that the child needs a defence counsel (Art. 49).

The public prosecutor is duty bound to notify the child welfare agency whenever proceedings are instituted against a child (Art. 47 (2), Juvenile Justice Act). Information on such proceedings may not be disclosed to the public without the permission of the judge and, when permission is granted, the name of the child and other information that could be used to identify him may not be disclosed. Proceedings against a child are always conducted *in camera* (Art. 55).

Proceedings against children are conducted by judges or panels of juvenile courts. Juvenile court judges and panel judges must possess special knowledge in the rights of the child and juvenile offences. Lay judges are appointed from the ranks of primary and secondary school teachers, educators and other professionals with experience in working with children (Art. 44 Juvenile Justice Act). The Act comprises special provisions on the protection of minors who are injured parties in criminal proceedings (Arts. 150–157).

The new Misdemeanour Act also comprises provisions on juvenile offenders (Chapter VIII). A juvenile offender under 14 cannot be subject to misdemeanour proceedings (Art. 63). If the misdemeanour was committed due to lack of obligatory supervision by the parents, adoptive parents or guardians, the latter will be punished as if they themselves had committed the misdemeanour (Art. 64 (1)). Disciplinary measures are the only sanctions that can be pronounced against a younger juvenile who perpetrated a misdemeanour (Art. 65). Both disciplinary measures and other penalties may be pronounced against older juveniles (Art. 65).

4.15.3.4. *Birth and Name of the Child*. – To ensure that every child is registered immediately after birth, the law prescribes oral or written notification of the Registry Office in the place of the child's birth. The birth of a child must be reported within 15 days. If the parents are unknown, the birth is recorded by the Registry Office of the district in which the child was found and on the basis of a decision of the competent child welfare agency (Arts. 17, 18 and 25, Public Registries Act).

Having a name (first and last names) is the right of every individual. The name of a child is chosen by both parents and is entered into the Register of Births within two months of birth. Under the Serbian FA,[224] a child may not be assigned a name that is derogatory, offends morality or is in contravention of the customs and opinions of the community. In the event that the parents do not agree on a name within the set time period, the child is named by the child welfare agency. A child bears the last name of one or both parents. In Serbia, children of the same parents may not bear different last names. The parents may change the name of a child over ten only with the child's consent.

4.16. Right to Citizenship

Article 15 of the Universal Declaration of Human Rights:

> Everyone has the right to a nationality.
>
> No one shall be arbitrarily deprived of his nor denied the right to change his nationality.

Article 24 (3), ICCPR:

> Every child has the right to acquire a nationality.

224 Serbia does not have a law on personal names; provisions on personal names are included in Chapter XI of the Family Act.

4.16.1. General

The Universal Declaration of Human Rights states the right of every individual to have a nationality and prohibits arbitrarily depriving a person of nationality or of the right to change it (Art. 15). Though the ICCPR does not refer specifically to this right, its Article 24, which treats the status of children, guarantees in para. 3 the right of every child to acquire a nationality. The provision only obliges states to enable new-born children to acquire a nationality, not necessarily to grant citizenship to every child. National legislation regulates the manner and procedure for acquiring nationality and it must not discriminate against new-born children on whatever grounds.

The European Convention on Nationality[225] adopted within the CoE, sets the basic principles, rules and regulations concerning citizenship.[226] Serbia has not signed the Convention yet, although the Convention is mentioned in the explanation of the Draft Serbian Citizenship Act that was adopted by the Serbian Assembly (*Sl. glasnik RS,* 135/04) in December 2004,[227] and in the explanation of the reasons for adopting the Draft Act Amending the Serbian Citizenship Act submitted to parliament September 2006.[228] One of the reasons given for the urgent adoption of the 2004 Serbian Citizenship Act was that citizenship is one of the fundamental human rights and that a large number of international documents regarding nationality have been adopted, whereby Serbia was obliged to urgently conform its legislation with international standards in this area, especially with the rules, principles and recommendations of the European Convention on Nationality.[229]

Since the independence of the Republic of Montenegro following the 21 May 2006 referendum and the dissolution of the Serbia and Montenegro State Union in June 2006, citizens of Serbia are not legal members of a complex state (like the SFRY, FRY or SaM) for the first time in decades, i.e. they no longer have complex nationality entailing two citizenships. The character of citizenship of Serbia and

225 European Convention on Nationality, Strasbourg, 6. XI 1997, www.coe.int.

226 The main principles of the European Convention on Nationality are that each state party shall determine under its own law who are it nationals and that this right, if consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality, shall be accepted by other states (Art. 3). Under the Convention, everyone has the right to a nationality, statelessness shall be avoided, no one shall be arbitrarily deprived of his or her nationality and neither marriage or dissolution of a marriage between a national of a state party and an alien shall automatically affect the nationality of the other spouse (Art. 4). The rules of a state party on nationality shall not contain distinctions or include any practice which amounts to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin; a state is also prohibited from discriminatory treatment of its nationals notwithstanding whether they are nationals by birth or acquired its nationality subsequently (Art. 5).

227 The Act came into effect 60 days after adoption (Art. 56).

228 See www.parlament.sr.gov.yu.

229 Draft Citizenship Act of the Republic of Serbia, *Explanation: see Reasons for adoption under emergency proceedings*, www.parlament.sr.gov.yu.

Montenegro nationals underwent changes back in 2003, when the then FRY federation was transformed into the State Union of SaM and most state competences were delegated from the federal (state union) level to the republican levels. These changes reflected also on the issue of nationality and, as opposed to regulations in force until 2003, the citizenship of the member-states obtained primacy over that of the state union, while SaM citizenship derived from the citizenship of Serbia i.e. of Montenegro.[230]

To address the effects of Montenegro's independence and the dissolution of SaM, the Serbian Government submitted the Draft Act Amending the Citizenship Act (hereinafter Draft Act Amending the Citizenship Act) to the Assembly on 28 September 2006. Citizens of the two former member-states no longer hold common SaM citizenship, but the citizenship of two independent and unitarian states – Serbia and Montenegro.

The Explanation of the reasons for the adoption of the Draft Act Amending the Citizenship Act sets out that the greatest effect of these changes lies in the fact that the Montenegrin citizens, who have remained living in Serbia, have lost the status of nationals and have thus become non-nationals in Serbia.[231] Under international standards, Serbia is obliged to facilitate the acquisition of Serbian citizenship by this category – Montenegrin nationals registered as permanent residents of Serbia on 3 June 2006, the day Serbia became the legal successor of SaM. Serbia needs to fulfil this obligation to realise its international and legal personality as the legal successor of SaM and, in the opinion of the proposers of the Act, because its fulfilment is in Serbia's interest.

The law also needs to establish who is considered a national of Serbia in the new circumstances. The terms "SaM State Union" and "SaM citizenship" need to be deleted from the valid Act, as do the provisions that are unnecessary or inadequate in the new circumstances. The Draft Act Amending the Citizenship Act also envisages amendments of relevant provisions. For instance, children born in Montenegro or whose one parent is Montenegrin now ought to acquire citizenship in accordance with provisions on granting citizenship to children born in another country i.e. whose one parent is a foreigner. Furthermore, the Act also no longer needs to include special provisions on acquisition of Serbian citizenship by Montenegrin nationals or termination of Serbian citizenship due to acquisition of Montenegrin citizenship. These amendments would also benefit Montenegrin citizens, who would otherwise be the only nationals of the former SFRY republics unable to acquire Serbian citizenship under laxer conditions and retain their present citizenship (because the previous FRY and SaM laws did not allow a person to simultaneously hold Serbian and Montenegrin citizenships).

230 See *Reports 2003, 2004, 2005*, I.4.16.1.

231 The term "non-nationals" not "foreign nationals" is used in the Explanation of the Draft Act Amending the Citizenship Act.

The explanation of the Draft Act Amending the Citizenship Act also invokes international citizenship standards and says these issues have been regulated "in accordance with the Convention Relating to the Status of Stateless Persons (1954), Convention on the Reduction of Statelessness (1961) and the set of comprehensive regulations and fundamental principles in the European Convention on Nationality (1997)."[232]

The authors of the Act propose it be adopted in an emergency procedure so as to legally regulate the status of citizens who have "become non-nationals under circumstances they could not have affected and that have caused damage to their daily lives" and to allow state bodies to work without hindrance by establishing who is deemed a citizen of Serbia as soon as possible.[233]

The new Constitution does not envisage the right to citizenship, an attitude which is commonplace and generally accepted.[234] The new Constititution guarantees the right to citizenship of the Republic of Serbia only to a child born in the Republic of Serbia, unless s/he fulfils the conditions for acquiring the citizenship of another state (Art. 38 (3)). Under Article 38 (2), a citizen of the Republic of Serbia "may not be expelled or deprived of citizenship or the right to change it".[235]

Acquisition and termination of Serbian citizenship shall be regulated by law (Art. 38 (1)) of the Constitution). Nationality issues are in Serbia governed by the Citizenship Act of the Republic of Serbia adopted on 27 February 2005. The Government Draft Act Amending the Citizenship Act has not been adopted yet, but will be quoted hereinafter alongside the provisions of the Citizenship Act in force. As mentioned, the Draft Act Amending the Citizenship Act deals with the effects of Montenegro's indenependence. Once the Draft Act is adopted, the relevant provisions of the valid Citizenship Act shall be amended or no longer applied at all, not even to procedures for acquiring or terminating Serbian citizenship that were initiated before the Amending Act comes into force. The Draft Act Amending the Citizenship Act explicitly sets out that the proceedings shall be completed under the amended provisions (Art. 17).

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232 See Act Amending the Citizenship Act of the Republic of Serbia, Draft, Explanation, Part II, Reasons for adoption of the Act, www.parlament.sr.gov.yu.

233 See Act Amending the Citizenship Act of the Republic of Serbia, Draft, Explanation, Part V, Reasons for the emergency adoption of the Act, www.parlament.sr.gov.yu.

234 The right to citizenship had not been guaranteed either by the previous Constitution of Serbia (*Sl. glasnik RS*, 1/90), the Constitutional Charter of the SaM State Union (*Sl. list SCG*, 1/03, 26/05) or the SaM Charter on Human and Minority Rights and Civil Liberties (*Sl. list SCG*, 6/03).

235 Both the Charter on Human and Minority Rights and Civil Liberties and the previous Serbian Constitution envisaged broader protection of nationals by explicitly prohibiting their deprivation of citizenship and expulsion and their extradition (Art. 35 (2) of the Constitutional Charter, Art. 47 (2) of the previous Constitution of Serbia). The Charter, however, did not provide such protection to nationals facing deprivation of citizenship, expulsion or extradition in accordance with SaM's international obligations (Art. 35 (2)).

4.16.2. Acquisition of Serbian Citizenship

The Serbian Citizenship Act prescribes the prerequisites, requirements, registry and procedures for acquiring and terminating Serbian citizenship. The Citizenship Act also regulates the continuity of citizenship of citizens of Serbia, facilitates the acquisition of Serbian citizenship by specific categories of people, and allows for dual and even multiple citizenship in many more instances than previously envisaged by law. The Act allows for the registry of citizenship only in birth registries notwithstanding the manner in which it was acquired, and addresses avoidance of statelessness. Generally, it can be concluded that the Act incorporates the principles of the European Convention on Nationality, which is particularly striking in certain provisions that had been absent from previous citizenship legislation.

The Draft Act Amending the Citizenship Act also deals with the continuity of Serbian citizenship with a view to ensuring that no one is left without nationality in the new circumstances (i.e. avoiding the appearance of new stateless persons) and the respect of the principle of voluntary citizenship as a free legal relationship everyone is entitled to change.[236]

The Citizenship Act prescribes that citizenship may be acquired by: origin, birth, naturalisation and international agreements (Art. 6).[237]

The Draft Act Amending the Citizenship Act makes no changes in the main ways citizenship can be acquired, but amends provisions regulating acquisition of citizenship in detail to conform the regulations to the new circumstances.[238] Articles 2 (1) and 3 delete the provisions in the Citizenship Act regarding acquisition of citizenship by origin by a child whose one parent is a citizen of Serbia and the other a citizen of Montenegro (Art. 7 (1.3 and 1.4) and Art. 8) and by a child born in Montenegro (Art. 7 (1.5)). Article 7 also deletes provisions on the acquisition of Serbian citizenship by a Montenegrin citizen, his or her child or underage adopted child (Art. 22).

Under the Draft Act Amending the Citizenship Act, Article 23[239] of the Citizenship Act will also apply to Montenegrin nationals whose Montenegrin citizenship shall not terminate as acquisition of citizenship on these grounds shall no longer require release from hitherto citizenship.[240] Article 13 (3) of the valid Montenegrin

236 Act Amending the Citizenship Act of the Republic of Serbia, Draft, Explanation, Part II, Reasons for the adoption of the Act, www. parlament.sr.gov.yu.

237 More on specific provisions on acquisition of Serbian citizenship in *Reports 2004, 2005*, I.4.16.2.

238 See I.4.16.1.

239 Article 23 (1) facilitates acquisition of citizenship of Serbs or persons belonging to other nations or ethnic communities in the territory of Serbia, who are not its permanent residents, if they are of age, able-bodied and submit a written statement acknowledging they consider Serbia their own state. The same requirements are set persons born in another ex-SFRY republic, who had had the citizenship of that republic or are citizens of a state created in the territory of the former SFRY and are residing in Serbia as refugees or IDPs or have fled abroad (Art. 23 (2)).

240 Act Amending the Citizenship Act of the Republic of Serbia, Draft, Explanation, Part III, Explanation of main legal institutes and individual provisions, www. parlament.sr.gov.yu.

Citizenship Act (*Sl. list RCG*, 41/99) stipulates the termination of the Montenegrin citizenship of a person who has acquired the citizenship of Serbia or of another state. In conjunction with Article 27 (3) of the Serbian Citizenship Act, a person cannot simultaneously hold the citizenships of both Serbia and Montenegro. The new Montenegrin Draft Citizenship Act does not provide for termination of citizenship on these grounds[241] and as the Serbian Draft Act Amending the Citizenship Act envisages the same changes in Article 9, it will be possible to hold dual Serbian and Montenegrin citizenship once these laws are adopted.

Under Article 27 of the Serbian Citizenship Act, citizenship can be terminated by: release from citizenship, renunciation, acquisition of citizenship of the other member state, by international agreement.[242] The Draft Act Amending the Citizenship Act deletes acquisition of the other member-state's citizenship (Art. 9 (1)) as grounds for termination of citizenship wherefore Article 35 setting out when citizenship can be terminated on these grounds shall be deleted (Art. 12).

The Ministry of Internal Affairs shall be charged with the procedure of conferring and terminating citizenship and the applications will be dealt with urgently (Art. 38).[243]

The Draft Act Amending the Citizenship Act amends the formulation of the provision in Article 51 (Provisional Articles) of the Serbian Citizenship Act under which citizens of Serbia comprise Yugoslav citizens who had Serbian citizenship on 4 February 2003, i.e. on the day the Constitutional Charter was promulgated, and persons who had acquired Serbian citizenship after that date and before the Act came into effect. Under the Draft, Article 51 will now read: "A person who has acquired the citizenship of the Republic of Serbia in accordance with regulations valid to date shall be deemed a citizen of the Republic of Serbia within the meaning of this Act" (Art. 15, Draft Act Amending the Citizenship Act). The Draft also amends Article 52 of the Serbian Citizenship Act,[244] by adding a provision, under which all Montenegrin citizens, who had been registered as residents of Serbia, shall be deemed citizens of Serbia within the meaning of the Act on condition that they submit written statements declaring they consider themselves citizens of Serbia and apply for entry in the Serbian citizenship registry (Art. 16 (2)). The proposers

241 See www.skupstina.cg.yu.

242 More on termination of Serbian citizenship in *Reports 2004, 2005*, I.4.16.2.

243 The provision on the emergency adoption procedure is in conformity with Article 10 of the European Convention on Nationality, which requires that all citizenship applications are processed within a reasonable time.

244 Under this Article, an SFRY citizen, who had the citizenship of another former-SFRY republic or state created in the territory of the ex-SFRY on the day this Act came into effect, shall be considered a citizen of Serbia if s/he has fulfilled the following three conditions: has been registered as a permanent resident for at least 9 years registered residence in Serbia and has submitted an application for entry in the Serbian citizenship registry and a written statement declaring s/he considers himself or herself a national of Serbia. Under Article 52, persons fulfilling these requirements acquire Serbian citizenship *ex lege*, i.e. only applications of persons who have not fulfilled the legal requirements are reviewed or decided on.

of the Draft explain that Serbia as the legal successor of the SAM is entitled to resolve the citizenship issue of this category of citizens under laxer conditions. Montenegrin citizens residing in Serbia will thus enjoy status equal to that of nationals of other former-SFRY republics who are permanently residing in Serbia and whose citizenship status Serbia was also obliged to resolve after succession. These persons can acquire Serbian citizenship under laxer conditions and need not give up their hitherto citizenship.

4.17. Freedom of Movement

Article 12, ICCPR:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 2, Protocol No. 4 to the ECHR:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in para. 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Article 3

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

2. No one shall be deprived of the right to enter the territory of the state of which he is a national.

Article 4

Collective expulsion of aliens is prohibited.

Article 1, Protocol No. 7 to the ECHR:

1. An alien lawfully resident in the territory of a State shall not be expelled there from except in pursuance of a decision reached in accordance with law and shall be allowed:

(a) to submit reasons against his expulsion,

(b) to have his case reviewed, and

(c) be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under para. 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

4.17.1. General

Under the new Constitution, everyone shall have the right to free movement and residence in the Republic of Serbia and the right to leave it and return to it (Art. 39 (1)).[245] Unlike Article 12 (1) of the ICCPR and Article 2 (1) of the Protocol 4 to the ECHR on freedom of movement and free choice of residence, the Constitution does not require that persons protected by this provision are lawfully within the territory of Serbia.

Movement of aliens is regulated by the Movement and Residence of Aliens Act (*Sl. list SFRJ*, 56/80, 53/85, 30/89, 26/90, 53/91; *Sl. list SRJ*, 16/93, 31/93, 41/93, 53/93, 24/94, 28/96, 68/02, 12/05, 101/05). This Act is obsolete, both with regard to the terms it uses and its provisions. Although it was amended a number of times after the FRY/SaM was constituted, it still uses the concepts and prescribes the competencies of institutions which have long ceased to exist. The Act is also restrictive in some parts and in certain cases leaves matters related to movement and residence of aliens to the Ministry of Interior, with broad guidelines for decision making.

The new Constitution leaves the elaborate regulation of entry into and residence of aliens in the Republic of Serbia to relevant laws. It provides that foreign citizens can be expelled only by a decision of a competent body, in a procedure stipulated by the law and allowing for appeal of the decision, but only when there is no threat of persecution on grounds of race, sex, religion, national affiliation, citizenship, membership in a particular social group, political opinions, or of serious violations of rights guaranteed by the Constitution. (Art. 39 (3)).

245 The same elements of freedom of movement were protected by the constitutional documents previously in force – Article 37 of the SaM Human Rights Charter and the 1990 Constitution of Serbia in Article 17 The 1990 Constitution of Serbia, however, regulated the freedom of movement of nationals and aliens in different provisions; Article 17 guaranteed freedom of movement only to nationals. The Constitutional Charter of the SaM State Union provided for the freedom of movement of humans, goods, services and capital in the SaM and prohibited the obstruction of their free circulation between the member states of Serbia and Montenegro (Art. 13).

Expulsion of an alien is a security measure also envisaged by Serbian criminal law (Art. 79 (1.8) of the CC). Expulsion of a foreigner from the country may be pronounced if an offender is under pronouncement of penalty or suspended sentence (Art. 80 (5) of the CC). When deciding on the measure, the court is to take into consideration the time and gravity of the offence, its motives, manner of commission and other circumstances for declaring an alien a *persona non grata* in Serbia (Art. 88 (2) of the CC). The measure may be pronounced for a period between one and ten years (Art. 88 (1) of the CC).

This security measure may not be pronounced against an offender enjoying protection in accordance with ratified international agreements (Art. 88 (4) of the CC).

4.17.2. Right to Asylum

Serbia ratified a number of international treaties directly or indirectly related to the issue of asylum, notably the 1951 UN Convention on the Status of Refugees and the 1967 Protocol thereto, the ICCPR, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the ECHR, the European Convention for the Prevention of Torture, Inhumane or Degrading Treatment or Punishment and the UN Convention on the Rights of the Child. The state is thus obliged to incorporate these documents in its legal system in an appropriate fashion and to consistently apply them.

EU experts had taken the view that the former SaM would have to make headway on the asylum issue if it wanted to continue the EU accession talks.[246] When SaM became a member of the CoE in 2003, it committed itself to adopting legislation enabling the implementation of the 1951 UN Convention on the Status of Refugees and the 1967 Protocol thereto within one year. Unfortunately, Serbia remains the only country in the region that still has not established a legal system for the protection of asylum-seekers.

4.17.2.1. Constitutional Framework. – The Human Rights Charter guaranteed the right to asylum to any alien who had reasonable grounds to fear s/he will be persecuted because of his/her race, colour, gender, language, religion, ethnic affiliation, membership in a group or political convictions (Art. 38). Provisions on this right had extended the scope of protection of refugees and from persecution on grounds of gender, colour and language, which the UN Convention on Refugees does not include as conditions for acquiring the refugee status. The new Constitution fails to mention the new grounds listed in the Charter and limits itself to the

246 *Commission Staff Working Paper, SERBIA AND MONTENEGRO, Stabilisation and Association Report 2004* (Com (2004) 206 final). The next, 2005 Progress Report for SaM noted that no headway had yet been made in adopting republican asylum laws and the absence of adequate reception centres for asylum-seekers and refugees in view of the fact that the existing ones have very limited capacity and inadequate infrastructure.

ones mentioned in the 1951 Convention: "Any foreign national with reasonable fear of prosecution based on his race, gender, language, religion, national origin or association with some other group or political opinions, shall have the right to asylum in the Republic of Serbia". The procedure for granting asylum shall be regulated by the law. (Art. 57 (paras. 1 and 2))

4.17.2.2. Legal Framework. – The SaM Assembly enacted the Serbia and Montenegro Asylum Act on 21 March 2005,[247] replacing the provisions in the 1980 Act on Movement and Residence of Aliens on asylum and refugees (Arts. 44–60). The 2005 Act has no practical value, as it neither lays down the procedure nor specifies which bodies are competent for implementing the asylum granting procedure. It is a so-called umbrella law, comprising merely the fundamental principles of international law and leaving the detailed regulation of the issue to the then SaM member-states. After the disintegration of the SaM state union, Montenegro passed its Asylum Act in June 2006, while the working group in Serbia still has not publicised its draft.[248]

As Serbia is now an independent state, it would be irrational to adhere to the existing structure and have both an umbrella (SaM Asylum Act), some of the provisions of which are obsolete and inapplicable in view of the disintegration of the state union, and a separate law elaborating the procedure and designating the authorities that will provide protection to asylum seekers. The Serbian draft law and the valid umbrella Act contain several identical articles and others which are incompatible. The National Assembly needs to adopt an integral and consistent law comprehensively regulating the protection of asylum-seekers and rectifying the shortcomings of the valid SaM Asylum Act.[249]

The asylum requests, protection of asylum-seekers and provision of appropriate international protection to them i.e. search for a state that will accept them remain within the mandate of the UNHCR Mission in Belgrade until Serbia passes its asylum law and the subsidiary legislation and builds adequate institutions.[250]

4.17.2.3. Obligations Undertaken within the EU Accession Process. – Adoption of a republican Asylum Act in accordance with international standards is one of the main obligations the Government of Serbia envisaged in the chapter on visas, asylum and migrations of its National Strategy for SaM's Accession to the EU adopted in June 2005.[251] It concluded that the adoption of the law would have to be

247 *Sl. list SCG*, 12/05.

248 The BCHR had the opportunity to see the Draft Asylum Act in May 2006 and has had numerous objections to and comments of the text. See "Right to Asylum – Legal Framework: Comments and Recommendations", www.bgcentar.org.yu.

249 For BCHR's comments on the SaM Asylum Act, see *Report 2005,* I.4.17.2, p. 280.

250 This mandate is founded on a 'gentlemen's agreement' made with the UNHCR in 1969.

251 Serbia's National Strategy for SaM's Accession to the EU is available at the website of the Serbian EU Integration Office http://www.seio.sr.gov.yu.

accompanied by the adoption of a set of by-laws, identification of the most efficient way to provide interpreters for various foreign languages, organisation of training for the border police and other competent authorities; as Serbia does not have an adequate reception centre for asylum seekers, the authors of the Strategy laid special stress on the need to elaborate an efficient procedure and provide adequate facilities for the reception and accommodation of asylum-seekers.

The adoption and implementation of the Asylum Act and the improvement of the capacities and infrastructure of the reception centres for asylum-seekers and refugees have been qualified as short-term priorities (1–2 years) under a decision of the European Council on the principles, priorities and conditions in the European Partnership with Serbia and Montenegro.[252] The Serbian Government on 7 April 2006 adopted a Plan for the Implementation of European Partnership Priorities.[253] In addition to specific priorities in the field of visas, border control and migrations, its short-term objectives also include the adoption of the Asylum Act and relevant by-laws in Serbia, the conclusion and implementation of readmission agreements, the improvement of the capacity and infrastructure of the reception facilities for asylum seekers and refugees and the construction of the reception centre for asylum seekers, for which the UNHCR granted Serbia 200,000 Euros. The Serbian MIA was designated as the responsible state authority.[254] The Plan contains an odd statement, to say the least – that the Draft Asylum Act has been completed. The Government adopted the plan on 7 April, which implies that the draft must have been completed by March 06. As far as the BCHR is aware, work on the text of the law had continued into the summer. Moreover, the draft law has never been presented to the public. The Plan, unfortunately does not specify any deadlines for the adoption of the appropriate legislative framework, but merely mentions the obstacles to its adoption: lack of funds and professional experience. The lack of funds cannot justify the state's decades' long failure to fulfil its obligations under the treaties it ratified. Although Serbia's strategic documents draw attention to the insufficient training of the authorities on asylum issues, the drafting of the law has nevertheless been entrusted solely to the MIA. The administration's lack of professional training is evident, but the state has not taken all the measures it could have to rectify the situation. The BCHR has noted that there is no continuity of training or staffing and that staff that had undergone some training has moved on to other jobs and been replaced by new, untrained staff. This unprofessional approach to the vital issues of formulating state policy on migrations and asylum shows that the state authorities

252 EU Council decision of 30 January 2006 on the principles, priorities and conditions in the European Partnership with Serbia and Montenegro, including Kosovo, as defined by UNSC Resolution 1244 of 10 June 1999 and repealing Decision No. 2004/520/EC, 2006/56/EC, p. 11 is available at www.seio.sv.gov.org.

253 The Serbian Government Plan is available at http://www.seio.sr.gov.yu.

254 Serbian Government Plan for the Implementation of European Partnership Priorities of 7 April 2006, part VIII headlined Judiciary, Freedom and Security, Section 8.1 *Visas, Border Control, Asylum and Migrations*, paras. 8.1.5 and 8.1.6.

are either unaware of the importance of the issue or have not approached it in good faith and with strong political will to comply with their international obligations.

4.17.3. Restrictions

Restrictions of the freedom of movement in the new Constitution of Serbia are formulated in accordance with international standards. They prescribe that restrictions may be imposed only by law and if necessary to attain a legitimate goal – for the purpose of conducting criminal proceedings, protecting public law and order, preventing the spreading of contagious diseases or defending the Republic of Serbia. The grounds for restrictions are less numerous and more narrowly defined than those in the ICCPR and ECHR.

The Act on Travel Documents of Yugoslav Citizens (*Sl. list SRJ*, 33/96, 49/96, 12/98, 44/99, 15/00, 95/00, 71/01, 22/02, 23/02, 53/02, 68/02, 5/03, 101/05) lists grounds on which the issuance of such documents may be denied, which are in keeping with the constitutional restrictions of the freedom of movement.[255] Under the Act, the competent body shall reject an application by a duly reasoned decision (Art. 49 (1)) in the following events – for the duration of criminal proceedings against the applicant, at the request of the competent court; if the applicant is sentenced to an unconditional prison sentence longer than three months, until the sentence has been served; of an applicant denied movement pursuant to existing regulations enforced to prevent spreading of contagious diseases or epidemics, and in case of a state of war, a state of imminent threat of war or a state of emergency (Art. 46 (1)). In particularly justified cases (e.g. the law quotes in example the death of a family member, medical treatment abroad, pressing official business), a passport or a visa of limited duration may be granted at the request of the person whose application had been rejected or whose passport or visa had been annulled with the prior consent of the court, i.e. another authority which requested the dismissal of the application (Art. 51).

Although so-called exit visas are not part of the practice of the state authorities and everyday life of Serbian citizens, the Act on Travel Documents for Yugoslav Citizens foresees the possibility of introducing such visas (Art. 2 (4)).

Article 33 of the Yugoslav Army Act (*Sl. list SRJ*, 43/94, 28/96, 44/99, 74/99, 3/02, 37/02, *Sl. list SCG*, 7/05, 44/05) requires of professional army staff to report any trips abroad and of conscripts serving their military service and army staff to obtain permission to travel abroad during a state of war, immediate threat of war or a state of emergency. This provision applies also to civilian Army employees (Art. 149). Draftees must also seek the permission for temporary or permanent residence

255 The Act had for a long time provided for the denial of passport in contravention of constitutional provisions. Two unconstitutional provisions were declared unconstitutional and invalidated by the Federal Constitutional Court and the third problematic provision was rescinded by the adoption of the amendments to the Act in April 2002 (See *Reports 2001* and *2002*, I.4.17.3.).

abroad from the competent military body. The Act lists grounds on which such approval may be issued or denied (Art. 321). Also, persons in the reserve forces may be prohibited from travelling abroad or from temporarily or permanently residing abroad in specific circumstances and the Government may set conditions under which it will temporarily restrict travel abroad of conscripts of a specific age or with a specific profession required by the Army (Art. 323).

4.18. Economic, Social and Cultural Rights

4.18.1. General

In addition to ICESCR, Serbia is also a signatory of numerous conventions of specialised UN agencies and specific regional organisations.

Economic, social and cultural rights are guaranteed by the Constitution and regulated in detail by laws and subsidiary legislation. Although formally constitutional, these rights are regulated in detail by laws, not only in terms of their realisation but content as well, which gives legislative bodies ample room to restrict or expand them. These rights are thus within the legislative jurisdiction whereby they practically cease to be fundamental constitutional guarantees.

4.18.2. Right to Work

Article 6 of the ICESCR:

> 1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
>
> 2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

According to the practice of the Committee for Economic, Social and Cultural Rights, the right to work does not imply the right of a person to be provided with a job s/he wants, but the state's obligation to take necessary measures to achieve full employment. The right to work implies the right to employment, the right to the freedom of choice of work, i.e. prohibition of forced labour[256] and the prohibition of arbitrary dismissal.

Serbia is a member of the ILO and a signatory of 69 conventions under ILO auspices, including the Employment Policy Convention (No. 122) and the Discrimination Convention (No. 111).

256 See I.4.4.5.

The Constitution guarantees the right to work and free choice of occupation in Article 60. Under the Constitution, everyone shall have the right to fair and favourable working conditions and equal access to all jobs. The new Constitution does not include a provision contained in the prior constitutional enactments, under which the state was obliged to ensure that everyone can gain his living by work, which is the main purpose of the right to work.

Labour law is regulated in greater detail by laws.

Security of jobs has been endangered by economic transition and the move to market economy. This is why the Labour Act devotes a number of provisions to the termination of employment against the will of the employee due to redundancies arising from technological, economic or organisational changes in a company and regarding the rights of employees whose employers have gone bankrupt. In the former case, the employer is obliged to adopt a programme addressing the surplus labour issue. Before termination of the employment contract, the employer is obliged to pay the employee a severance package; the Act prescribes minimum severance package (Act amending the Labour Act, *Sl. glasnik RS*, 61/05; Art. 7 referring to amendment of Art. 158 of the Labour Act). After terminating an employment contract on grounds of surplus labour, the employer does not have the right to hire another person to perform the same job the next six months. If the need arises for the opening of the same job before the six months are up, advantage shall be given to the employee who had held the job before his employment was terminated. Section 4.18.4 elaborates the rights of employees in case of bankruptcy.

Article 179 of the Labour Act regulates the issue of termination of employment against an employee's will in detail. Dismissal may occur for justified reasons regarding the employee's ability to perform the job (under-performance or lack of knowledge or skills required for a specific job), the conduct of the employee (if a work obligation was violated through the fault of the employee, if the employee violated a work rule i.e. if his/her conduct precludes his further employment with a specific employer, if s/he commits a criminal offence at work or related to work, in the event s/he does not come to work 15 days upon expiry of unpaid leave or dormancy of employment, if s/he abuses sick leave). An employee may also lose his/her job if the circumstances change with regard to the employer's needs (in the event a job becomes redundant due to technological, economic or organisational changes, so-called surplus labour). The Act also allows for the dismissal of an employee who refuses to transfer to another appropriate job because of organisational or work process changes, to transfer to a job in another town or an appropriate job with another employer. Under the Act, an appropriate job is a job the performance of which requires the same type and degree of qualifications set in the employment contract. Moreover, an employment contract may be terminated against the employee's will if the employee disagrees with salary-related changes in the employment contract. In the event s/he agrees to the new terms, the employee retains the right to dispute the legality of the contract (Art. 172 (4)). Although the Act does not include

an explicit provision about the right of the employee whose employment contract was terminated because s/he refused to sign the changed employment contract, there is no reason why s/he should not be able to exercise the same right. The employee realises his/her right in a civil lawsuit.

If an employee is dismissed for the last reason, the employer may not hire another person for the same job for a period of three months. Should the need arise to re-open the job within that period, the redundant employee will be given precedence over other job applicants. An employer may not dismiss an employee without prior warning. Also, an employer may not dismiss an employee if she/he is able to offer him/her another job or re-qualification. Article 183 (4) prohibits discriminatory treatment during termination of employment, including prohibition of dismissal due to the political convictions of the employee, which is in keeping with the Committee practice.[257] The dismissal procedure is regulated in detail by Articles 104–107. In the event of illegal dismissal, an employee enjoys court protection and the right to compensation of damages.

The new Act expands the provisions prohibiting dismissal of specific categories of employees. Apart from banning the dismissal of employees during pregnancy, maternity or child care leave, the Act also prohibits the dismissal of the representatives of employees during their terms in office and in the subsequent year, if the representative of the employees has acted in keeping with the law, general enactment and the employment contract. This is in keeping with both with the Committee's principle of free trade unionist activities and ILO Convention 135 on workers' representatives.[258]

In Article 284 (2), the Labour Act prescribes that the General Collective Agreement shall cease to be valid six months from the day the Act comes into force. As the Act came into force on 23 March 2005, the deadline expired on 23 September 2005. The new General Collective Agreement was not passed and no such Agreement is currently in force in Serbia.

Employment is regulated in detail by the Employment and Unemployment Insurance Act (*Sl. glasnik RS,* 71/03). This law establishes the National Employment Agency, which is obliged to provide its services to job-seekers free of charge. Job-seekers may seek the assistance of private employment agencies when looking for a job. Private employment agencies may charge only employers for their services.

The Act also regulates the issues of training and additional training of job-seekers, the employment programme for persons with physical or psychological disabilities (Art. 50) and most of the other issues the Committee for Economic, Social and Cultural Rights qualified in its practice as relevant to Article 6 of the Covenant.

257 See Concluding Observations on the Report of Germany, E/C.12/1993/17, para. 8.

258 See I.4.18.5.

Article 93 of the Act is problematic because of its inadequate interpretation of "appropriate employment". Under the Article, an unemployed person may insist on seeking a job corresponding to his/her degree and profession during the first three months of registration on the labour market. Over the next nine months, s/he may insist on seeking a job only in the profession, notwithstanding his/her degree. In the event s/he does not find a suitable job in the nine months, she/he has to accept any job on offer. If s/he does not accept it, s/he will be deleted from the register and will be eligible for re-registration after three months. Although the state is not obliged to ensure a job which would fully correspond to a person's degree, profession and place of residence, it nevertheless cannot force an unemployed person to accept a job that obviously does not suit him/her by its regulations, either directly or indirectly.

4.18.3. Right to Just and Favourable Conditions of Work

Article 7 of the ICESCR:

> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
>
> (a) Remuneration which provides all workers, as a minimum, with:
>
> (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
>
> (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
>
> (b) Safe and healthy working conditions;
>
> (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
>
> (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

4.18.3.1. Fair Wages and Equal Remuneration for Work. – According to hitherto Committee practice, the obligation to provide fair wages above all implies establishment of a system for fixing minimum wages. Fairness in this context implies fixing wages in keeping with the real social value of each specific job. When it deliberated the ensuring of a 'decent living' of the workers and their families, the Committee established that this provision needed to interpreted in keeping with the whole Covenant, with special emphasis on Article 11 that addresses adequate living standards. Therefore, a decent living in this context means enjoyment of the rights that depend on wages, such as the right to housing, food, clothing, even to education, medical treatment and culture.[259] As far as equal remuneration is concerned, it

259 See Concluding Observations on Report of Kenya, UN doc. E/C.12/1993/6, para. 12.

may be viewed in the context of equal wages for the same jobs. As the Committee has in its hitherto practice aimed at conforming the enjoyment of economic, social and cultural rights of all persons, it is reasonable to expect the imminent adoption of a test drafted by the Committee of Independent Experts supervising the implementation of the European Social Charter, under which minimum wage may not be lower than 68% of the national average in any economic sector.[260] The Committee has so far viewed the principle of equal remuneration for a job of equal value mostly from the viewpoint of prohibition of discrimination.

Serbia is a signatory of the ILO Minimum Wage Fixing Convention (No. 131) and the ILO Equal Remuneration Convention (No. 100). Serbia has not yet ratified ILO Minimum Wage-Fixing Machinery Convention (No. 26) and the ILO Minimum Wage Fixing Machinery (Agriculture) Convention (No. 99).

The Serbian Constitution guarantees the right of workers to fair remuneration for their work (Art. 60 (4)). It does not include a provision explicitly prescribing equal remuneration for work of equal value.

The Labour Act prescribes that an appropriate wage shall be fixed in keeping with the law, a general enactment or an employment contract and that an employee shall be guaranteed equal wage for the same work or work of the same value and says that the employment contract violating this principle shall be deemed invalid. The Act defines work of the same value as work requiring the same qualifications, working ability, responsibility and physical and intellectual work.

With a view to ensuring financial and social security of employees, the Labour Act envisages the right of employees to minimum wages (the so-called right to guaranteed wages under previous regulations). Conditions for fixing the minimum wage are to be defined by the General Collective Agreement. The minimum wage is fixed by a decision of the Social Economic Council of Serbia (Art. 112, Labour Act). A Social Economic Council is an independent agency. It comprises representatives of the Government of the Republic of Serbia (i.e. representatives of competent provincial or municipal executive bodies) and of large employer associations and trade unions.[261] If a Social Economic Council fails to reach a decision within 10 days from the day the negotiations began, the decision on the minimum wage shall be reached by the Government. When setting the minimum wage, the following must be taken into account: living expenses, average salary trend in the Republic of Serbia, existential and social needs of the employees and their families, unemployment rate, employment trend at the labour market and the general level of economic development of the Republic of Serbia. Under Article 112 (4) of the Labour Act, the minimum wage may not be progressively reduced; every time a new minimum wage is fixed, it can remain either at the same level or increase. The minimum wage is fixed periodically, every six months.

260 See D. Harris, *European Social Charter*, 1984, p. 4951 and UN doc. E/C./12/1994/SR12, para. 6.

261 Article 2 Social Economic Council Act, *Sl. glasnik RS*, 125/04.

Since many legal entities in Serbia are in the process of liquidation, the position of employees, who had not been paid salaries and compensations because the companies they worked for were insolvent, has been somewhat improved by amendments to the Liquidation Act (*Sl. glasnik RS*, 84/04) and by the 2005 Labour Act. In Article 124, the Labour Act explicitly guarantees the employees' right to be paid the unpaid claims by the employer that has gone bankrupt.[262] In order to settle the employee claims as much as possible, the new Bankruptcy Act in Article 35 abandons the principle of equality (parity) of the bankruptcy creditors and introduces payment ranks.

4.18.3.2. Promotion at Work. – Article 7 (c) on equal promotion opportunities is closely related to Article 2 of the Covenant prohibiting discrimination in the realisation of economic, social and cultural rights. Certain Committee members have expressed the view that a state is obliged to set certain impartial criteria of promotion which would ensure equal opportunities, at least in the public sector.[263] As far as the private sector is concerned, Committee members are of the opinion that a state is obliged to pass general regulations guaranteeing equal opportunities of promotion.[264] However, general anti-discrimination provisions still play the leading role in the realisation of this right.

Serbia has ratified the ILO Discrimination (Employment and Occupation) Convention (No. 111).

The Serbian Constitution comprises a provision which, if interpreted widely, may reaffirm equality in promotion; in Article 60 (3) it prescribes that everyone shall have access to a job under equal conditions.

4.18.3.3. Safety at Work. – Serbia has ratified the ILO Conventions on Workmen's Compensation (Accidents) (No. 17); Workmen's Compensation (Occupational Diseases) (No. 18); ILO Equality of Treatment (Accident Compensation) (No. 19); Labour Inspection (No. 81); Employment Injury Benefits (No. 121); Labour Inspection (Agriculture) (No. 129); and, on Occupational Safety and Health (No. 155); Occupational Health Services (No. 161).

Art. 60 (4) of the Constitution guarantees everyone the right to occupational safety and health and the right to protection at work. Para. 5 of the Article guarantees special protection at work to women, the young and persons with disabilities.

Under the Labour Act, an employee has the right to health and safety at work. As opposed to the previous law, the new Labour Act no longer contains the provision obliging the employer to organise work in a manner ensuring the protection of the employees' lives and health. Instead, in Article 80 (2), it introduces the

262 See *Report 2005,* I.4.18.4.1.

263 See UN doc. E./C.12/1987/SR5, para. 40.

264 See UN doc. E./C.12/1987/SR5, para. 15.

obligation of the employee to abide by safety and health protection regulations so as not to endanger his/her own health and safety and those of other employees and people. The Act does not ban night shifts under identical conditions. An employee with health problems may not perform jobs which would aggravate his health or result in consequences detrimental to his environment. Jobs carrying a higher risk of injury, occupational or other diseases may be performed only by employees, who fulfil both the special job requirements and health, psychological, physical and age requirements. For the same reason, the Act prescribes shorter working hours for employees performing these jobs.[265]

The Act on Health and Safety at Work (*Sl. glasnik RS*, 101/05) strives to adjust the safety at work regulations to the new business conditions marked by an increasing number of small and medium sized enterprises, which are unable to set up large services to manage safety at work. This is why the Act also allows individuals with a state exam in safety at work or the employers themselves working in specific branches (trade, catering, etc) and employing fewer than ten people to manage safety at work. Moreover, the Act allows the founding of legal entities and enterprises licensed to provide safety at work services on the basis of criteria set by the Labour, Employment and Social Policy Ministry. Their work is monitored by the newly-formed Safety and Health at Work Administration within the Labour Ministry (Art. 60 Health and Safety at Work Act).

Regulations and Directives regulate specific norms and standards regarding safety at work.

Inspectorial supervision of the implementation of the laws and other safety regulations, measures, norms and technical measures, company enactments and collective agreements shall be performed by the labour inspectors in the ministry charged with labour affairs (Serbian Safety at Work Act, Art. 60). The Act also prescribes penalties for violating the provisions of the Act and the norms, standards, regulations and directives. The fines used to be symbolic, but have been increased several times over in the new Act.[266]

Non-abidance by safety at work measures used to be grounds for shutting a company down under the old Serbian Act on Enterprises. Neither the new Act on Companies (*Sl. glasnik RS*, 125/04) nor the Act on Health and Safety at Work contain such provisions. However, the Act on Companies prescribes that a company cannot be founded or conduct business activities if its premises do not fulfil technical, safety, environmental and other requirements. The non-fulfilment of health and safety at work requirements may in specific cases constitute an act of crime (Art. 280 of the CC).

In the event an employee suspects deprivation or violation of his/her right relevant to employment, she/he may complain to the labour inspectorate (Art. 268,

265 See 4.18.7 on special protection of women and youth.

266 Chapter XI Health and Safety at Work Act.

Labour Act), institute proceedings in the competent court (Art. 195, Labour Act), or file for arbitration of the disputed issues together with the employer (Art. 194, Labour Act).

4.18.3.4. Right to Rest, Leisure, and Limited Working Hours. – According to Committee practice, the right to rest, leisure and limited working hours is primarily interpreted as a state's obligation to ensure such schedules of working hours which leave employees time to rest. On the other hand, the provision is interpreted also as the state's obligation to initiate legislature ensuring the employees the right to different types of paid leave. The Committee has so far mostly relied on the practice of the ILO and the agreements signed under ILO's auspices.

Serbia ratified nearly all ILO conventions regarding weekly rest and paid leave. Serbia withdrew from ILO Holidays with Pay Convention (No. 52) and Holidays with Pay (Agriculture) Convention (No. 101). Serbia never ratified ILO Hours of Work (Commerce and Offices) Convention (No. 30) or the Forty-Hour Week Convention (No. 47).

Article 60 (4) of the Constitution explicitly guarantees the right to limited working hours, daily and weekly rest, and paid annual vacations. The Labour Act stipulates a five-day working week (Art. 55) and a 40-hour full-time working week (Art. 50). The schedule of the working hours in a working week is set by the employer. As a rule, a workday lasts eight hours. Exceptionally, an employer may schedule a working week in a different manner if work is performed in shifts, at night or if so required by the nature of the work. An employer is obliged to inform the employee of the work schedule and any changes in working hours at least seven days in advance. Work performed between 2200 hrs and 0600 hrs the following day is deemed night work. An employee may contract employment with more than one employer within a 40-hour working week and thus achieve full-time employment.

The Act also envisages the obligation to introduce shorter working hours for persons performing extremely difficult, strenuous or hazardous to health jobs. An employee may work overtime, but is only obliged to in the event of a *force majeure*, unexpected increase in volume of work or if unplanned work needs to be done within a specific deadline.

Employees have the legal right to a break during working hours and the right to daily, weekly and annual rests, as well as to paid and unpaid leave in keeping with the law. Employees may not be deprived of these rights. A full-time employee has a right to a minimum 30-minute break during a workday (Art. 64, Labour Act). Employees also have the right to a break between two consecutive 12-hour workdays (Art. 66, Labour Act). An employee has the right to a minimum 24-hour weekly rest; in the event the employee must work during his/her weekly rest, s/he will be given one-day rest during the course of the following week. All employees are entitled to annual leave every calendar year. Annual leave shall be minimum 20 workdays. A first time employee and an employee, who had a break in employment

lasting over 30 workdays, have the right to take annual leave after six months of continuous work. The duration of annual leave is fixed on the basis of the duration of service, working conditions and other criteria set by a general enactment or employment contract. An employee on annual leave has the right to compensation of the wage she/he would earn that month. Employees have the right to paid leave of maximum seven workdays in case of marriage, birth of a baby or serious illness of a close family member. Death in the family entitles employees to five-workday paid leave.

4.18.4. Trade Union Freedoms

Article 8 of the ICESCR:

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

4.18.4.1. Freedom to Form Trade Unions. – Freedom to form trade unions is the only trade union right guaranteed by all three general human rights protection instruments Serbia has ratified – ICCPR (Art. 22), ECHR (Art. 11) and ICESCR (Art. 8). The right to form trade unions is general believed to imply the right to found a trade union and the right to join in a trade union of one's own free will, the

right to establish associations, national and international associations of trade unions, and the right of trade unions to function independently, without state interference. The formulation in Article 8 (1) of the ICESCR "undertake to ensure" should not be interpreted in the spirit of the progressive realisation of the freedom of organisation in trade unions. Article 8 of the ICESCR is an immediate obligation as the freedom of association is guaranteed also by other human rights protection instruments whose provisions require immediacy. The Committee for Economic, Social and Cultural Rights has taken the same view.[267] Freedom of organisation in trade unions does not boil down to a state's negative obligation – not to prevent realisation of the freedom by its actions; it also implies the obligation of the state to encourage and assist the founding and functioning of trade union organisations and to prevent anti-trade union activities.[268]

Serbia is a signatory of the following ILO Conventions: Right of Association (Agriculture) (No. 11), Freedom of Association and Protection of the Right to Organise (No. 87), Right to Organise and Collective Bargaining (No. 98), and on Workers' Representatives (No. 135). Serbia never signed the ILO Rural Workers' Organisations Convention (No. 141), the Labour Relations (Public Service) Convention (No. 151) or the Collective Bargaining Convention (No. 154).

Article 55 of the Constitution guarantees the freedom to associate in trade unions. Under para. 2 of the Article, persons establishing trade unions need not obtain prior consent and trade unions shall be set up by entry in a register kept by the competent state authority in accordance with the law. Only the Constitutional Court may prohibit the work of an association, including a trade union, in instances explicitly enumerated in para. 4 of the Article. The realisation of the freedom of organisation in trade unions is regulated in greater detail by the Labour Act, laws regulating association of citizens and bylaws. Article 6 of the Labour Act defines a trade union as an autonomous, democratic and independent organisation of employees which they associate in of their own free will to represent, advocate, promote and protect their professional, labour, economic, social, cultural and *other individual and collective interests*. Article 206 guarantees the employees freedom of organisation in trade unions.

Under the Labour Act, trade unions do not need approval for registration in the register kept by the ministry charged with labour affairs. This provision is not in contravention of the practice of the Committee for Economic, Social and Cultural Rights or other human right protection bodies as long as the registration requirements and procedure do not significantly hinder the registration of trade unions. This particularly pertains to the minimal number of members a trade union needs in order to register, and state influence during the establishing of a trade union.[269] The practice of the ILO Committee on Freedom of Association (CFA) is of particular

267 General Comment No. 3 (1990), UN doc. E/1991/23 (1991).

268 See UN doc. E/C./12/1994/SR9, para. 33 and UN doc. E./C.12/1994/SR10/Add. 1, para. 1.

269 See UN doc. E/C/12/1994/SR. 9, para. 26.

relevance to this issue.[270] In Serbia, the trade union registration procedure is regulated by the Rules on Entry of Trade Union Organisations in the Register (*Sl. glasnik RS*, 6/97, 33/97, 49/00, 18/01, 64/04).

Article 4 of the ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise explicitly prohibits the dissolution and suspension of work of a trade union by the administrative authorities. According to the CFA, this is the most extreme form of interference in the independent operations of trade unions by public authorities. Under Article 7 of the Rules on Entry of Trade Union Organisations in the Register, a trade union organisation shall be deleted from the register, *inter alia*, pursuant to a legally binding decision prohibiting the work of the trade union (Art. 7 (2) of the Rules). Under Article 67 of the Act on Social Organisations and Citizens' Associations, the decision to ban the work of a trade union is reached by *a municipal administration body* charged with internal affairs, which is in contravention of international obligations. A decision prohibiting the work of a trade union need not be reasoned and an appeal of the decision does not stay its enforcement. There is no court protection against the final decision in an administrative dispute, i.e. there is no effective legal remedy.

The freedom of association in trade unions of police and other civil servants is not explicitly addressed by the Constitution. Under Article 55 (5) of the Constitution, specific categories of civil servants (judges and prosecutors, police and army staff and the Ombudsman) are prohibited from membership in political organisations. As the Constitution does not include a provision prohibiting their association in trade unions, it should be interpreted so as to imply that these categories of employees are constitutionally guaranteed the right to association in trade unions.

4.18.4.2. Protection of Workers' Representatives. – The ILO In 1971 adopted Convention 135 on Workers' Representatives. The need for giving this category of employees special status arises from the sensitivity of their position.

The Labour Act u Article 188 prohibits the employer from terminating an employment contract or placing a workers' representative at a disadvantage in another manner while the employee is holding the position of workers' representative and over the following year if the workers' representative is acting in keeping with the law, general enactments and the employment contract. The Act defines workers' representatives as: members of staff councils and staff representatives in the employer's executive or supervisory boards, chairmen of trade union branches in the company and appointed and elected trade union representatives. The employer can nevertheless in keeping with the law dismiss a workers' representative who refuses to sign an amended employment contract.[271] The Act also prescribes that, in keeping with the collective agreement or agreement between the employer and trade union(s), authorised trade union representatives have the right to paid leave to per-

270 See ILO 1996d, Documents No. 0301, 0302, 0303, 0304, 0305, 0306, 0307, 0208. Also see *China Freedom of Association Case*, ILO CFA, Vol. LXXIII, 1990, Series B, No. 3.

271 See 4.18.3.

form the trade union function; the leave is proportionate to the number of trade union members in the company (Art. 211, Labour Act). An authorised trade union representative may be fully relieved of his duties under the employment contract while holding the function by a collective agreement or another agreement.

4.18.4.3. Right to Strike. – The right to strike is guaranteed by Article 8 (1.d) of the ICESCR, Article 6 (4) of the European Social Charter, but not explicitly by the ICCPR or ECHR.[272]

The right to strike is guaranteed by Article 61 of the Constitution. The employed shall have a right to strike in accordance with the law and the collective agreement. The right to strike may be restricted only by law and in accordance with the type and nature of activity. The issue of politically motivated strikes and support strikes is disputable. According to ILO CFA jurisprudence, these types of strikes do not fall under the definition of strike under ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise.[273] However, the right to strike does not only imply halting work solely to address economic or social problems caused by unfavourable working conditions or similar issues that may be resolved by collective employer-employee negotiations. According to ILO practice, the right to strike also implies the right of employees to halt work demanding new solutions to be found to improve the economic or social policy in the state.[274] Also, support strikes may not be prohibited in general; workers must be given the opportunity to go on support strikes in the event the strike they are supporting is legal.[275]

The ICESCR prescribes that the right to strike is to be exercised in conformity with the laws of the particular country (Art. (8.1.d)), which permits the imposition of certain restrictions in order to mitigate the effects and consequences of strikes on public order; however, the right to strike itself cannot be denied.

Under the Strike Act (*Sl. list SRJ*, 29/96) the right to strike is limited by the obligation of strikers' committee and workers participating in a strike to organize and conduct a strike in a manner which does not jeopardise the safety of people and property and people's health, which prevents causing of direct material damage and enables the continuation of work upon the termination of strike. Besides that general restriction, a special strike regime is also established: "in public serv-

272 Unlike the Human Rights Committee which decided, in a controversial opinion, that the right to strike was not included in the right to freedom of association guaranteed by the ICCPR (*Alberta Union v. Canada*, Com. No. 18/82*),* the European Court of Human Rights recognised the importance of the right to strike for the promotion of the freedom of trade union association, but its scope and importance remain to be elaborated in the jurisprudence of the Court (*Schmidt and Dahlstrom v. Sweden*, A 21, 1976). The ILO Committee on Freedom of Association also took the view that the right to strike, which is not explicitly mentioned in ILO Convention No. 87, constituted a legitimate and indispensable means for unions to protect the interests of employees (Com. No. 118/82, para. 2.3).

273 See ILO 1996d, Document 0902, para. 481.

274 *Ibid.*, para. 479.

275 *Ibid.*, para. 486.

ices or other services where work stoppages could, due to the nature of the service, endanger public health or life, or cause major damage" (Art. 9 (1)). Activities of public interest are those implemented by an employer in the following spheres: power generation industry, water supply industry, transport, information, PTT services, public utilities, staple foods production, health and veterinary protection, education, social care for children and social welfare, as well as activities of general interest for the defence and security of the SaM and affairs necessary for the implementation of the SaM's international obligations. The list is much too extensive and is not in conformity with international standards. The same view was taken by the Committee on Economic, Social and Cultural Rights in its Concluding Observations on the realisation of social, economic and cultural rights in Serbia and Montenegro.[276]

Fields in which work stoppage could jeopardise people's life and health or cause major damage are: the chemical industry, ferrous and non-ferrous metallurgy (Art. 9 (2–4)). In these branches, the right to strike can be exercised if special conditions are met, which means to "ensure the minimum process of work which ensures the safety of people and property or is an indispensable condition for life and work of citizens or another enterprise or a legal or natural person performing an economic or other activity or service" (Art. 10 (1)). The minimum process of work is set by the director, and for public services and public enterprises by the founder, in the manner established by the general employment act, under the collective contract; the director and the founder have the obligation to take into account opinions, remarks and proposals of trade unions (Art. 10 (3 and 4)).

Though there is no doubt as to the need for a special regime for strikes in services that are indispensable for the normal functioning of the country, it should be ensured through other means. The necessity of a minimum of the work process in vital installations is acceptable only in some services. The rules setting the minimum work process should be very restrictive but with regard to the employer, not the work force. The Strike Act's definition of the minimum is so broad that it brings into question the possibility of a strike or its effectiveness. Moreover, vague formulations such as "compliance with international obligations" make it possible completely to ban industrial action in some cases, for example in companies that are exclusively export-oriented. Thus the established regimen of strikes to an extent contradicts the very right to strike.

Article 8 (2) of ICESCR allows countries to restrict by law the right to strike of members of the armed forces, the police or of the state administration. The Constitution does not explicitly deny civil servants the right to strike. As it includes a provision allowing for restrictions of the right to strike by law in specific areas of activity and as this provision must be interpreted in conjunction with Article 18 (2) of the Constitution, under which laws may not affect the essence of constitutionally

276 Concluding Observations, UN doc. E/C.12/1/Add.108, 23 June 2005.

guaranteed rights, it can be concluded that employees in state administration and members of the police in Serbia have the right to strike.

The Act on Strike in Article 18 stipulates termination of employment of an Army, state and police employee if it is established that s/he organised a strike or took part in one.

4.18.5. Right to Social Security

Article 9 of the ICESCR:

> The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

The right to social security comprises the rights to social insurance and to social welfare.

Under Article 69 of the Constitution, citizens and families in need of welfare to overcome their social and existential difficulties and begin providing subsistence for themselves shall have the right to social protection, the provision of which shall be based on the principles of social justice, humanity and respect for human dignity. The Constitution also guarantees the rights of the employed and their families to social protection and insurance, the right to compensation of salary in case of temporary inability to work and to temporary unemployment benefits. The Constitution also affords special social protection to specific categories of the population and obliges the state to establish various types of social insurance funds. Article 70 of the Constitution specifically guarantees the right to pension insurance.

Social security comprises pension, disability, health and unemployment insurance. The issues are regulated by a number of laws.

Social insurance against old age and disability is regulated by the Pension and Disability Insurance Act (*Sl. glasnik RS*, 34/03, 64/04, 84/04, 85/05).

Compulsory insurance encompasses all employees, individual entrepreneurs and farmers. This insurance ensures the rights of the insurants in old age, or in the event of disability, death or corporal injury caused by a work-related accident or occupational disease.

The law also allows voluntary insurance for persons who are not covered by the compulsory insurance schemes, in the manner prescribed by a separate law (Art. 16, Pension and Disability Insurance Act). At the same time, by voluntary insurance, the ensured persons can secure a wider scope or other form of rights for themselves and their families, outside those prescribed by the Act. The September 05 Act on Voluntary Pension Funds and Pension Plans (*Sl. glasnik RS*, 85/05) largely clarifies the Pension and Disability Insurance Act provisions related to voluntary insurance. It resolved the dilemma whether an employer-pension fund agreement (so-called pension plan) can be concluded on behalf of third parties i.e. employees. The first draft of the law had not envisaged this possibility but the legislator decided to

include it after the public debate of the law. This solution is commendable, as it expands the range of social insurance against old age and increases the security of the employees as, from the viewpoint of an employee, this type of insurance is obligatory since the contract binds the employer to pay contributions to the private social fund.

Retirement contributions to the pension plan cannot be subtracted from employee salaries without their consent and participation in a pension plan cannot be a prerequisite for employment or for membership in a trade union or another form of staff association. Although, in comparative law, employers joining pension plans are not obliged the pay contributions to the compulsory state pension insurance (as the contractual nature of the pension plan already obliges them to pay contributions to private companies managing voluntary pension funds), the legislators seem to have opted for a good solution, leaving Serbia's society time to get used to the private pension funds and gain trust in the new system. Interpretation of relevant laws shows pension plans are merely an *additional form* of social insurance against old age as state insurance is still obligatory for all categories of employees without exception (Arts. 11 and 12, Pension and Invalid Insurance Act). The Act also prescribes the possibility of voluntary insurance of individuals. It allows national and foreign natural or legal persons to found private societies managing voluntary pension funds exclusively as closed joint stock companies. With the exception of banks and insurance companies with majority state capital, joint stock companies with majority state capital may not manage voluntary pension funds.

Insurance against old age implies the right to an old-age pension. An insured person becomes eligible for an old-age pension when s/he has cumulatively fulfilled the requirements in terms of age and years of service. The Act amending the Serbian Pension and Disability Insurance Act passed in 2005 prescribes that the insured person becomes eligible for an old-age pension at the age of 65 (for men) and 60 (for women) and at least 15 years of service, or 40 (35) years of service and at least 53 years of age (Art. 19) or 45 years of service. The amendments thus move up the age limit but reduce the required duration of service.

Insurance against disability implies the right to a disability pension. The cause of the disability has no significance in the determination of the disability itself but does have an effect on eligibility for certain rights and their scope.[277]

A disabled person has the right to a disability pension and other rights on the basis of his remaining ability to work, the right to retraining or acquiring additional qualifications, the right to be assigned to an appropriate full-time job, and the right to financial benefits. In order to provide at least minimum means of living for those who have only a few years of employment and/or received very low wages when they worked, the Act on Pension and Disability Insurance (Arts. 25 and 26) prescribes the lowest old age and disability pensions.

In the event of death of a person covered by the compulsory insurance scheme, a recipient of an old age or disability pension or of a person who was em-

277 See I.4.18.11.

ployed for least five years or met the disability pension requirements, his family acquires the right to a family pension (Arts. 27–36, Act on Pension and Disability Insurance).

The Pension and Disability Insurance Act also envisages the right to financial compensation for damage incurred to the employee's body by a work-related injury or an occupational disease. The concept of work-related injury is defined quite broadly and is in conformity with international standards. This right may be exercised by an employee also in the event it has resulted in the disability of the employee.

Unemployment insurance is governed by the Employment and Unemployment Insurance Act.

The right exercised in the event of unemployment is the right to financial compensation on condition the person was insured for at least 12 consecutive months or over a period of 18 months, with unemployment intervals shorter than 30 days (Art. 108 of the Employment and Unemployment Insurance Act). However, not every termination of job means that a person is entitled to an unemployment benefit. Article 109 of the Employment and Unemployment Insurance Act prescribes when a person is eligible for unemployment benefits. Generally speaking, a person who has lost his job through his own fault or has resigned, is not entitled to an unemployment benefit. This right may also be exercised by the unemployed falling within the category of so-called surplus labour. Unemployed persons receiving benefits also have medical, pension and disability coverage (Art. 8 (6), Medical Insurance Act).

In contrast to social insurance, funds that come from the contributions employed persons pay from their incomes, social benefits entail the expenditure from public funds established from public income of the state. The area of social welfare is regulated by the Act on Social Security and Provision of Social Welfare.

Social security rights include the right to welfare benefits, outside assistance and care allowances, job training allowances, home care, day care, placement in an institution or another family, social welfare services, preparatory work for placement of beneficiaries in a welfare institution or another family, and one-off assistance.

The Social Care Centre, with branch offices in municipalities, is charged with the realisation of social protection rights.

4.18.6. Protection Accorded to Family

Article 10 of the ICESCR:

> The States Parties to the present Covenant recognize that:
>
> 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Serbia is the signatory of the Convention on the Rights of the Child, the Optional Protocol to the Convention on Sale of Children, Child Prostitution and Pornography, and the ILO Conventions on Maternity Protection (No. 3); Medical Examination of Young Persons (Sea) (No. 16), Underground Work (Women) (No. 45), Night Work (Women) (Revised) (No. 89), Night Work of Young Persons (Industry) (Revised), (No. 90), Maternity Protection (Revised) (No. 103), Minimum Age (No. 138), Workers with Family Responsibilities (No. 156) and Worst Forms of Child Labour (No. 182).

Article 66 of the Constitution guarantees special protection to the family and the child, mothers and single parents. In para. 2, it guarantees support and protection to mothers before and after childbirth and, in para. 3, it guarantees special protection to children without parental care and children with physical or mental disabilities. The Constitution prohibits employment of children under 15; minors over 15 are prohibited from performing jobs that may adversely affect their health or morals. Article 64 of the Constitution is devoted to the rights of the child.

The Labour Act does not afford special protection to employed women, except in case of pregnancy, whereby the international obligations under specific ILO Conventions are violated. Although formally groundless in legal terms, this is not inconsistent with the European trends to equate treatment of men and women at work.[278] However, Serbia should have first denounced the relevant ILO conventions and then opted for such legislative solutions to conform the national regulations with community law.

Pregnant women and women with children below the age of three may not work overtime or at night. Exceptionally, a woman with a child over the age of two may work at night but only if she specifically requests this in writing. Single parents with a child up to the age of seven or a severely handicapped child may work over-

278 Namely, all EU member states apart from Slovenia have denounced Convention 89 Concerning Night Work of Women Employed in Industry at ECtHR's indirect suggestion (see: *Stoeckel* C-345/89 and *Levy* C-158/91). Some European states denounced Convention 45 on hiring women to work underground in mines of all categories (UK, The Netherlands, Finland, Sweden, Ireland and Luxembourg) while Denmark, Norway, Latvia, Lithuania and Cyprus never signed it.

time or at night only if they make a written request to this effect (Art. 68 (3), Labour Act).

Maternity leave is a basic right of working women. A pregnant woman may start her leave 45 days before her due date or at the latest 28 days before the due date (Art. 94, para. 2 Labour Act). Maternity leave lasts 365 days from the day the baby is due (Art. 94 (1), Labour Act). The Labour Act also prescribes two-year maternity leave for mothers who gave birth to their third or fourth child.

An employed woman has the right to compensation of her salary equalling the salary she would have earned in her workplace during maternity leave, leave for the purposes of child care and leave for the purposes of special child care. Or, she shall have the right to compensation of a certain percentage of the wage, depending on the duration of employment immediately prior to exercising this right (Arts. 10–12, Act on Financial Support for Families with Children).

If the condition of a child requires special care or if it suffers from a severe disability, one of the parents has the right to additional leave. One of the parents can choose between leave and working only half-time, for 5 years maximum (Art. 96, Serbian Labour Act). Under the Labour Act, one parent may take leave from work until the child's third birthday, while his/her labour rights and duties will remain dormant during this period. (Art. 100 (2) Labour Act).

The law guarantees to an extent a woman's job during pregnancy, maternity leave and additional leave (and to a man exercising the right to ordinary and additional child care leave). The Labour Act provides for extensive protection of employees on the basis of exercising the above-mentioned rights (Art. 187 (1). The only exception regards employees with limited contracts if their employment contract expires while they are exercising the rights.

The Labour Act sets 15 as the minimum employment age (Art. 24) and afford special protection to employees under 18 years of age. In order to protect their health, minors and young adults may not be hired to perform specific jobs. An underage employee cannot work more than 35 hours a week or more than eight hours a day. A minor may not work nights, except in culture, sports, arts and advertising if necessary to continue work interrupted by a *force majeure*, if the employer does not have enough adult employees; in the latter case, the employer is obliged to ensure supervision of the minor's work (Art. 88, Labour Act).

4.18.7. Right to an Adequate Standard of Living

Article 11 of the ICSECR

> 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

4.18.7.1. Right to Housing. – According to the Committee for Economic, Social and Cultural Rights, the right to housing is of central importance for the enjoyment of all economic, social and cultural rights.[279] The Committee established that the right to housing should not be interpreted narrowly, that it should not imply merely the provision of any kind or shelter or 'a roof over one's head'.[280] This right should be viewed as an individual's right to "live somewhere in security, peace and dignity".[281] The right to housing implies the legal security of tenure (ownership and tenancy rights, right to rent, etc.), availability of services, materials, facilities and infrastructure essential for health, security, comfort and nutrition (energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage, et al), affordability of both attainment and maintenance (rent, public utility costs, etc), habitability, accessibility to disadvantaged groups, especially children, the disabled and the ill (lifts, ramps, et al), and location, which allows access to employment options, and cultural and social life.[282]

The Housing Act[283] (*Sl. glasnik RS*, 50/92, 76/92, 84/92, 33/93, 53/93, 67/93, 46/94, 47/94, 48/94, 44/95, 49/95, 16/97, 46/98, 26/01) regulates: 1) purchase of the remaining socially-owned apartments; 2) renting of socially-owned apartments; 3) the status of legal occupants of housing which is the private property of others. In all other areas, the market has taken over and housing is merely a commodity. Only in Article 2 does the Act say that the "state takes measures to create favourable conditions for housing construction and ensures conditions for meeting the housing needs of underprivileged persons, in accordance with law." All the other elements designed to protect and assist vulnerable social groups and which exist in different forms in all European countries, are no longer a matter of interest or concern of state agencies in Serbia. The problem is further exacerbated by the fact that "underprivileged persons" in fact entails people on welfare, that is, those below the line of

279 General Comment No. 4 UN doc. E/192/23, para. 1.

280 *Ibid*., para. 7.

281 *Ibid.*

282 *Ibid.*, para. 8.

283 More on the housing situation in Serbia in *Report 2004*, I.4.12.7.

absolute poverty of one dollar per day. Hence the number of people who can hope for state assistance with respect to their housing needs is indeed negligible.

The right to housing of vulnerable groups, especially refugees, IDPs and Roma, living in unhygienic and unsuitable housing, is a burning issue. Retired persons are the only vulnerable category of the population for which Special Regulations on Housing Requirements have been adopted (*Sl. glasnik RS*, 38/97, 46/97). These matters are administered by the Serbian Pension and Disability Insurance Fund.

In Serbia, minimum housing standards are not fixed. This creates insurmountable problems in statistically determining the number of substandard dwellings.[284]

Municipal funds for building housing for indigent families are scant. There is no systematic record of the number of such apartments or their quality, nor are there fixed criteria for their allocation and use. The Constitutional Court in 2001 designated the Belgrade City Assembly as the body empowered to lay down uniform criteria for the allocation of these "solidarity" apartments, and companies, through their by-laws, to set the criteria under which the apartments are rented (*Sl. glasnik RS*, 1/01).

4.18.7.2. Right to Adequate Nutrition. – Certain members of the Committee for Economic, Social and Cultural Rights have emphasised that Article 11 of the Covenant contains two different and thereby two independent provisions on the right to nutrition. The first is expressed in para. 1 of the Article as "right to adequate food" and the second in para. 2 as "the right to protection (freedom) from hunger". The first right implies progressive realisation as it requires a specific quantity and quality of food, while the other right is 'not to die of hunger', wherefore some interpret it as a fundamental right and therefore immediately applicable,[285] all the more as the realisation of this right is prerequisite for the realisation of the very right to live.[286]

The Act on the Safety of Foodstuffs and Objects in General Use (*Sl. list SRJ*, 24/94, 28/96, 37/02) prescribe standards that must be respected in the turnover of foodstuffs. Food safety entails hygienic safety and the safety of food components. Adequate supervision is prescribed the Act on Supervision of the Safety of Foodstuffs and Objects in General Use (*Sl. glasnik SRS*, 48/77, 29/99; *Sl. glasnik RS*, 44/91, 53/93, 67/93, 48/94) and is performed by the Serbian Health Ministry sanitary inspectors.

There are no special food subsidies designed to improve the diets of the poorest and most vulnerable groups. The prices of some basic foods are "protected" to keep them at a relatively low level.

284 The Housing Act defines a dwelling as "A dwelling within the meaning of the present Act is one or more rooms *intended and suitable for habitation* which, as a rule, makes up a single unit with a separate entrance" (Art. 3). The definition in official statistics is: "a built unit consisting of one or more rooms with ancillary rooms (kitchen, pantry, entranceway, bathroom and similar, or *without ancillary rooms* and with one or more entrances" (italics added).

285 See UN doc. E/C.12/1989/SR20, para. 26.

286 UN doc. E/C.12/1989/SR20, para. 18.

4.18.8. Right to Highest Attainable Standard of Physical and Mental Health

Article 12 of the ICSECR

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

4.18.8.1. General. – The right to physical and mental health implies freedoms and obligations: freedom from physical and mental torture and injury, freedom of decision on therapy, prohibition of experimentation for health purposes, etc. On the other hand, there is the obligation to establish a health care system within which health care beneficiaries may be set obligations with the purpose of providing equal health care to all citizens.[287] The right to physical and mental health also comprises access to health care services without discrimination.[288]

The right to health protection is guaranteed by the Constitution, which entitles children, pregnant women, mothers on maternity leave, single parents of children under seven and the elderly free medical aid even if they are not beneficiaries of compulsory health insurance. The Constitution obliges the state to assist the development of health and physical culture but does not specify how. It also obliges the state to establish health insurance funds.

The matter is regulated by the Medical Insurance Act (*Sl. glasnik RS*, 17/05) and the Health Protection Act (*Sl. glasnik RS*, 107/05).

4.18.8.2. Medical Insurance. – The Medical Insurance Act regulates compulsory and voluntary health insurance. The Republican Health Insurance Bureau is charged with managing and ensuring compulsory health insurance, while voluntary health insurance may be provided by private insurance and special medical insurance investment funds whose organisation and activities will be regulated by a separate law.

Insured persons and members of their families are beneficiaries of compulsory health insurance. Under the law, the following are insured: employees (not-

287 General Comment 14, UN doc. E/C 12/2000/4.

288 *Ibid.* para. 12.

withstanding the legal grounds of employment, character of the employer or form of employment), farmers, entrepreneurs, share-holders, members and founders of companies, athletes, priests of registered religious communities, persons eligible for unemployment benefits, pensioners, et al.[289] They include *inter alia* children under 15, school-children and university students until the end of schooling and under the age of 26, women (in terms of maternity care), persons older than 65, persons with disabilities, persons treated for HIV, Roma without permanent or temporary residence in the Republic due to their traditional way of life, et al.[290]

Immediate family members, enjoying rights based on compulsory medical insurance, include: spouse (and extramarital partner if s/he has lived in an extramarital union with the insured person for at least two years before applying for health insurance), children born in or out of wedlock, adopted or foster children, step children, and other family members: parents (father, mother, stepmother, stepfather, adoptive parent), grandchildren, brothers and sisters if permanently and totally unable to lead an independent life and work in accordance with separate regulations and dependant on the insured person.

Rights exercised on the basis of health insurance include the right to health protection, right to salary reimbursement during sick leave and reimbursement of transport costs related to health care. Under the Act, these rights may be exercised by an insured person who has paid all due health insurance contributions.

Health insurance rights are as a rule in the first instance decided on by the beneficiary's local branch office, while appeals are decided on by the Republican Health Insurance Bureau. The Medical Insurance Act allows for an administrative dispute against the second-instance decision by the Republican Bureau (Art. 175) but envisages significant exceptions. An administrative dispute may not be initiated, for instance, if the decision violates the beneficiary's right to health care, but a lawsuit may be filed within 30 days upon receipt of the Republican Bureau decision. The proceedings are urgent in such cases.

4.18.8.3. Health Protection. – Health protection comprises curative, preventive, and rehabilitative care. It is funded from the medical insurance funds, the state budget and by beneficiaries in cases specified by the law (participation). The right to health protection provided by compulsory medical insurance comprises: prevention and early diagnosis of illnesses, check-ups and treatment of women with regard to family planning, during pregnancy, delivery and maternity; check-ups and treatment in case of illness or injury, dentistry check-ups and treatment, medical rehabilitation in case of illness or injury, medications and medical equipment and technical aides.[291] Health protection in the above cases may be fully covered from insurance funds or with the participation of the insured person. The Act enumerates

289 Article 17 of the Serbian Medical Insurance Act lists all beneficiaries of compulsory health insurance.

290 See Article 22 of the Medical Insurance Act and Article 11 (2) of the Health Protection Act.

291 The new Act introduces extensive restrictions with respect to dental services.

all the cases in which the insured person must participate in the medical costs and sets the amounts in percents (Art. 45 Medical Insurance Act). Specific categories are exempted from paying the participation (war military and civilian invalids, other persons with disabilities, blood donors, et al.).[292]

4.18.8.4. Rights of Patients. – As opposed to the previous laws, the Health Protection Act devotes special attention to the protection of patients' rights. The patient's fundamental right is right of access to health care in keeping with the financial possibilities of the health care system (Art. 26, Health Protection Act). All patients have the right to all types of information notwithstanding their state of health, medical service or manner in which they are using it and to all information available on the basis of research and technological innovations, as well as the right to timely information needed for a decision on whether to agree or not to a proposed medical measure (Arts. 27 and 28, Health Protection Act). The Act also envisages an exception from the obligation to inform the patient of the diagnosis if that would endanger the patient's health, but in that case, a relative of the patient must be informed of the diagnosis. A patient has the right to free choice of medical team i.e. doctor and to free choice of medical procedure, including the right to refuse treatment. As a rule, no medical measures may be taken with respect to a patient without his consent. Exceptions pertain to the immediate need for medical measures in circumstances in which the patient is unable to give his/her consent (including the impossibility of obtaining the timely consent of the patient's guardian or legal representative) as well as medical treatment of a person with a mental disorder.[293] The Act allows the patient to himself decide who will reach decisions on medical measures in case he is incapable of taking the decision (so-called advance care directives). A patient shall enjoy the protection of personal data and privacy s/he imparted to the health workers or that were obtained during diagnostic check-ups or treatment. Experimenting on patients without their explicit consent is also forbidden. A patient also has the right to compensation of damages caused by medical negligence. This right cannot be ruled out or restricted in advance.

The Health Protection Act establishes protectors of patient rights who will be charged with reviewing patient complaints within the health institutions (Art. 39, Serbian Health Protection Act). A protector of patient rights will be independent in his work and must decide on a complaint within eight days. If the patient is dissatisfied with the decision, s/he may complain to the health inspectorate.

4.18.9. Right to Education

Under the Constitution, everyone shall have the right to education. Article 71 sets out that primary and secondary education shall be free of charge. In addition, primary education shall be mandatory. Under the Constitution, all citizens shall

292 See Article 50 of the Medical Insurance Act.

293 See I.4.18.11.

have equal access to tertiary education; the state shall provide free tertiary education to successful and talented students, who are unable to pay the tuition, in accordance with the law. This provision falls short of the right to education standard that had been set by the 1990 Constitution, under which the right to free education was exercised at all levels of *regular* education.

The Primary Education Act (*Sl. glasnik RS,* 62/03, 64/03, 58/04) allows private persons to found primary schools.

In 2004, an Act on Amendments to the Education Act was passed, annulling many of the Act's reformist provisions (*Sl. glasnik RS*, 58/04). The amendments abolished special Councils – for Education, Professional Training, Harmonisation of Stands on Education – and set up a National Education Council. The composition of this new Council is disputable, especially the provision prescribing that one Council member shall be appointed from amongst the ranks of the Serbian Orthodox Church and another from amongst the ranks of all other "traditional religious communities and churches" (Art. 11 (3, items 7 and 8)). The provision under which only one member from amongst the ranks of all national minorities is appointed to the 42-member National Council also gives rise to concern. Mandatory education is again reduced to eight years and the teaching licences have been abolished. Provisions allowing pupils to master the curriculum and pass a grade more easily were also abolished (Art. 101 (2, 4, 8 and 9)). Concern also arises over the provisions that replaced the ethnically neutral provisions in the initial Act.[294]

In addition, the Act on Amendments to the Act on Elementary Schools was passed (*Sl. glasnik RS*, 22/02) and the Act on Amendments to the Act on Secondary Schools (*Sl. glasnik RS,* 23/02) were passed in 2002.

Changes and amendments mainly refer to the status, organisation, plan and programme of religious education and education in the other optional subject designated by the Minister of Education, determining the professional, administrative and inspection supervision, as well as the area of responsibility of school boards and parental councils. School boards, i.e. the school management bodies comprise school staff, parent and local self-administration representatives (Art. 118 (2), Act on Elementary Schools; Art. 89 (2), Act on Secondary Schools, *Sl. glasnik RS*, 50/92, 53/93, 67/93, 48/94, 24/96, 23/02). The intention of the legislator was to create a partnership and harmonised opinions of those groups that have a natural interest in participating in education. One of the powers of the school board is to nominate school principals based on the prior opinion of the teachers' council. The current practice (after the amendments came into force) shows that the opinions of the teachers' councils have mostly been disregarded in the nomination of school principals.[295]

294 See provisions on education objectives: Article 3 (5 and 11).

295 When there is a reference to the right to education we usually think about children as beneficiaries of education or about parents who have the right to bring up their children in accordance with their religious and philosophical beliefs (Art. 2, Protocol No. 1 to the ECHR). Teachers

Education laws comprise provisions protecting groups and individuals from discrimination and protection from physical punishment and verbal abuse of students. Article 7 of the Act on Elementary Schools and Article 8 of the Act on Secondary Schools envisage the following:

> All activities threatening or degrading groups and individuals on the grounds of race, national, language, religious affiliation, sex or political conviction, as well as instigating such activities is strictly prohibited in the school.
>
> Physical punishment and verbal abuse of a student's person is prohibited in the school.

In this way the laws underline the provisions of the Convention on the Rights of the Child related to non-discrimination, protection from abuse and school discipline in terms of the way it can be exercised (Arts. 2, 19 (1) and 28 (2), Convention on the Rights of the Child; for prohibition of physical punishment see *Campbell and Cosans v. United Kingdom*, ECtHR, App. No. 7511/76, 7743/76 (1982)).[296] These prohibitions are supported by appropriate protection mechanisms and their breach constitutes the grounds for dismissal of teachers or associates from the teaching process (Art. 73 (1), Act on Elementary Schools; Art. 80 (1), Act on Secondary Schools). This is also the grounds for dismissal of school principals who do not take appropriate action in cases of improper conduct of teachers (Art. 88 (3), Act on Secondary Schools), and sanctions have also been prescribed for the school, which is obliged to pay a fine for the offence if it fails to take action against such conduct (Art. 109 (11 and 12), Act on Elementary Schools and Act. 140 (1 and 2) Act on Secondary Schools).

The laws for the first time separate the management and professional and pedagogical supervision in schools. Salaries, compensations and other income of educational staff, as well as the funds for joint consumption, are centralised and streamlined through the Ministry of Education. Also, the laws explicitly allow schools to generate their own income from donations, sponsorships, contracts and other legal affairs. The municipal or town authorities fund the further professional development of teachers and associates, investment and regular maintenance, equipment, material costs and depreciation in keeping with the law, transport of students living more than 4 km away from the school, if there is no other school in their vicinity. Transport is provided for students with developmental disabilities regard-

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are most often and easily forgotten in the process. Although they are not the only ones concerned by the life and organisation of the school, the issue of electing school principals is primarily of their concern and interest. This is particularly important since the Act Amending the Act on Secondary Schools envisages that Parental Councils are to deal with issues related to school life (Art. 90a). Election of the school principal is of greater relevance to the life of school as a collective; therefore this power should be fully granted to the Teachers' Council. School would then become a truly democratised and depoliticised institution.

296 See *Campbell and Cosans v. the United Kingdom*, ECHR, App.No. 7511/76; 7743/76 (1982) Re corporal punishment of minors see also the case *Tyrer v. United Kingdom* (ECtHR, App. No. 5856/72 (1978)).

less of the distance between their house and school. Changes and amendments to the Act on Elementary Schools have introduced a provision pursuant to which "the municipality or town in the territory of which the parent of the student has residence keeps records of children categorised and enrolled in an appropriate school, covers the cost of transport, food and accommodation of students if there are no appropriate schools in that particular municipality" (Art. 85 (9)). The problem, however, remains how this obligation will be met by poorer municipalities, which cannot allocate the necessary funds from their budgets. Although stipulated by law, this obligation has not been met in poor municipalities (usually rural communities), where the problem of long distances between schools and homes is the most acute. The Act does not envisage organising specialised school buses, not even in municipalities with a small and dispersed population. For these settlements, as well as for settlements with very small number of children of primary school age, the legislator envisages establishing of so-called branch schools, with combined classes. The Act contains the category "combined class" for lower elementary school grades (grades 1–4), in which children in two grades study together (in this case the class has 20 pupils) or children in three or four grades study together (in classes of 15 pupils each). The quality of work in combined classes, located in old and poorly equipped buildings (frequently without toilet facilities and running water, library, kitchen, proper classrooms and similar rooms), is rather low and has a demotivating effect on pupils.

The laws have detailed and improved regulations on professional advancement, certificates and development of teachers, associates and child minders.

The Act does not envisage penal provisions for municipal authorities, nor for the Ministry of Education, should they fail to ensure that students are able to attend school under conditions stipulated by this Act, but it does envisage sanctions for parents.

4.18.9.1. Higher Education. – As opposed to the 1990 Constitution, Article 72 of the new Constitution explicitly guarantees the autonomy of the universities, colleges and scientific institutions. Under para. 2 of the Article, they shall decide freely on their organisation and work in accordance with the law. Article 73 of the Constitution also guarantees the freedom of scientific and artistic creation.

This area is regulated by the Higher Education Act (*Sl. glasnik RS,* 76/05). The Act, drafted for several years, introduces a large number of new and modern provisions. In its introductory provisions, it says that higher education is of special relevance to the Republic of Serbia and part of international, notably European education, science and arts (Art. 2). Higher education is based *inter alia* on the principles of academic freedoms, autonomy, respect of human rights and civil liberties, including prohibition of all forms of discrimination, participation of students in management and decision making, especially on issues of relevance to quality of instruction (Art. 4). The Act explicitly prescribes the equality of higher education

institutions notwithstanding their ownership i.e. who their founders are (Art. 4, para. 1, item 9). In several provisions, the Act especially insists on prohibition of discrimination. The most explicit prohibition of discrimination is found in Article 8 (1), under which:

> All persons with secondary education, notwithstanding their race, colour of skin, gender, sexual orientation, ethnic, national or social origin, language, religion, political or other convictions, status acquired by birth, existence of a sensory or motoric disability or financial status have the right to high education.

Although the Act can be criticised on some minor points and there are doubts that there is readiness to implement it rapidly and efficiently, it can be generally assessed as good from the viewpoint of human rights.

4.18.10. Rights of Persons with Disabilities

Provisions regulating the rights of persons with disabilities are extremely diverse and dispersed in many laws and subsidiary legislation. Although legislators have focussed on improving legislation in this area in the recent years, the existing provisions are still largely inadequate and often insufficient. The National Assembly in 2006 adopted the extremely important Act on Prevention of Discrimination against Persons with Disabilities.[297] A law on the professional rehabilitation and employment of persons with disabilities has not been adopted yet however.

4.18.10.1. Right to Work. – As opposed to the 1990 Constitution, the new Constitution does not include provisions obliging the state to organise special and professional training for partly disabled persons (Art. 39). Employment and professional rehabilitation of the disabled are also regulated by the Serbian Employment and Unemployment Insurance Act (*Sl. glasnik RS,* 71/03, 83/04) and the Social Welfare Act (*Sl. glasnik RS,* 36/91, 79/91, 33/93, 53/93, 67/93, 46/94, 48/94, 52/96, 29/01) and the Act on Professional Training and Employment of Disabled Persons (*Sl. glasnik RS*, 25/96, 101/05). However, the provisions in the Act are insufficient as they invoke other laws which are actually non-existent.

The Serbian Employment and Unemployment Insurance Act prescribes the Government's obligation to pass an Active Employment Policy Programme which the Social Economic Council has rendered an opinion on. The Programme is to devote special attention to the employment and professional rehabilitation of persons with disabilities or lesser working ability.

The Act on Professional Training and Employment of Persons with Disabilities regulates the founding and working conditions of companies providing professional rehabilitation and employment to persons with disabilities. Under the Act, a person with a disability cannot sign an employment contract with the company whilst undergoing professional training. Jobs offered by such companies to disabled

297 *Sl. glasnik RS*, 33/06. See I.4.1.2.

persons need not be advertised by the National Employment Agency or the employment agencies. Such companies are granted specific subsidies from the Serbian budget. The 2005 amendments[298] have increased several times over the extremely low fines imposed on companies and responsible persons abusing the rights guaranteed by the Act.

The Rulebook on Rights of Unemployed Persons (*Sl. glasnik RS*, 35/97, 39/97, 52/97, 22/98, 8/00, 29/00, 49/01, 28/02) prescribes that persons with disabilities shall be given priority in employment and professional orientation programmes, employment preparations and educational programmes. The state budget subsidises 80% of the average net wage of an employee with a disability during the first 12 months of employment.

4.18.10.2. Right to Social Security. – The right to social security implies the right to a disability pension, social aid and accommodation in social welfare institutions.

The right to a disability pension is acquired by an insurant, who has become totally incapacitated for work due to health changes caused by a work-related injury, occupational disease, injury outside of work or a disease that cannot be cured by treatment or medical rehabilitation (Art. 21). Right to a disability pension in the event of an injury or disease unrelated to work is acquired when a person becomes incapacitated for work before fulfilling the old age pension requirements or after five years of service. If disability occurs before the person turned 20 due to an injury or disease unrelated to work, the insurant is eligible for a disability pension after one year of service; persons in this category and aged between 25 and 30 are eligible for pension after 2 or 3 years of service. The Serbian Labour Act binds the employer to provide a person with a work-related disability a job which she/he can perform, in keeping with the pension and disability insurance regulations (Art. 78). A significant shortcoming of the new Pension and Disability Insurance Act is that it does not mention re-qualification or reassignment to another job of an employee who has suffered significant decrease of the ability to work due to a work-related injury or occupational disease, i.e. an injury or disease unrelated to work.

Realisation of the right to accommodation in a social welfare institution in Serbia is especially problematic. There are no adequate alternatives to institutional placement of mentally disabled persons who are unable to lead an independent life (protected tenancy/housing rights may be exercised only by persons whose ability to live alone is intact or slightly reduced; there are no communes, the foster home system does not function due to the absence of a favourable legal framework, et al.) De-institutionalisation has not even begun yet in practice. There are no legal provisions stipulating the placement of such a person in a social welfare institution closest to his family's home in the event she/he has a family. Beneficiaries are often

298 Amendments to the Act setting fines for commercial offences and misdemeanours (*Sl. glasnik RS*, 101/05), Article 83.

deprived of fundamental human rights. Most beneficiaries are incapable of working and are placed under guardianship. There is no legal framework which would prevent such practice.

4.18.10.3. Right to Education. – Persons with developmental problems, adults and persons with special abilities have the right to education conformed to their special educational needs (Art. 4 of the Act on Bases of the Education System). Instruction in sign language and with the help of sign language means of communication is provided for the education of persons using sign language (Art. 7). Special education of children with developmental problems is regulated by Chapter VII of the Serbian Primary School Act. The Act regulates so-called classification of children with developmental problems, funding of this form of education and forms of their kindergarten education. In terms of the Act, children with developmental problems are children with physical disorders, mentally disabled children and children with multiple developmental disorders. Physical disorders comprise sensory disabilities, i.e. sight or hearing impairments. The Act classifies mental disabilities into four groups (mild, moderate, profound and severe). Classification of children is as a rule conducted before they are enrolled in primary schools, but may be conducted during schooling as well. It serves to determine a child's ability to acquire primary education and the type of school the child is to be enrolled in. The decision thereof is passed by the competent Classification Commission and can be appealed by the parents. Under these provisions, the parents' role in choosing the manner in which their child will be schooled is minimal, which is especially disadvantageous where children with physical disorders are concerned.

II
HUMAN RIGHTS IN PRACTICE

1. Introduction

1.1. National Media as Source of Data. – The Serbian print media in 2006 comprised twelve newspapers with an overall daily circulation of around 600,000 and five political weeklies, only two of which had significant circulation and sold across the country.

BCHR associates had for the 2006 Report perused the following dailies: *Politika*, *Danas*, *Večernje novosti* and *Blic*, and the weeklies *Vreme* and *NiN*. In addition to print media, BCHR associates also monitored the wires of the state news agency *TANJUG*, the private news agencies *BETA* and *FONET*, and some foreign agencies, notably the Spanish agency *EFE*. They also referred to the *Ebart* media documentation archives and *B92'*s website.

A total of 6,676 articles in dailies and weeklies published in Serbia were read for the 2006 Human Rights in Serbia Report, i.e. 10% more than for the 2005 Report (6,067). The increase in the number of articles on human rights may be indication of the deterioration in the human rights situation in Serbia.

Serbia's readership was in 2006 year again the most interested in reports on what it perceived as human rights violations of Serbs by the ICTY and the UN and NATO administration in Kosovo. Articles on these issues accounted for 46.47% of all articles used for this report. However, the number of articles on the ICTY has decreased for the third year in a row (from 29% in 2005 to 25.42% in 2006).

There was a significant increase in the share of articles on Kosovo (21.05% in 2006 over 14.05% in 2005) due to intensified talks about the province's future status. The topic of Kosovo was also amply used in political propaganda accompanying the referendum on the new Constitution of Serbia in late 2006 and during the campaign ahead of the early parliamentary elections called for 21 January 2007.

The year 2006 saw a significant increase (from 9.72% in 2005 to 16.72% in 2006) in articles on political rights, the third most frequent subject of media reports on human rights. The greater focus on political rights can be ascribed to the major political events that marked 2006, such as the referenda on Montenegro's independence in May and on the Serbian draft Constitution in November, as well as the early local elections held in a number of Serbian towns during the year.

The right to life was again the fourth most popular subject, although the share of articles on this human right fell from 9.72% in 2005 to 7.37% in 2006, probably due to a slowing down in war crime trials.

The share of articles on the freedom of expression in 2006 increased over 2005 (from 4.7% to 5.77%), due to stronger pressures on media accompanying all important political events and some odd and apparently politically motivated decisions made during the allocation of frequencies to electronic media.

The percentage of articles dealing with the right to a fair trial also considerably rose over 2005 (from 2.91% to 4.89%), the consequence of the executive authorities' attempts to exert greater influence on the judiciary over the past three years.

The share of articles on discrimination recorded a slight increase (from 3.52% in 2005 to 3.60% in 2006), as did the share of articles on the right to peaceful enjoyment of property (from 0.46% in 2005 to 0.54% in 2006).

The number of articles on the special protection of the family and the child in 2006 fell considerably over 2005 (from 5.28% to 3.54%) because the media tended to ignore the so-called "ordinary" cases and focus on drastic cases of physical and sexual domestic violence, which have been on the rise.

There were fewer articles on social and economic rights (2.58% in 2006 over 3.01% in 2005), prohibition of torture (1.93% in 2005 and 1.43% in 2006), prohibition of slavery and forced labour (1% in 2005% and 0.77% in 2006) and freedom of thought (1.04% in 2006 over 2.04% in 2005). Fewer articles on these rights were, unfortunately, not an indication of fewer violations of these rights, but the consequence of public weariness of them and the pre-occupation of the media with issues such as the ICTY, Kosovo and the constant conflicts between political parties.

These reasons also lie at the cause of a decrease in the number of articles on rights of national minorities (2.26% in 2006 over 5.25% in 2005), excluding the articles on the human rights of non-Albanians in Kosovo.

Table 1. Number of articles on human rights in 2006

	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII	Total
V. novosti	120	145	153	139	137	151	153	130	139	132	126	95	1.620
Danas	145	171	156	162	157	172	191	168	164	165	166	147	1.964
Politika	96	115	123	112	131	126	126	107	118	101	117	114	1.386
Blic	77	100	102	105	102	122	133	92	109	98	100	93	1.233
Vreme	16	20	34	24	18	26	16	18	19	18	22	15	246
NiN	16	16	33	18	14	19	25	19	19	14	20	14	227
Total	470	567	601	560	559	616	644	534	568	528	551	478	6.676

Apart from the media, the BCHR associates perused reports by local and foreign NGOs, notably the Humanitarian Law Centre (HLC), the Helsinki Committee for Human Rights in Serbia (HC), the Lawyers Committee for Human Rights, the Youth Initiative for Human Rights (YIHR), Human Rights Watch, Amnesty International (AI), *et altera*. UN, Council of Europe and OSCE materials were also used in the Report.

2. Implementation of Human Rights

2.1. Prohibition of Discrimination and Rights of Minorities

Instances of discrimination in Serbia in 2006, though not greater in number, were graver than the ones that occurred in 2005.

The Roma, ethnic Hungarians and other minorities, persons with disabilities and citizens of different sexual orientation were again the most frequent targets of discrimination. The authorities failed to take systematic steps to rapidly identify and punish the perpetrators of such incidents or pre-empt such incidents and discourage potential offenders.

Ethnic distance felt towards minorities in Serbia is still quite big. According to a Centre for Free and Democratic Elections (CeSID) survey, the greatest ethnic distance is felt towards ethnic Albanians; 42% of the pollees would not accept them as citizens of Serbia, 73% of them would never marry an Albanian. The next are Croats, with whom 25% of the pollees would not like to have even the most superficial relationship: they are followed by Bosniaks, Roma and ethnic Hungarians. The author of the research, sociologist Dragan Popadić, noted that the degree of ethnic distance coincided with the one in 2003, when it was higher than in 2001. (*Večernje novosti*, 8 October, p. 16).

2.1.1. Status of Roma. – Roma, who account for between 108,000 (2002 census figures) and 800,000 (Roma organisations' estimates) of the population, are the most vulnerable ethnic group in Serbia. Only one in 100 Roma lives to see 60 and the average lifespan of Roma stands at 40. Some 80% of the Roma are totally or functionally illiterate; less than 10% of Roma children go to kindergarten. Of 89,000 Roma children, only 15,000 attend elementary school and only 28% of them finish it. About 7.8% of the Roma graduate from high school and only 3 out of 1,000 go on to college or university (*Danas*, 31 March, p. 6, *Vreme*, 4 May, p. 38 and *Politika*, 8 April, p. 10).

The social and economic status of Roma in Serbia is best illustrated by data showing that they are the only residents of the over 600 favelas in Serbia and that 90% of them are unemployed (*Vreme*, 4 May, p. 38).

Roma have been the most frequent targets of ethnically motivated incidents. Bogdan Vasiljević, employed at the sports recreational centre Krsmanovača in Šabac,

was sentenced to 6 months in jail or a 1-year suspended sentence in mid-February for not letting Roma enter the pool grounds on 8 June 2000 (*Blic*, 14 February, p. 13).[299]

The Humanitarian Law Centre (HLC) in February filed charges with the Niš Municipal Court on behalf of Roma Dragiša Ajdarević seeking compensation from Oliver M. and Nataša M, who beat Ajdarević up in April 2004 because of his ethnicity (*BETA*, 10 March).

The Novi Sad District Court in March convicted Dolf Pospiš to one year in jail for inciting ethnic, racial and religious hatred by drawing Nazi symbols on walls and threatening to kill underage D.J. because of the colour of his skin in 2004 (*Večernje novosti*, 28 March, p. 12).

In early June, G17+ dismissed from its membership a Pančevo party official Zlatko Bekić, against whom criminal charges were subsequently filed for inciting ethnic, racial and religious hatred. At a party meeting, Bekić said "we needn't worry about the Roma and Jews because gas chambers are readied for them anyway" (*Politika*, 9 June, p. 7). The same month, unidentified persons insulted and beat up three Roma in the Belgrade suburb of Borča; the police identified the perpetrators and raised criminal charges against them, but there was no information on the course of the proceedings by the time this Report went into print. (*BETA*, 20 June). Several days later, the residents of the Roma favela in Jagodina complained that unidentified persons had been pelting their homes with stones for several nights in a row (*Večernje novosti*, 26 June, p. 11).

Seven Roma in Ripanj were in July beaten up by a group of young men whom the victims described as skinheads. The police qualified the incident as an ordinary fight (*Blic*, 10 July, p. 14). Ten days later, a group of Roma high-schoolers was attacked in Valjevo; the local police said this incident, too, was just a brawl (*BETA*, 21 July). Later that month, four Roma young men were reportedly beaten up in a Novi Sad police station and sustained grave bodily injuries. The police said the young men were interrogated over a theft, that the police had found the stolen things in their possession and would launch an investigation. No information on the case was made available by the time this Report was completed (*BETA*, 28 July and *TANJUG*, 29 July).

Two skinheads were arrested in Belgrade in November and criminally charged with physically assaulting a Roma (*Blic*, 18 November, p. B5). A group of hooligans in the Vojvodina village of Jaša Tomić allegedly beat up a Roma woman the same month. Roma activists claim the incident was ethnically based, while the local residents say an ordinary fight was at issue (*Večernje novosti*, 8 November, p. 16).

2.1.2. Vojvodina. – The number of ethnically based incidents in Vojvodina fell over 2005,[300] but the attitudes of some senior state officials towards minorities in Vojvodina did not change in 2006.

299 More on *Krsmanović* case in *Report 2000*, IV.4.3.3., *Report 2002*, II.2.1.1., *Report 2003*, II.2.1.1.1., and *Report 2004*, II.2.1.1.

300 See *Report 2005*, II.2.1.3..

In his report to the National Assembly, BIA Director Rade Bulatović qualified Vojvodina as an area of "higher security risk" and said that extremists were "abusing the current political processes" to achieve their "separatist goals" (*Danas*, 22 June, p. 5). Two weeks later, he said that Vojvodina was a stable and safe region characterised by good inter-ethnic relations (*Blic*, 6 July, p. 2).

The Novi Sad District Public Prosecutor raised charges in January against 19 members of the unregistered organisation National Formation for inciting ethnic, racial and religious hatred, dissent and intolerance.[301] The accused had in 2005 interrupted a panel discussion organised by the NGO Anti-Fascist Action at the College of Philosophy, insulted the participants and audience, accusing them of being traitors and foreign mercenaries, and physically assaulted Zoran Petakov, a co-organiser of the panel (*Danas*, 10 January, p. 7). The trial began in September (*Politika* 13 September, p. 11). The indictment was modified in late October and charges against two of the accused were dropped. The leader of the group, Goran Davidović *aka* Fuhrer, and Miodrag Stefanović remained charged with for inciting racial, ethnic and religious hatred, while the rest of the accused were charged with endangering safety (*Danas*, 31 October, p. 7). The Novi Sad District Court sentenced Davidović to one year and Miodrag Stefanović to six months in jail. Two other members of the group were convicted to four and three months of imprisonment respectively, while 11 of the accused were handed down suspended sentences. Two were found innocent. Judge Đurđina Bjelobaba assessed that the "media predisposition" during the pre-trial proceedings had not affected the decision of the judicial panel. She said the accused were sentenced to minimum penalties because the court had taken into account all the alleviating circumstances and the good conduct of the accused during the investigation and trial (*Danas*, 11 November, p. 5).

Bishop Irinej of Bačka sued Petakov in September for, *inter alia*, claiming publicly that the Bishop had links with the National Formation Bishop Irinej is demanding 1 million dinars in compensation (*Blic*, 22 September, p. 12).

In early June, Milojka Petrović from Futog was sentenced to six months in jail for spreading ethnically based hatred against Slovaks (*Blic*, 12 July, p. 15).

The Serbian Ministry of Education in February withdrew the Hungarian language secondary school application tests because of inappropriate content on the front page of the test book, which had "You Should Go" and "Sinking" written on it. The Ministry claimed a technical error was at issue (*BETA*, 3 February and *Danas*, 3 and 4 February, pp. 3 and 6).

Representatives of the Subotica-based Civic Alliance of Hungarians protested against double standards they claim were applied by the Vojvodina judiciary after the Novi Sad District Court sentenced six Serbian youths to a total of 14 years in jail for attempting to extort and kidnap a Hungarian youth. They recalled that five Temerin Hungarian youths were in 2004 sentenced to a total of 61 years in jail for the attempted murder of a Serbian youth[302] (*TANJUG*, 2 March).

301 See *Report 2005*, II.2.1.4.

302 See *Report 2004*, II.2.1.1.

Nationalist symbols were drawn on the walls of houses owned by Serbs in Srpski Itebej (*BETA*, 6 March). The Hungarian names of Zrenjanin and the village of Mihajlovo were sprayed over, and "Death to Hungarians" was sprayed across the local road between the villages of Mihajlovo and Jankov Most (*TANJUG*, 24 April and *Danas*, 30 June, p. 37). Euđen Petri from Jankov Most was in July accused of writing those words (*TANJUG*, 17 July). Swastikas were drawn on the walls of a number of private shops and homes of Hungarians in Mali Iđoš in July (*Večernje novosti*, 27 July, p. 16), while "Hungaria" "Freedom for the Southern Part" and "Go to Kosovo" were written on the walls of Serbian homes in Senta (*Večernje novosti*, 21 July, p. 5).

Slovaks, who make up the majority population in Bački Petrovac, were victims of an incident that occurred at a soccer game in that town in June. A group of Serbian fans who had come to the game from other towns were chanting "Kill, slay, no more Slovaks", "Kill the Slovak". The police did not react (*Danas*, 19 June, p. 8).

The Novi Sad District Public Prosecutor in October filed criminal charges against unidentified persons for attacking three Preševo Albanians (*Blic*, 1 November, p. 14).

2.1.3. Bosniaks. – The Bosniak Sandžak Democratic Party (SDP) in late June reported that a group of prisoners in the Niš prison had beaten up a group of Bosniak prisoners. The prison administration refuted the allegations (*Danas*, 22 June, p. 7 and *Politika*, 22 June, p. 7).

The HLC the same month filed criminal charges against unidentified authors and singers of the song "Let's Slay", glorifying the war crime committed in Srebrenica and calling for the extermination of Bosniaks, which had appeared on the Internet (*Danas*, 7 June, p. 7).

Eulogies to the Srebrenica crime and calls for the extermination of Bosniaks also marked a soccer game between the teams *Rad* and *Novi Pazar* in Belgrade. The police arrested 152 *Rad* fans, 47 of whom were under age (*Politika*, 19 October, p. 1).

An incident that occurred in Novi Pazar shows there are extremists in the Bosniak population as well. A group of some ten young men with long beards, who declare themselves as members of the Wahhabi movement, prevented the concert of the Serbian ethnic music group *Balkanika* by damaging its equipment and calling on the audience to disperse because the group was "working against Islam". Fans of the local soccer club pelted the stage with stones. The police took four people into custody on suspicion of inciting racial, ethnic and national hatred. By the time this Report went into print, there was no information on a court epilogue to the incident (*Danas*, 5 June, p. 29 and *Večernje novosti*, 7 June, p. 10).

2.1.4. Antisemitism. – Antisemitic incidents were recorded in Serbia in 2006 as well. Antisemitic and chauvinist slogans "Holocaust – Jewish Lie by which They Rule the World" and "Serbia to Serbs" were written on the walls of the Niš Red

Cross headquarters, where a concentration camp was housed in W.W.II (*Danas*, 17 February, p. 6). The Smederevo District Court in late March raised criminal charges against Ivan T. and Mihajlo S. for fomenting ethnic, racial and religious hatred. In July 2005, the two men wrote anti-Semitic messages such as "Halt Jewish Control over our Government" "Racial Mixing is Genocide" "Rise against the Jews" in July 2005 (*BETA*, 28 March). No information on the proceedings was made public by the end of the reporting period.

A group of skinheads beat up two Israeli nationals in Belgrade in late August. The two suspects claim they had only slapped one of them who had been behaving inappropriately (*Blic*, *Politika* and *Vreme* 31 August, pp. 14, 11 and 5). The Belgrade District Prosecutor in December raised charges against Aleksandar Hadži Prodanović and Predrag Milovanović for inciting ethnic, racial and religious hatred and intolerance (*Večernje novosti*, 13 December, p. 12).

The Novi Sad authorities in November unveiled a monument to the late 19th century Serbian politician Jaša Tomić notwithstanding public protests. Tomić had been known for his antisemitism and had been convicted to an 8-year prison sentence for killing a liberal journalist (*Danas*, 10 November, p. 4). Graffiti appeared in Belgrade the same month with Nazi symbols and the message "Death to Jews" on the monument commemorating the Jews and Roma killed during W.W.II (*FONET*, 30 November).

The SRS-led management of the Niš municipal Red Cross filed misdemeanour charges against a local LDP official, who had taken part in painting over the swastikas and nationalist graffiti. They explained that he had violated the municipal decision on the maintenance of public grounds and facilities. The municipal leaders had, however, failed to in any way comment the fact that the painted over graffiti were inciting to ethnic, racial and religious hatred (*Danas*, 13 and 14 December, pp. 4 and 11).

2.1.5. Southern Serbia. – Ethnically-based incidents occurred in 2006 also in the three municipalities in Southern Serbia with a majority Albanian population. This area had been the scene of conflicts between extremist Albanians and the security forces in the early 2000s and is still marked by tensions.[303] For instance, the police stations at Bujanovac (*Večernje novosti*, 28 January, p. 10) and in the village of Končulj were attacked (*Večernje novosti*, 7 March, p. 13).

Tensions amongst the ethnic Albanian population rose when their compatriots from Veliki Trnovac were sentenced in February 2005 to between 5.5 and 7 years in jail for killing BIA officer Selver Fazliu. Three of the nine convicts were released from jail in February 2006 at the order of the Supreme Court of Serbia because the higher court had failed to pass its second-instance decision within the legal deadline (*Politika*, 18 February, p. 11 and *Danas*, 21 February, p. 16). The three men fled to Kosovo and the authorities were thus unable to deliver them the

303 More in *Reports 2000,* II.2.2.1 and *2002,* II.2.2.5. *and 2003*..

Supreme Court decision upholding the first-instance verdict (*Večernje novosti*, 10 and 23 March, pp. 12 and 13). In late March, some 2,000 Albanians living in Veliki Trnovac and Bujanovac protested, demanding the three be pardoned (*Danas*, 31 March, p. 4). Ethnic Albanian councillors in the three municipalities called for the amnesty of all members of the disbanded extremist Liberation Army of Preševo, Bujanovac and Medveđa who, they claim, had been arrested "for political reasons" and demanded the full implementation of the Amnesty Act and the demilitarisation of the whole area (*Večernje novosti*, 6 April, p. 4).

Preševo resident Sami Sulejmani was convicted to one year in jail for inciting ethnic and religious hatred and intolerance in March. Sulejmani had destroyed several Orthodox gravestones in February 2005 (*BETA*, 3 March).

In late November, during the celebration of Albania's Flag Day, a group of young ethnic Albanians hoisted the flag of that country on the town hall by force. The same was done in Preševo; some 2,000 ethnic Albanians gathered to watch the young men take the Serbian flag off the town hall and replace it with that of Albania (*Politika*, 29 November, p. 7). In early December, the Preševo Mayor protested because several Albanians were summoned for questioning about the incident. The local police stated they had summoned the persons who had taken part in the incident (*Blic*, 4 December, p. 3). Former Preševo Mayor Riza Halimi said that his party was ready to assume responsibility for the unlawful hoisting of the Albanian flag, which he described as a warning that it was high time to address the Albanians' right to display their symbols (*Blic*, 5 December, p. 5).

2.1.6. Other Inter-Ethnic Incidents. – A group of round 30 young men clad in Ku Klux Klan robes insulted the Zimbabwean player of the Čačak club Borac Mike Tawmanyera at a soccer game in October and flying a banner saying "Leave, no one wants you here". The police threw the fans out of the stadium and took 37 of them into custody. Charges were raised against 27 of them for inciting racial, religious and ethnic hatred. One of the accused is a captain of the Army of Serbia. Eight were kept in detention (*Danas*, 16 and 17 October, p. 27 and *Blic*, 18 October, p. 15).

SRS deputy Zoran Krasić in June called the Farm Minister Ivana Dulić-Marković, who is an ethnic Croat, an Ustasha and accused her of breaking the state up. The session chair did not react to his words and the deputies of the party G17+, which the Minister belongs to, walked out of the session (*Politika*, 7 June, p. 1, *Danas*, 7 June, p. 1 and *Večernje novosti*, 7 June, p. 4). In mid-July, the Serbian Assembly deputies concluded that Krasić had not violated the Rules of Procedure (*Blic*, 15 July, p. 2). The vehement public reactions prompted PM Koštunica to ask the SRS to apologise; the SRS, however, continued insulting their political opponents. G17+ called for the prohibition of the SRS (*Politika*, 8 and 9 June, p. 1, *Večernje novosti,* 9 June, p. 4 and *Danas*, 29 June, p. 5) but the Republican Public Prosecutor dismissed the G17+ motion (*Blic*, 11 August, pr. 11).

G17+ filed a criminal report against Zoran Krasić for inciting ethnic, racial and religious hatred (*Danas*, 17 August, p. 4), as did Dulić Marković, but her charg-

es was dismissed and she was advised to file a private libel suit (*Večernje novosti*, 19 August, p. 12).

Leskovac Mayor and SRS deputy in the Serbian Assembly Goran Cvetanović behaved in a similar fashion. At a municipal session, he called Dulić Marković an Ustasha and enemy of Serbia (*Danas*, 31 July, p. 7). Her action against Cvetanović was also dismissed and she was again advised to sue him privately for libel (*Politika* and *Blic*, 16 August, pp. 7 and 2 and *Danas*, 17 August, p. 9).

A Belgrade court in late January convicted Aleksandar Bošković to 40 days in jail for physically assaulting two Croatian diplomats (*Politika*, 28 January, p. 1 and *Večernje novosti,* 29 January, p. 6).

2.1.7. Gender Equality. – Despite public calls for improving the status of women in Serbia, their position continues deteriorating. According to the National Employment Agency data, 54% of the unemployed in 2005 were women, whose share in the employed population has fallen from 47.5% to 45.8%. Moreover, women account for 80% of employees in the textile and leather industries, health, social welfare, education, where the average salaries are two-thirds of those in other branches. Only 11% of the deputies in the National Assembly in 2006 were women. Women hold only 14% of the senior offices in state administration (*Politika*, 12 January, p. 1 and 15 and *Danas, Forum*, January, p. 5F).

2.1.8. Discriminiation against Persons with Disabilities. – More than 700,000 residents of Serbia suffer from some form of disability. Only 13% of them are employed, three times less than in Europe (*Politika*, 25 October, p. 10). Over 80% of these 13% have at least high school diplomas (*Večernje novosti*, 23 July, p. 15).

Only 15% of children with special needs attend school (*Vreme*, 23 September, p. 70).

The difficulties persons with disabilities face prompted the Serbian National Assembly to adopt the Act on the Prevention of Discrimination against Persons with Disabilities in April. The Act prescribes fines for those discriminating against persons with disabilities who wish to enrol in kindergarten, schools or college, find a job or use public transport. The fines range between 5 and 50 thousand dinars for natural persons and between 10 and 500 thousand dinars for legal persons (*Politika*, 18 April, p. 8).

War invalids protested in Belgrade in May against the Government decision to reduce by 23% their subsidies and those allocated to families of combatants killed in action. They said that only 1% of them owned their homes and that the funds allocated for the purchase of orthopaedic devices had been slashed. Several thousand of the 66,000 registered invalids were protesting that day. Media reported the Government building was surrounded by a large number of policemen carrying anti-demonstration gear (*Večernje novosti*, 14 May, p. 4). The protest prompted the Government to abolish the disputed decree (*Politika*, 12 May, p. 9).

The Government in January also cut the number of necessary blood sugar measurement devices issued free of charge to children with diabetes and additionally complicated the procedure for obtaining such devices. The regulation was amended several days later after a fierce public outcry (*Blic*, 13 January, p. 8 and *Danas*, 13 January, p. 6). The Government did not, however, amend the provision under which only persons under 26 years of age are entitled to contemporary insulin apparati, whereby those over 26 are deprived of this right unless they are pregnant, blind or visually impaired. The Constitutional Court of Serbia ruled that the provision was not unconstitutional because it was medically justified, although it was not professionally equipped to assess that, and that the provision did not constitute discrimination because it pertained to all persons under 26 years of age (*NiN*, 22 June, p. 30).

2.1.9. Discrimination against Sexual Minorities. – Sexual minorities in Serbia were again subjected to extensive discrimination in 2006.

According to a poll conducted by the lesbian human rights NGO *Labris*, two-thirds of the lesbian and gay population have been exposed to violence because of their sexual orientation and 59% of them feel the need to emigrate from Serbia because of the disrespect of their sexual orientation (*Vreme*, 16 March, p. 72 and *Politika*, 10 March, p. 10).

The Belgrade Blood Transfusion Institute in May refused to take blood samples from a number of lesbians qualifying them as "members of an at-risk sexual group" (*Blic*, 21 May, p. 6).

The poll published the same month by the research agency Strategic Marketing showed that 90% of Serbia's citizens would not live with a person with HIV, while one out of three pollees said they would end their friendship with such persons. Some 35% of the pollees would sack an employee if they found out s/he was infected with HIV (*Politika*, 11 May, p. 9).

2.2. Right to Life

2.2.1. War Crime Trials.[304] – The Supreme Court of Serbia in February upheld the war crime conviction and 20-year sentence pronounced by the Belgrade District Court at the retrial of Saša Cvjetan who was found guilty of killing 14 Kosovo Albanians and wounding five Albanian children in March 1999.[305] The initial sentence pronounced against Cvjetan on 17 March 2004 had been quashed by the Supreme Court, which had ordered a retrial. In her explanation of the sentence, presiding judge Biljana Sinadinović said Cvjetan had been sentenced to the maximum penalty because he had "committed the crime against a group of children, women and harmless people without a motive, justification or alleviating circumstances" (*BETA*, 21 February). The Supreme Court of Serbia in December rejected

304 See III.5.

305 See *Report 2002*, II 2.2.2, *Report 2003*, II 2.2.1, *Report 2004*, II.2.9.5. and *Report 2005*, IV.3.3..

the request for a review of the legality of the District Court's final decision and its own ruling filed by Cvjetan's lawyers (*FONET*, 25 December). The prosecution discontinued the investigation against co-accused Dejan Demirović for lack of evidence (*Politika*, 11 April, p. 11).

The Supreme Court of Serbia in mid-May upheld the conviction of four members of the paramilitary unit Avengers for war crimes and their 15–20 year jail sentences for kidnapping, torturing and killing 17 Bosniaks in Sjeverin in October 1992.[306] (*BETA*, 18 May).

In early 2006, the Supreme Court of Serbia overturned the Niš Military Court October 2002 verdict against four Army of Yugoslavia (VJ) members convicted to 7, 5, 4, and 3 years in jail for the war crime they committed in the village of Kuštin at Prizren in 1999, when they killed 2 Albanian civilians.[307] (*Danas*, 11 February, p. 5, *BETA*, 17 April and *Politika*, 31 May, p. 10).

In early September, the War Crimes Chamber convicted a volunteer of the former JNA Saša Radak to 20 years' imprisonment for taking part in the maltreatment and liquidation of 200 Croatian POWs in Ovčara at Vukovar in 1991. Proceedings against Radak were separated from the main Ovčara trial (*Danas*, 7 September, p. 1).[308]

The Supreme Court of Serbia in December quashed the 5– to 20– year jail sentences pronounced against the 14 defendants in the main Ovčara trial. It said the sentence had grossly violated the criminal procedure provisions on establishing the facts. The Court decision provoked a public outcry. HLC concluded that the court continued its practice of repealing every first-instance war crime sentence and ordering retrial (*Danas*, 15 December, p. 2).

The War Crimes Chamber convicted Kosovo Albanian Anton Lekaj, former member of the separatist Kosovo Liberation Army (KLA), to 13 years in jail for war crimes against civilians. He and his unit physically and sexually ill-treated and killed Serb and Roma civilians in a Đakovica hotel in 1999. UNMIK did not enable the court to question the witnesses for the prosecution living in Kosovo (*Danas*, 19 September, p. 4).

The War Crimes Prosecutor in April raised charges against eight policemen accused of killing 48 members of the Albanian family Beriša in Suva Reka in March 1999 (*Danas*, 26 April, p. 7 and *Večernje novosti*, 14 June, p. 13). The indictment states that police general Vlastimir Đorđevic, wanted by the ICTY for war crimes and still at large, had ordered the removal of the bodies to a mass grave at Batajnica near Belgrade (*Večernje novosti*, 27 April, p. 13). The trial before the War Crimes Chamber began on 2 October (*Danas,* 3 October, p. 7).

The War Crimes Prosecutor in August issued an indictment against two members of special Serbian police units for abetting the murder of the Bitiqi brothers,

306 See *Report 2003*, II 2.2.2 i *Report 2005*, IV.3.3.

307 See *Report 2002*, II.2.2.2. and *Report* 2003, II.2.2.2.1.

308 See *Report 2005*, IV.3.3.

US citizens who had fought in the KLA. The two men are charged with taking the Bitiqis over from the authorities in July 1999 in Prokuplje, where they had spent two days in jail for crossing the border illegally, and for handing them over to unidentified masked policemen. The bodies of the brothers were found in the Petrovo Selo mass grave, with their hands tied by wires and bullets in the napes of their necks, (*Danas*, 25 August, p. 1 and *Blic*, 25 August, p. 14).[309] The trial opened in November (*NiN*, 16 November, p. 8).

The War Crimes Chamber investigating judge in September ordered the custody of two policemen suspected of having committed a war crime when they killed an Albanian civilian in the village of Bukoš at Vučitrn in 1999 (*Danas*, 21 September, p. 5).

The HLC in October filed criminal charges against unidentified members of the VJ Užice Corps for attacking the Priboj village of Kukurovići in 1993, during which three civilians were killed and most of the villagers' property was destroyed (*BETA*, 26 October).

2.2.2. Missing Persons and Mass Graves. – The remains of the Beriša family and Bitiqi brothers were found in the mass graves in Batajnica, Petrovo Selo and Perućac that were discovered in 2002.[310] According to data of the Coordination Centre for Kosovo and Metohija, a total of 836 bodies were found in those graves. By the end of 2005, 645 bodies were handed over to the Priština authorities, said the International Commission for Missing Persons (ICMP) (*Danas*, 1 February, p. 18). Remains of another 52 people were handed over in March (*FONET*, 31 March) and the remains of another 22 identified Albanians and 214 body parts were handed over in July. This marked the end of the exhumation and identification of the bodies of Kosovo Albanians found in the three mass graves in Central Serbia. Of the total 836 bodies, 719 have been identified to date (*Danas*, 1–2 July, p. 5).

Slobodan Borisavljević, formerly the Chief of Cabinet of ICTY indictee Vlastimir Đorđević, was appointed chief of the police war crimes department, in early 2006 (*Blic*, 20 January, p. 12 and *Politika*, 21 January p. 11). The HLC filed criminal charges against Borisavljević for abetting Đorđević in the commission of war crimes against the civilian population. (*BETA*, 24 January).

Kosovo Serb families in April took over 11 bodies of their relatives kidnapped in 1998 and 1999 (*Večernje novosti*, 8 April, p. 12), and another six in May. Pathologist Slaviša Dobričanin said that a total of 408 bodies of Serbs have been disinterred and that 226 of them have been identified to date (*Danas*, 20 May, p. 19). Another 29 bodies of Serbs and other non-Albanians kidnapped in 1998 and 1999 were handed over to their families in October, bringing the total number of bodies given to their families to 213. The whereabouts of the remains or fate of another 700 kidnapped non-Albanians still remain unknown (*Blic*, 15 October, p. 3). Bodies

309 See *Report 2003*, II.2.2.3. and *Report 2004*, II.2.2.3.

310 See *Report 2001*, II.2.2.1.2. *Report 2002*, II.2.2.3, *Report 2003*, II.2.2.3. and *Report 2004*, II.2.2.3.

of another 8 killed Kosovo Serbs were handed over to their families in December (*Danas*, 2 December, p. 5).

2.2.3. Trials for Politically Motivated Murders. – The Supreme Court of Serbia in June upheld and partly modified the verdicts pronounced against defendants accused of assassinating former Serbian President Ivan Stambolić in August 2000 and of attempt to assassinate the leader of the then opposition Serbian Renewal Movement (SPO) Vuk Drašković in Budva in the June the same year.[311]

The first-instance sentence was pronounced in July 2005 – Milorad Ulemek Legija, chief of the police Special Operations Unit (JSO), and members of the State Security (DB) Branko Berček, Dušan Maričić Gumar and Nenad Bujošević were sentenced to maximum 40-year imprisonment, while former DB chief Radomir Marković, Leonid Milovojević and Nenad Ilić were sentenced to 15 years in jail and Milorad Bracanović to 4 years in prison. The Supreme Court of Serbia upheld the sentences pronounced against Ulemek and Berček, but it reduced Maričić's sentence to 30 and Bujošević's to 35 years in jail and increased Milivojević's sentence to 30 years in jail. The Court confirmed the Ilić and Marković sentences and reduced Bracanović's to 2 years in jail (*Danas*, 29 June, p. 7 and *Vreme*, 6 July, p. 18).

The Supreme Court of Serbia in May again quashed the sentences pronounced for the killing of four SPO senior officials on the Ibar Road in October 1999 (*Danas*, 18 May, p. 1 and *Večernje novosti*, 17 May, p. 13). The first trial ended in 2003, but the Supreme Court overturned the verdict in October 2003. The retrial opened in late 2004 and ended in June 2005.[312] After the Supreme Court repealed the sentences passed at the retrial, the new retrial of the case began in September 2006 (*Danas*, 12 September, p. 7).

Courts have not yet completed proceedings regarding the murders of journalists Slavko Ćuruvija in 1999 and Mihajlo Pantić in June 2001.[313] The Special Organised Crime Prosecutor's Office said it had made some headway in the Ćuruvija case (*Danas*, 11 April, p. 7), and Serbian Police Inspector General Vladimir Božović said that an "investigation into the investigations" of the Pantić and Ćuruvija murders had been opened (*Politika*, 14 June, p. 11).

Special Organised Crime Prosecutor Slobodan Radovanović said in late September that light would soon be shed on the Ćuruvija case and that he would publish all police information on the case if the prosecution found it did not have sufficient evidence to go to trial (*Politika*, 28 September, p. 1). *Večernje novosti* in November published that the Ćuruvija assassination had been organised by former DB chief Radonjić and agents Miki Kurak and Ratko Romić and that they knew

311 See *Report 2000*, II.2.2.3, *Report 2002*, II.2.2.1, *Report 2003*, II.2.2.1, *Report 2004*, II.2.9.8. and II.2.9.9. and *Report 2005*, p. 390.

312 See *Report 1999*, II.2.2.2, *Report 2001*, II.2.2.2, *Report 2002*, II.2.2.3, *Report 2003*, II.2.2.1 and *Report 2004*, II.2.9.7.

313 See *Report 1999*, II.2.2.2. *Report 2000*, II.2.2.3. *Report 2001*, II.2.2.2., *Report 2002*, II.2.2.1, *Report 2003*, II.2.2.1, *Report 2004*, II.2.9.4 and *Report 2005*, II.2.11.1.

who the killer was. The newspaper claimed that Prosecutor Radovanović was in possession of the data and had indication that Milošević's wife Mirjana Marković and former DB chief Marković had ordered the killing of Ćuruvija (*Večernje novosti*, 21 November, p. 3). In early December, Radovanović asked the investigating judge to conduct a reconstruction of the Ćuruvija assassination and some other investigations (*TANJUG*, 8 December and *Danas* 9–10 December, p. 3).

The trial of PM Đinđić's assassins continued in 2006. The events related to the trial remained in the public limelight and gave rise to suspicions that the Government of Serbia was conniving to slow the trial down and change its course.[314]

The presiding judge Marko Kljajević resigned on 28 August (*Danas*, 9 September, p. II) and was relieved of judgeship at his own request one month later (*Večernje novosti*, 29 September, p. 3). He said he had been subjected to pressures, which included the arrest of his brother Goran Kljajević,[315] a Belgrade Commercial Court judge, and concluded he had not enjoyed the support of state bodies which frequently treated him as an enemy (*Danas*, 23 September, p. 1).[316]

As the judges changed (with judge Nata Mesarević taking over Kljajević's place and a new judge, Radmila Dragičević-Dičić, joining the panel), the trial of the accused for Đinđić's assassination practically began from square one with the summary presentation of evidence (*Politika*, 8 September, p. 1). Just before the trial started again, news broke that witness collaborator Ljubiša Buha Čume had left the country with the prosecution's consent because his safety was at risk (*Danas*, 7 September, p. 1).

Witness collaborator Dejan Milenković *aka* Bagzi testified publicly in late November (*Danas*, 24 November, p. 1). One of the six defendants at large, Aleksandar Simović, was arrested in Belgrade the same month (*Politika*, 26 November, p. 1).

In his testimony in court, Milenković confirmed that his lawyer Biljana Kajganić had advised him to accuse witness collaborator Ljubiša Buha of the murder of former DB officer Momir Gavrilović in exchange for the status of witness collaborator. The weekly *Vreme* published a transcript of their telephone conversation back in 2004. The authorities denied the authenticity of the transcript and *Vreme* journalist Miloš Vasić was charged with libel. Gordana Čolić, a prosecutor in the Belgrade Third Municipal Prosecution Office, however, confirmed the existence of the transcript in a B92 show Insider (*Vreme*, 14 December, p. 8). Justice Minister Stojković again denied the existence of the transcript and accused Čolić of libel (*Danas*, 13 December, p. 3).

314 See *Report 2003*, IV.1.1., *Report 2004*, II.2.9.11. and *Report 2005*, II2.11.5..

315 See II.2.5.3

316 Kljajević said in June that neither he nor the Belgrade Special Court enjoyed the support or protection of the authorities and that all they got was criticism from some politicians (*Danas*, 17 June, p. 7).

B92 TV in February said that the Police Minister and BIA Director met behind closed doors with the principal defendant Milorad Ulemek Legija in the trial of Đinđić's assassins on 2 May 2004 when he turned himself in. The two officials first denied the report, but later admitted it was true. This prompted the Special Organised Crime Court to conclude that they had violated the law because they had not obtained prior consent of the presiding judge of the judicial panel to talk to the defendant. Justice Minister Zoran Stojković denied they had violated the law. He thinks only discussions of the court cases are forbidden. "(If that were the case), you'd have no idea who was entering your prison and how," said Stojković (*Politika*, 26 February, p. 16).

After public pressures, Minister Jočić made public a memo which he had earlier said was secret. The memo was unusual in form and contained little information, which gave rise to suspicion that it was drafted just to appease persistent journalists (*Danas*, 2 and 31 March, pp. 7 and 13, *Blic*, 23 March, p. 4 and 31 March, p. 6 and *Vreme*, 6 April, p. 10). These suspicions were indirectly corroborated in a *B92* show broadcast in November (*Danas*, 22 November, p. 5).

The prosecution in mid-June dismissed criminal charges filed against Jočić and Bulatović because of the memo made publicly available earlier that month (*Blic*, 6 and 13 June, pp. 3 and 2).

The police in April withdrew police security attached to the protected witnesses Ljubiša Buha and Zoran Vukojević, explaining that they had refused it (*Večernje novosti*, 8 April, p. 13). Two months later, Vukojević was brutally killed by the members of the Zemun Clan, accused of assassinating Đinđić, who are still at large (*Blic*, 4 June, p. 4).

2.2.4. Negligent or Unprofessional Medical Treatment – A large number of cases of negligent or unprofessional medial treatment resulting in the death or endangering the health of patients was recorded in 2006.

The Republican Health Inspection filed 233 motions for initiating misdemeanour proceedings over irregularities or violations of the law in the first eight months of 2006 (*Politika*, 20 September, p. 1). It was announced in August that criminal charges had been filed against 46 health workers suspected of negligence (*Blic*, 5 August, p. 11).

Two nurses were sentenced to suspended prison sentences in Valjevo in June. They had given a patient a transfusion with the wrong blood type, which had led to his death (*Večernje novosti*, 21 June, p. 12).

The Health Ministry filed criminal charges against Kragujevac emergency ambulance doctor Vladimir Gajić for setting the wrong diagnosis. He left the mother who had just given birth behind unattended in her home in a village at Kragujevac to wait for another ambulance and took the new-born to the hospital. The woman died (*Blic* and *Politika*, 13 May, pp. 14 and 11).

Autopsy results corroborate serious indications that Mirjana Jokić from Pančevo died because the doctors did not diagnose she was suffering from appendicitis and gangrene on time (*Večernje novosti*, 7 May, p. 15).

Student Jelena Radović died in Belgrade in September after a minor foot operation in the private clinic *Decedra*. Initial results show she had died of sepsis. The Health Ministry a few days later banned the work of the clinic, where another patient died due to negligence six years earlier. (*Večernje novosti*, 14 September, p. 7). Criminal charges were filed against three doctors and one nurse accusing them of negligent medical treatment (*Večernje novosti*, 20 October, p. 12).

The death of ten-month-old baby Mihajlo from Požarevac taken by an ambulance to a Belgrade hospital was qualified as regrettable by the Health Ministry, which found the doctors had not made any professional errors. Mihajlo's parents claim their baby had been inadequately treated and referred to Belgrade too late. They allege he was taken to Belgrade in an ambulance, but that he was not accompanied by an anaesthesiologist or paediatrician, which is standard procedure, and only after they had paid the hospital bill as their health card was not certified (*Danas*, 17 and 26 May, pp. 33 and 36 and *Večernje novosti*, 18 and 25 May, pp. 10 and 13).

The Belgrade Blood Transfusion Institute established in May that someone had intentionally contaminated the blood samples taken to check the antibodies of Rh– negative pregnant women. This could have led to depriving three pregnant women from protection after delivery, which would have brought into question both their health and chances to have more children. The Institute filed criminal charges against unidentified perpetrators (*Politika*, 16 May, p. 1).

Belgrade Central Prison inmate Velimir Knežević has been unable to have a hernia operation because, as his sister alleges, the doctors fear they will catch Hepatitis C from him. The prison doctors diagnosed he had hernia, which was causing him great pain and that he needed to be operated on. Their diagnosis and opinion were upheld by the Belgrade Zvezdara Clinical Hospital Centre. However, chief surgeon at the Zvezdara Centre Marko Kontić said a hernia operation was purely a cosmetic intervention, that 10% of Serbia's citizens lived normal lives with hernia and specified that Hepatitis C was a disease requiring serious protection measures (*Politika*, 22 February, p. 12).

Belgrade Clinical Centre doctor Aleksandar Radulović was arrested in May on suspicion of seeking and accepting a bribe from a patient. He demanded 400 Euros for a hand operation, which the patient gave him in bills the serial numbers of which were first registered by the police (*Blic*, 24 May, p. 15).

2.2.5. Work-Related Injuries. – Forty-five people were killed at work and 779 were injured in the first nine months of 2006 (*Večernje novosti*, 5 November, p. 13). The TU *Nezavisnost* said that more workers were killed in Serbia every year than in all of EU. In 2005, alone, 78 workers were killed at work, which is more than in all EU member-states together (*Danas*, 29 and 9 August, pp. 7 and 5).

2.2.6. Threats to Public Safety. – Stevan Bakalov, driver of the former Farm Minister Dragan Veselinov, was sentenced in Belgrade in March to 5 years in prison for killing one and injuring two persons when he sped through a red light in 2004 (*Blic*, 3 March, p. 6).[317]

In early September, the Novi Sad police filed criminal charges against DSS MP Dejan Mikavica for a grave but unintentional traffic offence he committed when he went through a red light and seriously injured a pedestrian (*Blic*, 5 and 13 September, pp. 4 and 15).

An explosion occurred in the explosives plant in Barič at Belgrade in May, leaving three workers dead. The authorities did not disclose the cause of the explosion by the time this Report went into print. (*Politika*, 30 May, p. 1).

Some 1,150 tons of ammunition exploded in the Army of Serbia ammunition depot at Paraćin. The explosion caused light injuries to around twenty people and caused great material damage (*Danas*, 20 October, p. 1). Investigation showed that the explosion was caused by the self-incineration of anti-aircraft ammunition 20 mm that had been improperly stored and should have been destroyed a long time ago (*Blic*, 22 November, p. 5).

The concentration of poisonous gases reached such proportions in the night of 14/15 November in Pančevo, that the siren signifying irradiation-biological-chemical threat was sounded. The concentration of benzene stood at 125 micrograms per cubic metre (although a maximum of 5 micrograms per cubic metre is permissible).

The management of the petro-chemical plant *Petrohemija* denied responsibility for the pollution and would not enforce the inspection order to halt production in one part of the plant. Although some 70 children sought medical assistance for serious respiratory problems at the time, the competent state bodies said the only relevant pollution data were the ones produced by the republican mobile eco-toxicological laboratory that was in Leskovac at the time, and that the data of local stations could not be considered valid. The Science and Environment Protection Minister Aleksandar Popović indicated to the local authorities that a meeting on how to address the problems, perpetrated by the plant that brings the state one-fourth of its revenues, could be expected in two weeks' time. Pančevo residents protested in Belgrade and kept the industrial facilities in their hometown under a blockade for several days, claiming that 30 residents of Pančevo, with a population of 130,000, died every day because of the pollution.

The concentration of poisonous gases again exceeded the permissible limits several times in the following days and, at one point, the recorded concentration of benzene stood at 140 micrograms per cubic metre (*Politika* 18 and 29 November, pp. 8 and 9, *Danas*, 16 and 28 November, pp. 5 and 1, *Blic*, 19 November, p. 4 and *Vreme*, 23 and 30 November, pp. 12 and 6).

317 See *Report 2003*, II.2.2.4.

2.3. Prohibition of Torture

The Serbian police continued resorting to torture to obtain confessions or demonstrate their power in 2006 as well. Complaints about the work of the police are rarely taken seriously, as corroborated by the fact that the MIA Inspectorate General found only 564 of the 40,558 complaints filed in 2005 justified. In 2005, criminal charges were raised only against eight policemen suspected of torturing citizens (*Danas*, 24 February, p. 7).

Reactions to civic complaints remain inadequate and slow, with the exception of some extremely brutal cases. The police, as a rule, first deny the allegations in the complaint and try to pin the blame on the victim, usually by accusing him or her of preventing an officer from discharging his duty. The few trials are, as a rule, prolonged and the defendants are usually convicted to mild penalties.

Police and prosecutorial obstructions often result in the expiry of the absolute statute of limitations by the time the charges over police maltreatment are finally filed in court. The HLC in 1996 and 1997 filed 59 criminal charges against policemen who had beaten citizens up, but none of the policemen have ended up in court or faced disciplinary proceedings yet (*Blic*, 28 October, p. 4).

2.3.1. Cases of Torture before International Bodies. – The circumstances in which Milan Ristić died in Šabac in 1995 have never been clarified. Some headway has finally been made on this case, which had been reviewed by the UN Committee against Torture.[318] The Supreme Court in February ordered the authorities to pay Milan's parents 500,000 dinars in compensation for the state bodies' failure to conduct a rapid and impartial investigation, as the Committee required back in 2001. The investigation has not been carried out yet, however, notwithstanding the Committee request that a report on the investigation be submitted to it within 90 days (*Danas*, 5 April, p. 7). The Šabac District Prosecutor's Office in September stated that it did not have enough evidence to retry the policemen acquitted in the Ristić case (*Danas*, 19 September, p. 7).

2.3.2. Judicial and Disciplinary Proceedings. – The Novi Pazar District Court in February convicted policemen Goran Rosić and Milić Karličić to three years in jail each for trying to extort a confession from a Began Muratović by torture in 1994 (*Danas*, 7 February, p. 7).

The trial of Kikinda policeman Saša Mijin, accused of torturing a local resident Zdravko Trivan, began in March 2006. Trivan, who was inebriated, was taken into custody in October 2005 for disrupting law and order. Mijin beat up Trivin, who later died of internal haemorrhage and fractured spleen caused by the beating (*Blic,* 7 March, p. 13 and *Večernje novosti*, 4 April, p. 20). The Zrenjanin District Court in November convicted Mijin to six years in jail for manslaughter (*Blic*, 10 November, p. 15).

318 See *Report 1998*, II.3.2.2, *Report 2001*, II.2.3, *Report 2002*, II.2.3, *Report 2003*, II.3.2, *Report 2004*, II. 2.3.2 and *Report 2005*, II.2.3.3.

Another case of torture was recorded in Kikinda in 2006. Mihalj Kaločanji was brought into the police station for disturbing law and order, where he was beaten up; he was hospitalised and the doctors were forced to take out his spleen. This case resulted in the dismissal of the local police chief, arrest of one policeman, criminal charges against two policemen and the suspension of a total of 12 police officers (*Večernje novosti*, 21 and 23 March, p. 12, *Blic*, 21 March, p. 13 and *Danas*, 23 March, p. 7).

The Minority Rights Centre in June filed criminal charges against three Novi Kneževac policemen for maltreating Roma Mladen Miklac and demanding of him to confess to a robbery. The policemen are also accused of insulting Miklac on ethnic grounds (*Danas*, 8 June, p. 7).

The HLC in March sued the Republic of Serbia, seeking the compensation of non-material damages on behalf of Munir Šabotić, who was tortured by the Novi Pazar police in August and September of 1994 in order to sign a statement on the involvement of 25 Bosniaks in the organisation of paramilitary headquarters. Proceedings against the accused policemen were launched in 1994, but discontinued ten years later because "the absolute statute of limitations had expired" (*TANJUG*, 3 March).

The HLC in September sued the state seeking compensation of damages on behalf of Alija Halilović, who was arrested without a warrant and subjected to police torture in 1993. Halilović was convicted in 1994, but the Supreme Court in 1996 repealed the sentence and ordered a retrial; the retrial opened in November 1999 and was discontinued on 1 January 2006 because the absolute statute of limitations had expired (*Danas*, 28 September, p. 7).

The HLC in November filed a lawsuit for compensation of damages on behalf of 19 women and minors in Vukovar, who were shut into a camp and prison in Serbia by JNA troops and allegedly subjected to torture in November 1991 (*Blic*, 17 November, p. 15).

In December, the HLC sued the state and sought compensation of damages on behalf of Šefćet Mehmedović, who was subjected to torture on ethnic grounds in Novi Pazar in May 1994 (*BETA*, 12 December).[319]

Two policemen in Srpska Crnja beat up underage I.V. after questioning him about disrupting law and order; one of the policemen was dismissed and criminally charged and the other suspended because of the incident (*Blic*, 14 February, p. 11). The accused policeman Nenad Glišić was found guilty, convicted to two months in jail and fined 20,000 dinars in November (*Kurir*, 2 November, p. 11).

The Smederevo District Prosecutor in mid-July issued an indictment against Smederevska Palanka Municipal Court judge Marina Jovanović Bajović accused of not reporting an incident she had witnessed, when a policeman inflicted Belgrader Milorad Miajlović grave bodily injuries and threatened to kill him in the local police station. She is also charged with trying to conceal the incident as an investigat-

319 See HLC statement, http://www.hlc.org.yu/srpski/Tortura/Saopstenja/index.php?file=1566.html.

ing judge by stating to the records that Miajlović's injuries were caused by a fall. The Smederevo investigating judge ordered an investigation of the three policemen, one of whom is the husband of judge Jovanović Bajović (*Blic*, 15 July, p. 15 and *Blic*, 25 October, p. 14).

The Niš police in April opened disciplinary proceedings against seven local policemen for excessive use of force after a soccer game between the Belgrade club Red Star and the Niš team Radnički. Four fans have been criminally charged for preventing an officer from discharging his duty and nine for disrupting law and order (*Danas*, 26 April, p. 33 and *Blic*, 13 April, p. 11). The Red Star fans claim the police caused the incident when they entered a café in anti-demonstration gear and beat up a fan (*Blic*, 15 April, p. 32).

The police also reacted inappropriately during an incident that resulted in the interruption of the second basketball championship finals in Belgrade in June. The fans were provoking the police, throwing plastic bags with urine and other objects at them. The fight that ensued led to the collapse of the grandstands and, according to a number of witnesses, the police applied excessive force. In result, 13 fans and 7 Gendarmerie officers were injured (*Politika*, 16 June, p. 19). Police Minister Dragan Jočić claimed that the police had used the means of coercion in accordance with regulations but that some policemen had exceeded their powers by "failing to stop using means of coercion on time" (*Večernje novosti*, 18 July, p. 13 and *Danas*, 18 July, p. 7). Police Inspector General Vladimir Božović in October said that the officers had used excessive force, that criminal charges had been raised against them, but that the police leadership was obstructing the investigation (*Blic*, 16 October, p. 14).

Policeman G. Đ. from the Smederevo village of Kolari was suspended in September for repeatedly torturing Mirkan Kostić, who has a weak heart. G. Đ. summoned Kostić in for questioning five times in 2006; during the questioning, he tortured him and tried to force him to confess to a robbery (*Blic*, 7 September, p. 13).

2.3.3. Other Cases of Maltreatment. – Two underage Roma were allegedly beaten up in the Subotica police station in early February. They and their parents alleged they were beaten up to confess to a robbery. The police confirmed the minors had been brought in, but denied that they had been tortured (*BETA*, 23 February).

Two Belgrade policemen are reported to have beaten up Belgrade daily *Večernje novosti* Secretary Oliver Vrcelj in April. He claims he was beaten up for no reason; the police filed charges against him for preventing an official from discharging his duty. The charges state that Vrcelj refused to show his ID, that he was insolent and insulted the policemen (*Večernje novosti*, 25 April, p. 12).

Belgrade policeman Dmitar Tomašević allegedly hit an unidentified young man with his police gun during a quarrel that occurred while he was off duty (*Blic*, 15 May, p. 11).

M. V, a member of *Otpor,* and E. Č. from Subotica had been subjected to torture by the Subotica police since May, the Youth Initiative for Human Rights (YIHR) reported. They were maltreated by a group of policemen led by inspector

Tomislav Lendvai, who threatened to kill them, insulted them on ethnic grounds and advised them to flee Subotica (YIHR statement, 27 September). YIHR in October filed criminal charges against Lendvai and three unidentified persons for inciting racial, religious and ethnic hatred and inflicting grave bodily injuries (*Danas*, 20 October, p. 21).

Five Novi Sad policemen allegedly beat up four Roma men and insulted them on ethnic grounds in July. The policemen tortured them into confessing to a robbery and stating that they had not been beaten up (*Večernje novosti*, 1 and 2 August, p. 12).

2.3.4. Situation in Detention Facilities. – A report by the Committee for the Prevention of Torture (CPT), the delegation of which visited Serbian prisons and psychiatric hospitals, was published in May. The CPT concluded that grave inter-prisoner violence occurred in the Sremska Mitrovica penitentiary and the District Prison in Belgrade and recommended a series of measures designed to combat ill-treatment by the police, including stepping up of professional training, diligent investigation of all information regarding possible ill-treatment and subjecting perpetrators of ill-treatment to severe sanctions. The CPT also highlighted the problems of inter-prisoner violence, excessive reliance on physical restraints in the Belgrade psychiatric hospital Laza Lazarević and excessive reliance on sedatives. The CPT report also contains recommendations aimed at reinforcing the safeguards surrounding involuntary placement in psychiatric establishments (*Danas*, 19 and 22 May, pp. 6 and 7).

The Penal Sanctions Enforcement Directorate in March published its first report, in which it stated that a total of 8,751 people were detained or imprisoned in Serbian prisons. For comparison's sake, 5,200 people were in custody in March and April 2003, during the state of emergency introduced after the assassination of Prime Minister Đinđić (*BETA*, 17 March). Apart from overcrowdedness, Serbian jails increasingly face the problem of drug addiction amongst convicts; moreover; guards cooperate with the inmates, letting them have mobile phones and other prohibited objects (*Politika*, 21 January, p. 12).

In early July, 320 inmates of the Belgrade District Court staged a strike and 65 of them sewed up their mouths in protest. They demanded that every day they had spent in prison during the state of emergency be reckoned as two days in jail because of the poor prison conditions. They also complained about the ineffectiveness of the courts, torture, substandard health protection and overcrowded cells, and sought an explanation about two deaths of inmates they found suspicious. Flyers with their demands were distributed on the streets of Belgrade (*Politika*, 4 July, p. 11, *Danas*, 4 July, p. 1 and *Vreme*, 6 July, p. 11).

The then Penal Sanctions Enforcement Directorate chief Dragoljub Lončarević said that the inmates had staged a peaceful strike and admitted that the detention conditions were not in compliance with European standards. He said that 770 people were detained in the Belgrade District Court, originally built to accommodate 450 detainees. Lončarević specified that some staff also took part in the protest and

that one employee was suspended and criminally charged ((*Danas*, 5 July, p. 3). The protest ended after four days.

In early October, around 1,000 prisoners in the jails in Sremska Mitrovica, Niš and Požarevac launched a protest demanding the adoption of the Amnesty Act, submitted to parliament on 15 September, as soon as possible. Under the Act, the vast majority of prisoners is to be freed from serving one-fourth of their sentences on the occasion of the adoption of the new Constitution of Serbia. The amnesty did not apply to those convicted to forty years in jail and those convicted to crimes against humanity, rape, sex with a helpless person or a minor, domestic violence or organised crime. At a press conference on the protest, Lončarević said that the amnesty would lead to the release of some 2,000 prisoners and that the prisons would no longer be overcrowded. The protest, which involved hunger strikes and acts of violence, ended after five days when Justice Minister Stojković promised its adoption would be sped up and that the prisoners' sentences would be cut down by a third. The strike was followed by a protest of the prison guards, who felt threatened; Minister Stojković said that some political parties had egged them on to stage a protest (*Danas*, 7 October, p. 1, *Blic,* 11 and 12 October, pp. 12 and 14, *Politika*, 20 October, p. 10 and *Vreme*, 12 October, p. 5).

The same reasons prompted another jail rebellion in November. Around 2,000 prisoners in Sremska Mitrovica and Zabela at Požarevac refused to eat because the Amnesty Act was not adopted by 15 November as promised. The inmates in the Niš prison joined the protest a few days later. Eight days into the protest, some 500 Gendarmerie officers entered the Niš prison and restored order by force, injuring forty inmates. Fifteen convicts sustained injuries during the quelling of the rebellion in the Zabela prison the same morning. The Justice Ministry, however, in early December stated that a total of 64 inmates had been injured during the police intervention in Niš and Zabela and claimed that the police had not applied excessive force in quelling the rebellion (*Politika*, 2 December, p. 12). In late November, the Leskovac Human Rights Committee published allegations by the convicts' families and friends that the Gendarmerie had treated the detainees with brutality and that two-thirds of the injured had sustained grave bodily injuries. The Niš prison guards did not let the lawyers contact their imprisoned clients. After the rebellion was quelled, Minister Stojković said that the prisoners had been manipulated with for political reasons (*Danas*, 17 and 30 November, pp. 2 and 5, *Blic*, 16 November, p. 14 and *Večernje novosti*, 25 November, p. 24). In early December, Stojković vowed that the Amnesty Act would be adopted after the early parliamentary elections scheduled for 21 January 2007 (*Politika*, 12 December, p. 13).

2.4. Prohibition of Slavery, Status akin to Slavery and Smuggling of Humans

Judging by media reports, 2006 did not vary much from 2005 with respect to the incidence of human trafficking, keeping people in conditions akin to slavery and human smuggling in Serbia.

Serbia in 2006 remained a source, transit and destination country for victims of human trafficking, according to the regular report published by the US State Department Office to Monitor and Combat Trafficking in Persons. The report places Serbia in the Tier 2 comprising countries, which are trying to combat human trafficking but need to invest additional efforts and adopt new measures theretofore. The report emphasises that Roma children are trafficked for the purpose of forced begging and warns of an increase in internal trafficking, i.e. more and more victims of trafficking in persons stay in Serbia.

One hundred and forty women – victims of human trafficking – were registered in Serbia in the first eight months of 2006 (*Blic*, 25 September, p. 12). According to data published by media, 71.6% of the discovered victims were nationals of Serbia and one out of two was underage (*Danas*, 2 March, p. 6).

NGO Astra coordinator Aleksandra Jovanović assessed that Serbian authorities still were not investing systematic efforts in combating trafficking in persons and said that most of the burden was carried by individual civil servants and NGOs (*BETA*, 6 June).

Experts stress that the mild penal policy is also not conducive to the successful combating of human trafficking. For the sake of comparison, perpetrators of this crime are usually sentenced to 2 or 3 years in jail in Serbia, 7 years' imprisonment in Bosnia and 12 years in prison in Bulgaria (*Danas*, 2 March, p. 6).

Until 2006, neither the media nor the state authorities distinguished between human trafficking for the purpose of sexual or labour exploitation and smuggling of humans.

2.4.1 Trafficking in Persons. – The Serbian police in 2006 discovered and arrested scores of people suspected of trafficking in humans.

Persons suspected of human trafficking were arrested in Kragujevac (*Politika*, 18 January, p. 12 and *BETA*, 22 April), Belgrade (*FONET*, 10 February), Sremska Mitrovica (*BETA*, 22 February and *Blic*, 20 June, p. 6), Pančevo (*TAJNUG*, 22 February), Bujanovac (*BETA*, 18 April and *Blic*, 29 July, p. 15), Topola (*Večernje novosti*, 24 April, p. 10), Kruševac (*Blic*, 24 May, p. 5), Smederevo (*Danas*, 7 July, p. 37 and *Blic*, 7 July, p. 15), Novi Sad (*BETA*, 31 July and *Blic*, 1 August, p. 15), Sombor (*Blic*, 7 August, p. 21), Vranje (*Politika,* 9 October, p. 10) and Niš (*Blic*, 18 October, p. 15).

Three persons were arrested in Kruševac in March on suspicion of labour exploitation. They had taken five persons to Russia, confiscated their passports and forced them to work at a construction site against their will (*Večernje novosti*, 27 March, p. 9).

A woman, who had sold her newborn for 200 Euros, was arrested in Bujanovac in July (*Politika*, 19 July, p. 3).

2.4.2. Human Smuggling. – In the first nine months of 2006, 715 illegal immigrants were discovered in Serbia. Some 25,000 foreigners are annually turned

away at the Serbian borders because they lack appropriate documents or money. An average of 55% of the illegal immigrants enters Serbia from Kosovo; most of them are Albanians (*Blic*, 12 September, p. 12).

One of the two first-instance judgments passed for human smuggling in Serbia in 2005 became final in 2006. The Supreme Court of Serbia in April passed the final conviction against an international group that had been illegally shipping Pakistani citizens to Western Europe. The first-instance court had convicted Pakistani Mulazam Hussain Shah to three years and three months in jail and his accomplices, nationals of Serbia, to shorter sentences. The Supreme Court repealed the conviction in January 2005 and ordered a retrial. At the retrial, Shah was sentenced to 4 years and two months in jail. The Supreme Court in April 2006 modified his sentence to three and a half years in jail and ordered his expulsion from Serbia for a period of 10 years. It also upheld the first-instance sentences pronounced against the four Serbian nationals (*Večernje novosti*, 18 April, p. 16).

Charges were in January raised against 12 people, some of whom are Chinese nationals, for smuggling and abducting Chinese citizens (*Blic*, 10 January, p. 13). The trial of eight Serbian nationals for smuggling citizens of Sri Lanka, Bangladesh and India began in February (*Blic*, 27 February, p. 13). There was no information about the progress of the trial by the time this Report went into print.

Smuggling of Albanian nationals led to the arrests of three persons in Bujanovac (*TANJUG*, 20 January and *Politika*, 14 April, p. 13), one policeman in Niš (*Blic*, 21 February, p. 11), five persons in Vranje and Bujanovac (*Politika*, 20 February, p. 11), four people in Sremska Mitrovica (*Blic*, 29 September, p. 14), two persons in Bač (*Večernje novosti*, 26 September, p. 11), two in Novi Pazar (*Večernje novosti*, 1 September, p. 12), two in Dobanovci (*Politika*, 6 October, p. 10**),** two in Belgrade (*Politika*, 5 November, p. 13), and one in Novi Sad (*Danas*, 29 September, p. 37), one in Preševo (*TANJUG*, 4 September) and one in Raška (*Večernje novosti*, 22 September, p. 13).

Attempts to smuggle Kosovo Albanians led to the arrests of three people in Novi Sad (*BETA*, 19 April), one person in Šabac (*BETA*, 20 April) and one person in Subotica (*Blic*, 16 September, p. 15).

2.5. Right to a Fair Trial and Effectiveness of the Judiciary

The Strasbourg Court of Human Rights in September passed its first judgement against Serbia (App. No. 23037/04). The Court found that the right of Milija Matijašević from Vrbas to a fair trial had been violated because his detention was extended *inter alia* on the grounds that he had incited to murder, although he had not yet been convicted of the crime (*BETA*, 19 September and *Politika*, 20 September, p. 10).

2.5.1. *Implementation of the Act on the Protection of Participants in Criminal Proceedings.* – The implementation of the Act on the Protection of Participants in Criminal Proceedings was brought into question merely three months after it came into force, because the Government had failed to allocate the planned 900 million dinars for its application in 2006. The safety of all seven witness-collaborators in Serbia was thus put at risk. One of them, Zoran Vukojević, was killed in June.[320] A US Government donation was instrumental in ensuring the work of the witness protection unit (*Blic*, 10 April, p. 12).

2.5.2. The Judiciary. – The judiciary was in 2006 burdened by conflicts with the executive authorities, trials of judges charged with corruption and public criticism of its dilatoriness.

Finance Minister Mlađan Dinkić in February accused the commercial courts of passing odd judgments, which were "not legally grounded" but were nevertheless depleting the state coffers. "I don't think the problem is in the system, we have good laws. The problem is in the people, in the individuals," he said and announced that all judges would have to stand for re-election (*Danas*, 9 February, p. 3). Experts warned that the valid laws did not provide for large-scale dismissals of judges and that none of the parties, including Dinkić's, had backed the implementation of the Vetting Act. The Association of Judges of Serbia qualified Dinkić's statement as the "most flagrant example of pressures on the judiciary" (*Danas*, 9 February, p. 3). The Act on the Imple mentation of the Constitution passed after the new Constitution was adopted envisages the re-election of all judges.[321]

In her letter to President Tadić and Prime Minister Koštunica in July, Serbian Supreme Court President Vida Petrović Škero warned that the judiciary was in a crisis, facing enormous backlogs, shortage of staff and funding. Justice Minister Zoran Stojković retorted that Serbia had more judges than it needed and that the lack of professionalism of the judges lay at the cause of the backlogs. (*Večernje novosti*, 23 July, p. 6). Škero reiterated that the dilatoriness was caused by the large number of new laws, which have resulted in the filing of a large number of new cases, but that the changes in legislation had not been accompanied by expansion of the judicial network. She stated that as many as 4,500 cases were filed with courts every day. (*Večernje novosti*, 19 May, p. 2, and *Večernje novosti* and *Danas,* 24 July, pp. 5 and 3).

The suspension of Belgrade Third Municipal Prosecution Office prosecutor Gordana Čolić also testifies of pressures the executive branch has been exerting on the judiciary. She claims Stojković wanted her dismissed because she was "disobedient". One of the reasons may lie in the fact that the Third Municipal Prosecution Office refused to raise charges against Stojković's predecessor Batić, whom the police had arrested on suspicion of abuse of post, because it found no evidence to corroborate the suspicions. Čolić claims the work of her Office cannot be the reason for her

320 See II.2.2.3.

321 See I.4.6.2.1.

dismissal, because only twenty of the 2,500 decisions the Office took in 2004 were found to be deficient, and only in terms of technicalities, during a professional audit that year (*Blic*, 26 June, p. 5). Čolić filed criminal charges against the District Prosecutor when it transpired in July that he had entered this false assertion on the ineffectiveness of her Office in the official memo on her dismissal (*Blic*, 5 July, p. 14 and *Politika*, 13 July, p. 12). The charges were dismissed by the Novi Sad Municipal Prosecution Office (*Danas*, 4 and 30 August, pp. 7 and 4). In early July, the High Judicial Council repealed Čolić's suspension because the decision to dismiss her was not reasoned (*Politika*, 13 July, p. 12). Several days later, however, she was again suspended. This decision was not reasoned either (*Vreme*, 20 July, p. 14).[322]

The fact that Čolić was suspended by the Republican Public Prosecutor, who had fulfilled the mandatory age retirement conditions back in December 2005, is a separate problem. The High Judicial Council established in August that he was a pensioner already seven months and that all the decisions he had reached in those months were null and void (*Danas*, 3 August, p. 7). When experts warned that the law did not allow prosecutors past the mandatory age of retirement to stay in office (*Danas*, 25 August, p. 5), Stojković retorted that Janković would remain in office until the parliament elected his successor because only it could decide on the termination of a prosecutor's tenure (*Danas*, 28 August, p. 6).

Rumour had it that the term in office of Deputy Special Prosecutor Miroljub Vitorović was not extended because he had said at the Stambolić assassination trial that the murder of the former Serbian President was committed by the state and that Slobodan Milošević was behind it. The Special Prosecution Office offered various reasons for Vitorović's dismissal to dispel such rumours (*Vreme*, 13 July, p. 10). The Office spokesperson Tomo Zorić, for instance, said that his tenure had not been extended because all the cases he had worked on were completed (*Danas*, 3 July, p. 1); Vitorović denied that this was the case (*Danas*, 4 July, p. 1).

2.5.3. Trial within Reasonable Time. – Courts were in 2006 frequently criticised for their dilatoriness. According to media reports, as many as 20,000 citizens of Serbia have filed complaints about the ineffectiveness of the courts; a total of 652,981 pending cases were carried over from 2005 to 2006 (*Blic*, 23 January, p. 6 and *Večernje novosti*, 5 August, p. 7).

The judiciary is yet to handle the 2,227 cases of the Supreme Military Court, which was abolished 2 years ago, and which were taken over by the Supreme Court of Serbia on 21 November (*BETA*, 4 December). Moreover, there are 2,105 pending cases of the SaM Court, which ceased to exist when Montenegro declared independence in June (*Politika*, 14 July, p. 8).

The statutes of limitations expired in 625 cases pending before municipal and district courts in the first nine months of 2005. Supreme Court President Škero reacted to the problem by initiating the dismissal of two underachieving Sremska

322 More on the suspension of Čolić in *HRW World Report 2007*, http://hrw.org/englishwr2k7/docs/2007/01/11/serbia14776.htm.

Mitrovica District Court judges. The problem of expiry of the statute of limitations became graver when the new Criminal Code came into force, as it envisages milder penalties and thus shorter statutes of limitations than the old Code (*Blic*, 23 January, p. 6 and *Politika,* 13 February, p. 12).

2.5.4. Combating Corruption and Abuse of Post. – The fight against corruption in the judiciary continued in 2006.

Supreme Court judge Ljubomir Vučković was in early July convicted to eight years in jail for accepting a bribe. Vučković had received money in exchange for influencing the Supreme Court to repeal the first-instance 12-year imprisonment sentence pronounced against the chief of the Kruševac crime clan Zoran Jotić *aka* Jotka.[323] (*Danas* and *Politika*, 8 July, pp. 3 and 11).

President of the Belgrade Commercial Court Goran Kljajević, suspected of membership in a criminal association involved in privatisation machinations and bribery, was arrested in April. Another judge of that court, Delinka Đurđević and seven businessmen and lawyers were also arrested in this anti-corruption campaign. Suspect Slobodan Radulović, former Director of the C Market supermarket chain, is at large (*Politika*, 11 May, p. 1 and *Večernje novosti*, 15 April, p. 2). Kljajević in August filed an application with the ECtHR claiming many of his rights had been violated in the proceedings (*Politika*, 8 August, p. 10). The "bankruptcy mafia", as this group was dubbed, was indicted in October (*Večernje novosti*, 13 October, p. 11).

The Novi Sad District Court convicted former Deputy Belgrade District Prosecutor Milan Sarajlić to three years in jail for abuse of post. Sarajlić had been arrested during the 2003 state of emergency and initially charged with corruption. The indictment was modified in March 2006 (*Danas*, 11 March and 22 June, p. 7).

2.5.5. Trials of Members of the Milošević Regime. – The case of Milošević's wife Mirjana Marković was activated in 2006 after he died and she wished to attend his funeral.[324]

The Belgrade District Court set a 15,000 Euro bail to allow Mirjana Marković to enter the country and attend the funeral of her husband and not be taken into custody. The set bail was simultaneously to be a guarantee that she would appear at the hearing scheduled for 23 March.[325] The bail was paid by Milošević's SPS, but Marković appeared neither at the funeral nor at the trial, wherefore the Court decided to transfer the sum to the judicial budget. The Supreme Court quashed the decision in May, explaining that the accused had not been properly summoned. The Belgrade District Court again reached a decision to pay the bail money into the judicial budget and issued an arrest warrant against Marković. This is the fourth arrest warrant this Court has issued against Milošević's wife (*Danas*, 19 May and 18 July, pp. 7 and 1 and *Večernje novosti*, 18 July, p. 12). The Supreme Court quashed the

323 See *Report 2005*, II.2.5.4.

324 See *Report 2003,* II.2.6.2, *Report 2005*, II.2.5.2.

325 See *Report 2003*, II.2.6.2.

decision on the bail transfer and the arrest warrant again in the December (*Danas*, 22 December, p. 5). The Belgrade District Court in late December again issued a warrant for Marković's arrest and passed a decision to transfer the money to the judicial budget (*BETA*, 29 December).

The proceedings regarding the seizure of the villa in the elite part of Belgrade Milošević had bought under dubious circumstances for a mere 9,000 DM in 1999 were adjourned in August 06. The court had ruled on the seizure of the villa after the 5 October 2000 democratic changes, but the Supreme Court of Serbia quashed the decision and ordered a retrial, which opened in August 2005. It was adjourned in July 2006 due to the death of the accused and it will continue once the probate court proceedings, which are not subject to any legal deadlines, are completed (*Blic*, 16, 17 August and 28 September, p. 4 and *Vreme*, 24 August, p. 18).

The Belgrade Second Municipal Prosecution Office raised charges against 36 persons with respect to events surrounding Milošević's arrest in 2001. The accused, most of whom are senior officials and members of the SPS, are charged with participation in a group preventing an official from discharging his duty (*Danas*, 23 November, p. 5).

2.5.6. Compensations for Unlawful Deprivation of Liberty. – NGOs in 2006 again called on the Supreme Court of Serbia to step up the proceedings on compensation of damages to forcibly mobilised Bosnia-Herzegovina and Croatia refugees and extend the statute of limitations for initiating proceedings that had expired in 2005 (*Danas*, 27 June, p. 7).[326]

The Supreme Court of Serbia on 19 July rejected the state's motion for retrial of a case, which had ended with the court awarding seven refugees 2.38 million dinars for being conscripted by force. These men were arrested and turned over to paramilitary units although they had enjoyed the status of refugees in 1995 (*Danas*, 25 July, p. 7).

The First Municipal Court of Belgrade ordered the Republic of Serbia to pay 183,300 dinars in compensation to a forcibly mobilised refugee for the sustained mental pain and impaired daily life activities resulting from the Post-Traumatic Stress Disorder (PTSD) he had suffered. This is the first conviction passed in Serbia establishing a link between the PTSD and unlawful deprivation of liberty (*Vreme*, 12 October, p. 8).

Four former policemen were charged in Belgrade in June for unlawfully arresting and coercing a confession from former State Security employee Vladimir

326 The BCHR and the International Aid Network (IAN) called on the Supreme Court of Serbia to extend the deadline for appeals in cases of forced conscription back in 2004. The Supreme Court replied that the statute of limitations was set by the Obligations Act and that any amendments to it would have to be made by the Assembly of Serbia (*BETA*, 1 February). IAN assessed that the prosecution offices in Serbia were obstructing these proceedings and recalled that 64 trials initiated on behalf of the refugees had not moved an inch since 2003 (*BETA*, 1 February). See *Report 2005*.

Nikolić in June 1999.[327] Nikolić was found guilty of revealing a state secret and sentenced to prison, where he unlawfully spent 400 days until the prosecutor later dropped the charges against him (*Vreme*, 8 June, p. 8 and *Dana*s, 6 June, p. 7).

A trial opened in Čačak in March 06 on charges filed by Zoran Katić, whose family was not notified of his whereabouts during the first six days of his imprisonment. Katić had been taken into custody for a traffic violation and fined. The judge sentenced him to 17 days in prison because he did not have enough money to pay the fine on the spot and did not allow him to go home and get it. He was allowed to phone his family and tell them where he is only after having spent six days in prison (*BETA*, 16 March).

In late May, the Smederevo Municipal Court ruled that the Republic of Serbia was to pay former opposition movement *Otpor* member from Požarevac Momčilo Veljković 590,000 dinars for the mental and physical pain he suffered during his unlawful detention from 2 May to 30 June 2000 (*Vreme*, 30 March, p. 4).[328]

The Belgrade District Court in October ruled the state pay another *Otpor* member Irina Ljubić 60,000 dinars in compensation for her unlawful arrest in September 2000 (*BETA*, 13 October).

The Čačak Municipal Court in September ordered that Miodrag Perović be paid 250,000 dinars in compensation for unlawful arrest and damage to his reputation. Perović was arrested under suspicion of fraud in May 1999 and was kept in custody until end June 1999. Charges against him were dropped in January 2004 (*Politika*, 18 September, p. 10).

In late October, the Novi Pazar Municipal Court passed a first-instance judgment ordering the Republic of Serbia to pay a total of 13.5 million dinars in compensation to 22 citizens of Novi Pazar, whose closest relatives were killed during the NATO air strikes in 1999. The court explained that it was ordering the payment of the sum to compensate them for the mental pain they sustained when they lost their relatives. It invoked an Obligations Act provision, under which "the state, whose bodies were legally duty-bound to prevent damages caused by death or bodily injury or damages caused by an act of violence or terror, shall be held accountable for such damages" (*Blic*, 25 October, p. 15).

2.6. Right to Protection of Privacy, Family, Home and Correspondence

2.6.1. Border Crossing Records. – Media in June discovered that an order, issued by Serbian police chief Miroslav Milošević to border authorities to register the crossing of the border by all "persons interesting from the viewpoint of security

327 See *Report 2000*, II.2.5.3 and *Report 2001*, II.2.6.3.

328 More in *Report 2000*, II.2.3 and *Report 2002*, II.2.5.2.

and not registered under the existing ROS and ROJ systems" (ROS and ROJ being lists of foreign citizens and nationals under surveillance of the intelligence services, according to well-informed sources), had been applied for already a year (*Blic*, 6 June, p. 3).

Police Minister Dragan Jočić said that EU countries also employed such measures and that security measures had been increased because the police had taken control over most of the border from the Army. (*Danas*, 9 June, p. 3). "I won't go into how the media got hold of a dispatch, a secret coded document, and I won't go into the malicious politicisation of the issue by specific people," Jočić said (*Blic*, 9 June, p. 2).

Serbian Police Inspector General Vladimir Božović called on Jočić to repeal this decision which was in contravention of the Constitution and law as a specific group of people was placed in a disadvantageous position in the absence of any predetermined criteria (*Blic*, 16 June, p. 2). No information on whether anything was done on the issue was published by the time this Report went into print.

2.6.2. Wiretapping. – The wiretapping issue arose in late 2005 when the NGO Youth Initiative for Human Rights (YIHR) asked the BIA for access to information on how many motions for wiretapping were filed and how many people were under surveillance in 2005. As the BIA failed to provide access to such information, the YIHR complained to the Commissioner for Information of Public Importance Rodoljub Šabić. He ordered BIA to release the requested data in late 2005, but BIA filed an administrative complaint with the Supreme Court of Serbia challenging his order (*Večernje novosti*, 24 May, p. 11). The Supreme Court dismissed the complaint (*Politika* 24 and 29 May, p. 11) and ordered BIA to release the data (*Danas*, 31 May, p. 5).

Justice Minister Stojković accused Šabić of working against the state because he was demanding the disclosure of a state secret (*Blic*, 5 June, p. 8). Šabić replied that access to information constituting a state, official or business secret could be restricted if the release of such information would have adverse consequences, but specified that the publication of summary figures could not produce such effects. In view of the recollections of the abuses by secret services in the recent past, it is not all the same to the public whether 300 or 300,000 people are wiretapped, he concluded (*Blic*, 6 June, p. 10).

The Government ignored the requests although it had been called on to enable the implementation of the law a number of times. "The Government's failure to respond to our request will corroborate that the state institutions are not controlling or do not want to control the secret police and that they do not care about the rule of law in Serbia," said YIHR (*Danas*, 27 June, p. 7).

In July, media reports that Defence Minister Zoran Stojković was being wiretapped were confirmed by the Minister himself on TV. The Military Department of the Belgrade District Prosecutor's Office launched an investigation against two

members of the Military Intelligence Agency (VBA) (*Danas*, 5 July, p. 1). The Defence Ministry stated that they had abused their post, that they had acted of their own accord and that they were not listening in on his conversations, but "perused without authorisation" the lists of the calls he had made from his landline and cell phones (*Danas*, 7 and 8 July, pp. 3 and 7).

2.6.3. Other Violations of the Right to Privacy. – A questionnaire the Education Ministry distributed to schools for pupils to fill out in February caused public outcry. The pupils were asked to write birth certificate numbers, whom they lived with, whether they shared their rooms with anyone, how they went to school, what their parents did for a living, whether their fathers were alive, whether they attended religious instruction (*Blic*, 23 February, p. 10). The questionnaire also included questions on the financial status and ethnic and religious affiliation of the pupils, all of which reminded the parents of data held in state security files (*Danas*, 25 February, p. 5). Similar questionnaires were distributed to the teachers, who were also asked to write down their bank account numbers and amounts of any credits they were repaying (*Blic*, 25 February, p. 8).

The parents' reaction prompted the Ministry of Education to announce that the pupils did not need to answer all the questions and that the information was collected for a database kept by other countries as well, all with the aim of ensuring better education (*Vreme*, 2 March, p. 30). Its explanations of the quality of data protection, however, were quite sparse and unconvincing.

In mid-December, Foreign Minister Vuk Drašković gave all MFA staff access to the Ministry security service files on staff (*Danas*, 15 December, p. 5).

2.7. Freedom of Thought, Conscience and Religion

2.7. 1. Amnesty of Draft Dodgers. – The Amnesty Act adopted by the Serbian Assembly in April 2006 freed from criminal responsibility 2,500 young men, who had avoided the draft since 7 October 2000 or had for this reason been imprisoned: they are, however, still obliged to complete their military service. The ones who had dodged the draft before October 2000 had already been amnestied (*Danas* and *Politika*, 18 April, pp. 4 and 8).

2.7.2. Rehabilitation Act. – This Act, adopted in April, rehabilitates persons who had for political or ideological reasons been deprived of their lives, liberty or other rights as of 6 April 1941. The Belgrade District Court had by end November received 247 requests for rehabilitation and passed five decisions, four of which were positive (*Danas*, 30 November, p. 5). The Šabac District Court was the first to pass a decision on rehabilitation on 10 November. This court repealed the conviction under which iron trader Nikola Despotović had been declared an enemy of the people and his property confiscated (*Politika,* 11 November, p. 1).

2.7.3. Attacks on Religious Facilities and Incidents on Religious Grounds. – In early January, SOC Patriarch Pavle sent a letter to the Vojvodina PM Bojan Pajtić with regard to the "attacks on Orthodox churches in the Srem Diocese and expression of hatred of SOC believers" (*Politika*, 11 January, p. 9). The Patriarch was referring to the theft of the copper roof of the church in Grabovo and a fire in the Rekovac Monastery in 2005. Vojvodina police stated the three persons arrested for stealing the copper roof were of the Serbian Orthodox faith and had prior criminal records and said that the fire in the monastery had broken out when a wooden plank in the chimney that "had not been thermally isolated" caught fire (*Danas*, 13 January, p. 19).

In his letter, the Patriarch warned that some media and individuals were spreading "hate speech" against the SOC and branded former Vojvodina Assembly Speaker Nenad Čanak as one of the most vociferous hate mongerers. Pajtić denied the allegations, explaining the provincial Government had no powers over the police or judiciary and that these concerns should be addressed to PM Koštunica and Police Minister Jočić. Čanak also refuted the allegations, expressing doubts about the authenticity of the letter (*Danas*, 12 January, p. 18).

Religion Minister Milan Radulović accused human rights advocates of being intolerant towards the SOC. Reacting to their criticisms of the decree on the issuance of obligatory additional stamps, the revenue from which would be used to complete the construction of the St. Sava church in Belgrade,[329] he said that the claims that the introduction of such stamps constituted a violation of the human rights of citizens who were not Serbian Orthodox or believers testified of the lack of understanding of the importance of religious culture to all people. The criticisms of the Government show some human rights activists are using the freedom of speech to express their politically motivated intolerance of the SOC, Radulović concluded (*Danas*, 26 January, p. 5 and 19 August, p. 3).

The SOC was also the main protagonist of an incident in Novi Sad in August. The police interrupted a reported and approved street performance by the Italian group *Teatro del Venti* after the local clergy complained it was preventing them from performing a religious rite. Bishop of the Bačka Diocese Irinej, at whose request the performance was interrupted, said that the actors were making so much noise that he could not talk on the phone and that it was an "arrogant and primitive Satanist séance" in which one actor was impersonating the devil and others were playing demons (*Danas*, 24 and 26 August, pp. 23 and 5, *Večernje novosti*, 25 August, p. 6).

The Lawyers Committee for Human Rights (YUKOM) in November warned the Education Minister that the SOC children's magazine *Svetosavsko zvonce* was inciting intolerance towards non-Christians, notably the Chechens (*Politika*, 22 November, p. 8).

A feature story on an old woman, a member of Jehovah's Witnesses, caused quite a lot of turmoil in Pirot in November. The staff of the paper *Sloboda,* in which

329 See also *Report 2005*, II.2.7.4.

the feature was published, distanced itself from the story, which was also condemned by the mayor who qualified it as promotion of a sect. The author of the feature and chief editor of *Sloboda,* Kaja Pančić Milenković, said such assessments were one-sided and recalled the numerous articles on the Serbian Orthodox faith she had published (*Danas*, 29 November, p. 18). At the initiative of the journalists of the paper, the Management Board of the public news company *Sloboda* dismissed Milenković in December (*TANJUG*, 14 December).

Four persons desecrated the Islam Aga Mosque in Niš, insulted the believers and pelted the mosque with stones. The police arrested two persons and the Religion Ministry condemned the incident and apologised to the Moslems. Imam Mustafa Jusufspahić asked for round-the-clock police supervision of the mosque that had been set on fire in March 2004. He concluded that the assaults on Moslems had become commonplace and recalled that the representatives of the Islamic Community in September abandoned the charges against a group of minors, who had physically assaulted an Imam, when the police explained that they could be expelled from school because of the incident (*Blic*, 20 October, p. 14 and *Danas*, 20 October, p. 7).

Radical Islamic believers, the Wahhabis, in November attacked a group of Moslem believers in the Novi Pazar Arab Mosque, trying to impose upon them their practice of religious rites. Several persons sustained light bodily injuries. The police filed criminal charges against 17 people, including Habib Fuljanin, who had fired his gun during the incident. Fuljanin was remanded in custody for 30 days and the mosque was closed (*Danas*, 4 and 6 November, p. 4 and *Blic*, 6 November, p. 4).

Several thousand Bosniaks in Novi Pazar in February protested against the insulting cartoons featuring Prophet Mohammed in the Danish press. They chanted "Allah is the Greatest" and set the flags of Denmark, Croatia and Israel on fire. No other incident occurred during the protests. The Islamic Community said it was not behind these protests (*Politika*, *Blic* and *Večernje novosti*, 11 February, p. 7, 3, 7).

In late August, the police at Gornji Milanovac stopped and spent 95 minutes searching the car of Sandžak Moslem religious leader Mufti Muamer Zukorlić. Zukorlić qualified the police statement that they were just performing a routine check-up as ridiculous and scandalous and asked why SOC priests were not subjected to such long searches. He added that the check of his personal luggage definitely could not be considered part of a routine check (*Večernje novosti*, 29 August, p. 6 and *Danas*, 30 August, p. 7).

During the local election campaign in Novi Pazar in early September, List for Sandžak activists damaged the facilities of the Islamic Studies College (*Politika*, 8 September, p. 8).

The Smederevo Catholic church in Smederevo was stoned by unidentified perpetrators in late March (*Večernje novosti*, 1 April, p. 6), and then again in July (*Večernje novosti*, 24 July, p. 10).

In December, a Molotov cocktail was thrown at the Protestant church in Kraljevo (*B92*, 18 December), a Baptist church in Novi Sad was stoned and a Cath-

olic church in the same town was robbed. These incidents were condemned by Serbian President Boris Tadić and Religion Minister Milan Radulović (*Danas*, 20 December, p. 6). Seven gravestones at the Novi Sad Catholic cemetery were demolished the same month (*BETA*, 25 December).

2.8. Freedom of Expression

Compared to 2005, there were more violations of the freedom of expression in Serbia in 2006. The moves taken by the Republican Broadcasting Agency (RRA) Council, charged with allocating national, regional and local radio and TV frequencies, the frequent political pressures on journalists and the increasing disrespect of professional and ethical rules by journalists and media – all these contributed to greater breaches of this freedom.[330]

In December, the RRA shut down the Belgrade Roma-language radio station *Krhlo e Romengo* explaining that minority-language stations are not envisaged by the Broadcasting Act. In fact, the minorities are guaranteed the right to information in their own languages under the law, but the Broadcasting Act does not guarantee this right and explicitly provides for electronic media owned by the civil sector (*Danas*, 13 December, p. 18). The same goes for radio stations owned by the church; the RRA in December also insisted on the closure of the Belgrade radio station *Voice of the Church*. The Serbian Orthodox church authorities said they were willing to pay the frequency fees once their unlawfully confiscated property was returned to them (*Večernje novosti*, 15 December, p. 6). They also noted they were not prohibited from having their own radio stations under the Broadcasting Act. The RRA reasoned its decision by adducing the fact that churches were entitled only to local frequencies. The church officials refuted the interpretation and said they would ask for a review of the constitutionality of the Broadcasting Act (*Vreme*, 14 December, p. 26).

An incident with regard to the screening of the Chinese movie *Summer Palace* occurred in late November at the Belgrade Festival of Authors' Films, held under the auspices of the city authorities. The festival organiser heeded the request of the Embassy of the Republic of China in Belgrade and decided against showing this movie on the brutal suppression of the student demonstrations in Tiananmen Square in which hundreds of students calling for democratisation and respect of human rights in China were killed. The movie was later screened twice after the audience and public fiercely reacted to its withdrawal from the Festival programme (*Večernje novosti*, 29 and 30 November, pp. 27 and 29).[331]

2.8.1. Trials of Journalists and Media. – Journalists were again the targets of numerous lawsuits in 2006. In the first seven months of the year alone, 106 private charges accusing them of libel and defamation were filed with the Belgrade First Municipal Court alone (*Večernje novosti*, 31 August, p. 12).

330 More on the frequency allocation procedure in I.4.9.3.

331 See also BCHR statement at http://www.bgcentar.org.yu/index.php?&p=116&nid=157.

Milutin Zdravković, the editor of the Aleksandrovac magazine *Župska reč* served a one-month prison sentence in April for insulting the former mayor of this town. (*Politika*, 18 May, p. 10).[332]

In early August, *TV Kuršumlija* editor Slavko Savić was sentenced to four months in jail or a one-year suspended sentence for libelling the local leadership. He commented he was subjected to "classical persecution by the local authorities spearheaded by the DSS" (*Danas*, 8 August, p. 6).

Dnevnik reporter Snežana Nikolić was found guilty of libel and sentenced to six months in jail or a two-year suspended sentence by a Novi Sad court in September. The court assessed that, in the journalist's case, the *suspended sentence was milder than a fine* (*BETA*, Media Week 18–24 September).

The Fourth Municipal Court in Belgrade ruled that former journalist of the magazine *Hronika za Zemun* Dragan Stojković was to pay 500,000 dinars in compensation to senior SRS official Dragan Todorović for the "mental pain he sustained because of his damaged honour and reputation". In an article he wrote in 2002, Stojković claimed that the SRS security unlawfully confiscated a camera from a TV crew and that senior SRS officials Vojislav Šešelj and Dragan Todorović were behind the move. He also criticised the court, which had not completed the trial of the case by the time this Report went into print (*BETA*, 18 October).

The Zrenjanin District Court in January modified the first-instance court sentence and ruled that former *Kikindske novine* journalist Željko Bodrožić and the publisher of the paper pay 80,000 dinars to Željko Ugren for tainting his honour and reputation. Bodrožić published an article in *Kikindske novine* in 2003 quoting the police "White Book" on organised crime in Serbia, which alleged that Ugren was a member of an organised crime group (*Danas*, 26 January, p. 7).

The Bodrožić case best demonstrates the Serbian authorities' attitude towards journalists. Bodrožić was found guilty and fined by the Kikinda Municipal Court on charges raised by senior SPS official Dmitar Šegrt back in 2002. The case was reviewed in 2005 by the UN Committee for Human Rights, which found that the conviction amounted to a violation of Article 19 of the ICCPR and asked the state to quash it and compensate damages to Bodrožić ((*Danas*, 26 July and 11 August, pp. 7 and 6).[333]

The Committee forwarded its request to the Serbian authorities in November 2005 and asked it to act in accordance with the Committee recommendations within 90 days, but the state had done nothing to enforce the Committee views by the time this Report went into print. Justice Minister Stojković stated that the "state cannot interfere in these decisions as that would amount to the executive authorities' interference in the work of the judiciary", while the Municipal Court indicated its conviction was upheld by the Kikinda District Court, which, in turn, announced that it had never received the Committee views (*Danas*, 26 July and 11 August, pp. 7 and 6).

332 See II.2.5.

333 See *Report 2002*, II.4.9 and *Report 2005*, II.2.8.5.

Bodrožić, who is facing five other trials in the same court, also complained to the ECtHR. When the value of the three fines he failed to pay amounted to 170,000 dinars in early August, the authorities garnished two-thirds of his salary and made a list of his movable property (*Danas*, 26 July, 8 and 16 August, pp. 7, 6 and 5).

The Novi Sad Municipal Court in February found columnist Ljiljana Jočić Kaspar guilty of libel and fined her 300,000 dinars. She wrote an article in the Novi Sad daily *Građanski list* about an unnamed doctor who had formerly been a sniper within the infamous Special Operations Unit. Dr. Miroslav Savić recognised himself in the article and sued her. Jočić Kaspar was initially sentenced to six-month imprisonment or a two-year suspended sentence in 2004, but the Novi Sad District Court quashed the sentence (*BETA*, 19 February).

The Belgrade First Municipal Court in April sentenced RTS and its former journalist to pay 5 million dinars of compensation for damaging the honour and reputation of judge Života Đoinčević (*Večernje novosti*, 13 April, p. 12).

The Third Municipal Court in Belgrade in May ordered the daily *Danas* to pay former JSO commander Franko Simatović Frenki 200,000 dinars in compensation for non-material damages (*Politika*, 23 May, p. 11).

The Kraljevo District Court in December ruled that *Ibarske novosti* journalist Ivan Rajović pay 82,000 dinars in compensation to a local official he had insulted in his 2003 article entitled "Former Directors Buying Companies while Children are Defending the Fatherland" (*Blic*, 5 December, p. 15).

2.8.2. Pressures on Journalists and Obstruction of their Work. – SRS deputy Hranislav Perić in April asked for protection from journalists and photographers "lurking in corners and preying on" MPs to catch them in compromising positions. Assembly session chairman Vojislav Mihailović then banned the journalists and photographers from attending the session and let them film only the beginning and end of the session (*Danas*, 11 April, p. 3).

The Vršac local authorities in January demanded the removal of the local station *TV Panovizija* from the cable network for allegedly spreading hate speech. It called on the RRA Council to ban the station, which had criticised the local authorities. The RRA found that there was no hate speech in the programmes of the station (*BETA*, Media Week 15–22 January and 5–12 March reports).

Vršac authorities also prevented *TV Panovizija* and *Blic, Dnevnik* and *BETA* correspondents from covering its press conference in July on the pretext that they were not accredited (*Blic*, 12 and 13 July, p. 2, *Danas*, 14 July, p. 37 and *Beta*, 6 July).

Radio Babušnica, the only local radio station operating in this town, was shut down in May because two groups of councillors in the local government both claimed to boast the majority. In result, the culture hall, where the station was headquartered, was simultaneously run by two directors from the opposing political camps. One group claimed the station was not following the editorial policy, the other that its opponents were intimidating the journalists. The Association of Jour-

nalists of Serbia (UNS) alleged that the chairmen of the local SPS, SRS and SPO boards were pressuring the journalists and that the station closed down after the staff went on strike over unpaid salaries and substandard working conditions (*Danas*, 1 June, p. 18 and *TANJUG*, 29 May).

A local radio in Kikinda halted all its shows in Hungarian in May and now only broadcasts translations of Serbian news items into Hungarian (*BETA*, 12. maj).

Journalists of the herald *Pančevac* interrupted a session of the Pančevo municipal assembly. They brought in a glass with the compound the city's petrol refinery was releasing into the air and sought an explanation on why the breakdown that caused the disaster was being kept secret. The mayor adjourned the session without answering the questions and the police paid a call on the paper and asked the journalists to disclose their source. The refinery director later confirmed that there had been a breakdown, said it was caused by obsolete equipment and apologised to the citizens (*Blic*, 11 April, p. B5).

Most of the equipment and facilities of *Magyar szo*, the only Hungarian language daily in Serbia, was moved from Novi Sad to Subotica in March. Many assessed this was done to boost the influence of the leading ethnic Hungarian party SVM on the daily. Two journalists, who were against moving the daily headquarters to Subotica, were sacked (*BETA*, 2 March, *Danas*, 6 March, p. 7 and *Večernje novosti*, 9 March, p. 6).

In mid-November, chairwoman of the *Studio B* Managerial Board Ljiljana Čolić accused the station of "anti-Serbian activities" (*Danas*, 14 November, p. 5) and said she had initiated the dismissal of the station's chief editor.[334]

The Zrenjanin receivership government in December dismissed the Director and members of the Management and Supervisory Boards of the herald *Zrenjanin*. The head of the receivership government, a DSS member, announced their imminent dismissals by saying that he "disagrees with the herald's editorial policy". The receivership authorities explained they had taken the decision because of "a kind of state of emergency" in the paper, which was negotiating its privatisation with the German concern WAZ (*BETA*, Media Week, 3–10 December).

The case of the SOC Žič Diocese shows that the clerics' attitude towards the media is not much better either. The Diocese failed to return TV Trstenik its equipment despite a final court decision to the effect. (*BETA*, 2 April).[335]

Journalists were subjected to physical attacks in Serbia in 2006 as well. A Gornji Milanovac local radio reporter was knifed at work in August (*Danas*, 19 August, p. 21), while former Belgrade city official Spasoje Krunić in April physically

334 The Studio B editorial board responded by saying it was the only one to have interviewed Patriarch Pavle in the past couple of years and that its two religious shows *Agape* and *Duhovnici* were amongst the most popular TV shows. (*Večernje novosti*, 14 November, p. 6).

335 Ahead of the 2004 elections, the Trstenik councillors decided to cede the local TV station's equipment to the Diocese. The court ruled in favour of the new local authorities, which sued the Diocese to restore possession of the municipal equipment.

assaulted journalists who had asked him to give them a statement (*Politika*, 11 April, p. 1).

Reporters of the Subotica weekly *Hrvatska riječ* received death threats in February (*Danas*, 4 February, p. 7). The editor of the weekly *Glas Sandžaka* was the target of death threats in July (*Danas*, 28 July, p. 7).

SRS representatives assaulted, insulted and threatened journalists Sveto Mirković and Mile Veljković in the Požarevac town hall in December (*BETA*, Media Week, 26 November – 3 December).

The husband of MP Nataša Mićić threatened the *Danas* Užice correspondent in July (*Danas*, 1 April, p. 5). Capital Investments Minister Velimir Ilić in September insulted and cussed out the journalists of *TV Leskovac* for cutting short his appearance in the station's regular show by 30 minutes. Ilić had come to the station 30 minutes later than agreed (*Danas*, 11 September, p. 5). Minister Ilić will not be held accountable for such behaviour. The protection he enjoys is corroborated by the ruling of the Belgrade First Municipal Court in December. Not only did the Court find Ilić innocent of slander, but it also ordered the plaintiffs, Sonja Biserko and Biljana Kovačević Vučo, to cover the court expenses to Ilić and the state amounting to 500 Euros. In the explanation of its decision, the Court said that "as public figures, they are obliged to withstand Minister Ilić's insults and must demonstrate a higher degree of tolerance".[336] Biserko and Vučo sued Ilić for saying during his appearance on TV Leskovac that "B92 hates everything Serbian" and "constantly has Nataša Kandić, Sonja Biserko and others on the air" (*Danas*, 9 December, p. 5).

2.8.3. Disrespect of Professional Standards and Press Code of Conduct. – The professional code of conduct was frequently violated in Serbia by the press in 2006 as well. This conclusion was drawn also by the press associations, which finally agreed on a draft press code of conduct in March and adopted it in late December. Under the Code, reports must be true, the accuracy of the information to be published must be checked, the journalists must rely on identified and reliable sources, resist all forms of pressure, use honourable means to obtain information, respect the privacy and dignity of their interlocutors, respect the presumption of innocence and protect minors (*Politika*, 26 December, p. 9).

The Belgrade Media Centre Press Council in 2006 submitted monthly reports in which it analysed the respect of professional standards by print media. It found continued decline of professionalism and large-scale violations of fundamental human and minority rights.[337] Excessive tendency towards sensationalism and political instrumentalisation were qualified as the key problems of Serbian journalism.

336 See YUCOM statement of 8 December 2006, at http://www.yucom.org.yu/SrpskaVerzija/KomitetPravnika.asp.

337 This is illustrated by headlines a la "They'd be Fags if They Dared" or "Shiptar Dancing in the Heart of Serbia". Journalists have been violating the rights of the child as well. An article entitled "Nikolina Born without Eyes" was accompanied by a photograph of the unfortunate baby. The press also published photos of childred who had been victims of rape. The Council, however, concluded that the situation was nevertheless improving as the papers were now publish-

The Council also concluded that the degree of vulgarity in the media always increased at the time of Assembly sessions (*Danas*, 9 May, p. 7).

Disrespect of the presumption of innocence was the most frequent breach of the media code of conduct, as the Association of Judges of Serbia warned. The Association stated that the judiciary was under pressure due to publication of unchecked information on corruption and statements by politicians publicly urging specific outcomes of trials. (*Danas*, 24 January, p. 7).

Media in April reported that many Croatian Serbs were converting to Catholicism They quoted only one source, the SOC.

The Belgrade weekly *NiN* ran a feuilleton scorning and to an extent criminalising historian and former politician Latinka Perović and liberal and democratic parties dubbed Other Serbia (*Danas*, 21 April, p. 5 and *NiN*, 13 and 20 April, p. 66). Hate speech found in these articles often appears in Serbian media. Analysts have assessed that the media, which mostly only conveyed hate speech in the Milošević era, were now generating it as well (*Vreme*, 23 March, p. 54).

The First Municipal Court in Belgrade fined Chief Editor of the weekly Standard Željko Cvijanović 200,000 dinars in November. Cvijanović was sued by Vladimir Popović for alleging that the latter was involved in the plot to assassinate PM Đinđić (*Večernje novosti*, 2 November, p. 16).

The most blatant example of hate speech occurred in the studio of the Novi Sad TV station *Apolo* in January when news editor Željko Rakočević set the magazine *Bezbožnik* on fire because, as he claimed, it "propagated hate speech against the SOC". *TV Apolo* Director said it was a symbolic gesture against hate speech and intolerance. After vehement public reactions, Rakočević was sacked, ostensibly for an entirely different reason. (*Danas*, 14 January, p. 7 and *Politika*, 2 February, p. 10).

Belgrade tabloids *Kurir, Nacional* and *Press* have spearheaded in hate speech and breaches of the professional code of conduct.

The *Kurir* in May published an article implying Albanians were a dirty and uncivilised people (*TANJUG*, 15 May), and a photomontage of PM Koštunica, featuring him as a bodyguard of Hague indictee Ratko Mladić in June (*Danas*, 29 June, p. 7). In September, *Kurir* published claims by rightist politician Siniša Vučinić that foreign intelligence services were plotting to assassinate the chairwomen of Serbian NGOs Nataša Kandić, Sonja Biserko and Biljana Kovačević Vučo. Vučinić alleged the assassinations were planned to demonstrate that the Serbian regime was Fascist and thus facilitate Kosovo's secession (*Kurir*, 4 September, p. 4). The same day, three bangs were heard as Nataša Kandić was leaving the *B92* TV station. The police claimed they were caused by firecrackers. Although the police said they would conduct an exhaustive investigation, its results were not made public by the time this Report went to print (*Danas*, 5 September, p. 1).

Kurir in September published an article about the father of Deputy PM of Serbia Ivana Dulić Marković, claiming he had been hiding a convicted WWII Usta-

ing only the initials of minors and not revealing the identity of photographed minors. (*Danas*, 9. maj, str. 7).

sha war criminal for two years. *Kurir* did not publish any data to corroborate its allegations and even called the father by the wrong name (*NiN*, 14 September, p. 7).

The daily *Glas javnosti* in September published a poster with three photographs of ICTY indictee Ratko Mladić. It later explained it had published the photos at the request of the readers. Press associations assessed that the publication of these pictures was a serious offence as it treated war criminals as national heroes and thus violated the valid laws (*Danas*, 4 October, p. 6).

Press associations said that the professional code of conduct was seriously violated during the show *Ključ* on RTS in October. The show host suggested to the children from Kosovo, who appeared as guests in the show, how to answer her question, abusing their feelings and fears (*Vreme*, 5 October, p. 7).

The regional TV Novi Pazar and RTS sports commentator Duško Korać also behaved unprofessionally in 2006. The RRA found the Sandžak Islamic Community Meshihat's complaints that the TV station inadequately reported on its work were grounded and constituted a violation of the Broadcasting Act (*Danas*, 30 August, p. 6). While covering the European Championship in Athletics, Duško Korać insulted the participants in the B92 website forum who were criticising his reporting and insults of some female athletes. Korać was suspended from work for a month and received "the ultimate warning letter" (*Blic*, 16 August, p. 26).

2.9. Right to Property

The long-awaited and promised Denationalisation Act was not enacted in Serbia in 2006, but the authorities did register property taken away from citizens after 9 March 1945 (*Politika*, 30 July, p. 1). The Republican Property Directorate received 130,000 applications from citizens seeking restitution of their property (*Večernje novosti*, 8 September, p. 9).

Estimates are that the value of property the state needs to return to the citizens stands at between 60 and 160 billion USD.

The former owners and their heirs have accused the state of delaying restitution and claim that it enacted the Act on Registration of Arrogated Property for that very reason. They allege such a law is unnecessary as the state has had records of arrogated property for a long time. The state bodies, on the other hand, underline that the Act "will help establish the volume of such property and its market value. Only once we have all the documentation will we be able to begin restitution". It remains to be seen how restitution will be carried out as the Restitution Fund had only 50 million Euros in its coffers in early 2006 (*NiN*, 19 January, p. 32).

2.10. Political Rights

Political parties made ample use of nearly all significant political events in 2006 to attack their opponents. Recriminations and smearing campaigns accompanied the run-up to the independence of Montenegro and the funeral of Slobodan Milošević, as well as Serbia's accession to the Partnership for Peace in late November.

The events surrounding Milošević's death and funeral turned into a drive to restore his regime. The day after he died, the SPS leadership said Milošević had been killed (*Večernje novosti*, 12 March, p. 2), while his wife Mirjana Marković said he was killed because the ICTY failed to prove he was guilty in the trial that was coming to a close (*Večernje novosti* 13 March, p. 3).

The city authorities rejected the SPS demand that Milošević be buried with state honours in the section of the Belgrade cemetery reserved for honourable citizens (*EFE*, 18 March). Despite the Revolution Museum Director's remonstrations, the Serbian Government allowed the body to lie in state in the museum because, as Labour Minister Slobodan Lalović explained, the Government wanted to "prevent disgrace". Exhibits were removed from part of the museum overnight to make room for the body (*Blic*, 17 March, p. 4). The SPS leadership demanded of the photographers covering the arrival of Milošević's body from The Hague to bow to the coffin before photographing it. Accreditations for the press covering the funeral in Požarevac bore Milošević's image and mourning bands (*EFE*, 19 March).

Scores of death notices devoted to Milošević were published in the press after he died. They comprised those by the dissolved JSO police unit and his friends in the ICTY detention unit, including Croatian General Ante Gotovina. A death notice written by a group of citizens and listing all the disastrous results of Milošević's regime, was also published (*NiN*, 23 March, p. 22). *Politika* Chief Editor Ljiljana Smajlović publicly apologised to the readers because of the "false death notice", qualifying it as "desecration of the feelings of the grieving" and a politically motivated attack on the deceased (*Politika*, 18 March, p. 7). Smajlović, however, made no comment on the political attacks on Milošević's opponents and the ICTY in the other death notices.

Around 80,000 people attended the rally in Belgrade to see off Milošević's remains that were taken to Požarevac for burial and some of the attendants physically attacked those protesting against the events accompanying Milošević's funeral. The ceremonies in Belgrade and Požarevac ceremonies were attended by ICTY indictees Gen. Dragoljub Ojdanić, in uniform with all his medals, and Gen. Nebojša Pavković, both of whom were awaiting trial in the ICTY (*Večernje novosti*, 19 March, p. 3). SPS and SRS deputies observed a minute of silence in the presence of DSS deputies at the first Assembly session following Milošević's funeral (*Blic*, 29 March, p. 3).

2.10.1. Local Elections. – Tensions rose also during the early local elections held in a number of Serbian towns in 2006. The gravest incident occurred in Novi Pazar, where List for Sandžak candidate Ruždija Durović was killed on election day (*Politika*, 11 September, p. 1). The election commission nevertheless declared the elections legitimate (*Večernje novosti*, 12 September, p. 4).

The Novi Pazar problems began in February when the then Human and Minority Rights Minister, head of the National Council for Cooperation with the ICTY and Sandžak Democratic Party president Rasim Ljajić received death threats because of his calls for the extradition of the ICTY indictees Mladić and Karadžić to The Hague (*Blic*, 24 February, p. 2).

The Serbian Government dissolved the Novi Pazar municipal assembly in early April. Analysts warned there were no legal grounds for the dissolution, which was prompted by its intention to ensure a majority in the National Assembly with the support of two deputies of Sulejman Ugljanin's List for Sandžak. The dissolution followed the decision of the municipal assembly to call a vote of confidence in Ugljanin, the mayor of Novi Pazar (*Danas*, 8–9 April, p. 3). Soon after the Government decision, a Molotov cocktail was thrown at the SDP headquarters in Novi Pazar (*Večernje novosti*, 9 April, p. 5), a bomb at the municipal building (*Večernje novosti*, 12 April, p. 4), the vehicle of a local TV station was damaged (*Danas*, 10 April, p. 4) and a bomb was hurled at the house of Fevzija Murić, the leader of a party in coalition with the SDP (*Danas*, 19 April, p. 3). The caretaker city authorities banned the vote of confidence in Ugljanin on 14 May and scheduled it for 25 June (*Večernje novosti*, 15 May, p. 4). The dismissed municipal leadership nevertheless held its vote on 14 May, at which Ugljanin lost the support of the voters; at the 25 June voting, Ugljanin won a vote of confidence (*BETA*, 26 June).

Early local elections in Serbia in 2006 were also characterised by problematic moves made by Capital Investments Minister Velimir Ilić aimed at attracting voters to vote for his party New Serbia (NS). He promised them houses, roads and electric power plants if they voted for his party. He was heard to have made such promises in Kraljevo and Užice (*Vreme*, 18 May, p. 26). During the local election campaign in Leskovac in September, Ilić accused the local officials of theft and corruption and publicly threatened to have them arrested, but produced no evidence to support his allegations (*Danas*, 26 September, p. 5).

2.10.2. Referendum on Montenegro's Independence. – The Serbian Government waged a fierce campaign against the referendum on Montenegro's independence held on 21 May. Koštunica asked the EU to help have circa 270,000 Montenegrins residing in Serbia included in the Montenegrin electoral rolls so they, too, could vote (*Blic*, 8 January, p. 2).

After the referendum succeeded, Koštunica emphasised it was fraught by serious irregularities, refused to comment the results and the EU offer to help regulate the relations between the two new states (*EFE*, 1 June and *Politika*, 2 June, p. 8). The Serbian Government recognised Montenegro on 5 June but informed the nation of its move only ten days later (*Danas*, 16 June, p. 1).

Montenegrin nationals living in Serbia were offered schooling under the same conditions applying to Serbia's nationals and easy acquisition of Serbian citizenship. Soon after Montenegro gained independence, however, the Serbian Financial Ministry reached an odd decision, probably motivated by short-term interests – to raise the citizenship application fee from 2,500 to 12,500 dinars. The MIA reversed the decision in face of vehement criticism (*Večernje novosti*, 13 July, p. 2 and *Politika*, 28 July, p. 9).[338] By November, over 9,000 Montenegrin nationals permanently residing in Serbia had applied for Serbian citizenship (*Politika*, 8 November, p. 1).

338 See *Report 2005*, II.2.12.5.

2.10.3. National Assembly Activities. – The conduct of MPs caused fierce public reactions throughout 2006. Details on insults SRS deputies voiced against the then Farm Minister Ivana Dulić Marković are elaborated in Section 2.2.1 of the Report. SRS deputies also hurled insults at Defence Minister Zoran Stanković (*BETA*, 11 April).

Two SRS deputies invoked their immunity to avoid trials for endangering lives of others by dangerous weapons and violence, while another 28 deputies invoked immunity to avoid lawsuits filed against them for libel and defamation. The Assembly Administrative Affairs Committee automatically grants immunity to deputies privately sued for libel and defamation to preclude the risk of "intentional filing of such charges to obstruct the work of the parliament" (*Blic*, 20 January, p. 2).

The Responsibility for Human Rights Violations Act (Vetting Act) was not applied in 2006 either. DSS chief whip Miloš Aligrudić said that the Act was not applied because it was pointless. "The implementation of that law would give rise to fresh injustices," he said, adding that the neighbouring countries passed such laws but to "vet foreign occupation forces" (*Danas*, 2. July, p. 5).

Problems with ownership of deputy mandates in the Serbian parliament continued in 2006. Both the Constitutional Court of Serbia and the then SaM Court declared themselves incompetent on the issue of ownership of mandates of two deputies who ran on the DS list Bajram Omeragić and Esad Džudžević. Ownership of mandates in the case of former G17+ deputies Sovronije Čonjagić and Vesna Lalić also remained unresolved (*Večernje novosti*, 8 March, p. 4, *Danas*, 31 May, p. 7 and *Politika*, 31 May, p. 8).[339]

The Republican Election Commission in September restored SRS deputy Dragan Todorović's mandate in the National Assembly. Todorović had previously handed his mandate back to take the post of deputy in the SaM Assembly, which was dissolved after Montenegro declared independence (*Danas*, 8 September, p. 9).

The Assembly paid 75 million dinars to deputies to cover their costs in the 1 Jan 2005–1 May 2006 period (*Blic*, 18 May, p. 2). According to Assembly data, the party caucuses held a total of 340 meetings in that period. The party with the greatest number of seats in parliament, the SRS, had claimed the most as every SRS caucus meeting cost around 5,500 Euros.

2.10.4. Funding of Political Parties. – Only 101 of the 396 registered parties submitted their financial reports for 2005. The SRS said it owned 72 million dinars worth of property, DS claimed its property was worth 24 million dinars and DSS reported 22 million dinars in property. As many as 136 parties could not be found at the addresses listed in the government registry of political parties, wherefore they could not have been served the request to submit their financial reports (*Večernje novosti*, 20 April, p. 4).[340]

339 See *Report 2005*, II.2.12.3.

340 The working group checking the financial reports submitted by political parties concluded that the three-year application of the Act on Financing of Political Parties showed that the law

2.10.5. Political Scandals. – In 2006, Serbia again had its share of political scandals, most of which have not been resolved. Indications are that some of them, although involving criminal activity, were apparently launched for political reasons.

The scandal over the cell phone operator Mobtel broke out in January and Serbian multi-millionaire Bogoljub Karić and his family were accused of tax evasion and illegal financial activities to the detriment of the state. The state-owned mobile operator Telekom Srbija in January took over ownership of Mobtel, a company set up by the Telekom and the Karić company back in 1996 (*Politika*, 13 January, p. 1). Telekom Srbija also filed criminal charges against the Karić family, demanding they pay it 700 million Euros to compensate for unpaid dividends (*Blic*, 5 January, p. 4).

Police files actually include two accusations of tax evasion against the Karić family: one pertains to tax evasion costing the state 7.7 million DM in the 1999–2001 period and the other to tax evasion costing it 17 million DM. The Karićs are also accused of stripping the state budget of 188 million DM through illegal financial operations (*Vreme*, 9 February, p. 26). Some Karić family members fled the country and an international warrant was issued for the arrest of Bogoljub Karić (*Blic*, 25 February, p. 2).

No answers have been provided to the question on why these documents on Karić family wheeling and dealing were kept from the public for so long and why it took the state authorities four years to file the criminal charges. It can be surmised that the accusations against Karić were activated when reports came out that he had allegedly tried to win over a DSS deputy to join his party ranks; an investigation into these allegations has been opened (*Blic*, 5 January, p. 4 and *Danas*, 9 January, p. 11). It, therefore, transpires that the Serbian Government's efforts to combat crime are largely dictated by political reasons.

2.10.6. Threats to and Attacks on Politicians and Party Activists. – A number of attacks on political opponents were registered in 2006 again.

A DS activist was beaten up in Požega in January (*Danas*, 4 January, p. 5) and an incinerating device was thrown at the house of former Justice Minister Vladan Batić (*Politika*, 19 January, p. 8). A bomb was hurled at the cottage of a Loznica councillor in February (*Večernje novosti*, 11 February, p. 20). The same month, the Požarevac court convicted two persons to 10 and 4 months in jail respectively for physically assaulting an SPS deputy in the National Assembly in late 2003. (*BETA*, 3 February).

An SPS activist, who had crossed over to the NS, was assaulted with a knife in the vicinity of Leskovac in March (*Večernje novosti*, 12 March, p. 20) and the same fate befell three SPO members in Novi Sad (*BETA*, 7 March). A group of citizens in Vrbas pelted with eggs the billboard of ICTY indictee Vojislav Šešelj.

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needed to be amended. It noted that the law should specify deadlines within which detailed reports had to be submitted, that these reports needed to be accompanied by audit reports and that the law should define the authority checking the veracity of the reports and the sanctions for those who violate the law (*Danas*, 21 June, p. 5).

This prompted an SRS deputy to threaten the journalists covering the event; the police took both the journalists and the woman who organised the pelting in for questioning (*BETA*, 25 April and *Danas*, 26 April, p. 7). The same month, someone broke into the offices of parties running the Kragujevac city government (*FONET*, 24 April). In April, 10 policemen brought LDP President Čedomir Jovanović into court after he failed to appear at a trial regarding a libel lawsuit filed against him (*Danas*, 5 April, p. 7).

A fight broke out between citizens and Požega municipal councillors in May (*Politika*, 11 May, p. 11). DS activists in Užice were assaulted in June (*BETA*, 29 June) and then again in July (*Danas*, 14 July, p. 6). NGO activists in Niš were assaulted the same month while they were commemorating the anniversary of the massacre in Srebrenica (*Politika*, 12 July, p. 8). The next day, four YIHR activists were questioned twice for several hours on end by the Niš police for writing graffiti against Hague indictee Ratko Mladić. The police explained they were brought in after citizens "upset" by the graffiti reported them, but were unable to say who had written the nationalist slogans across Niš the previous year. The police questioned the four activists about their political convictions, lectured them on patriotism, insulted and threatened them.[341]

The driver of the Kikinda (SRS) Mayor in August physically assaulted a councillor from the ranks of the League of Social Democrats of Vojvodina (*Danas*, 5 August, p. 15). An LDP activist was beaten up in Novi Pazar in September (*Blic*, 2 September, p. 2). A DS activist was assaulted in Leskovac the same month (*Danas*, 16 September, p. 21); shots were fired at the house of an SDP member in Novi Pazar (*Politika*, 15 September, p. 7). During September, a DS official in Niš received death threats (*Danas*, 14 September, p. 1), the DS offices in Valjevo were broken into (*BETA*, 12 September), and an SRS member in Belgrade threatened "traitors" with maiming them (*Danas*, 30 September, p. 5).

LDP followers barged in on a DS panel discussion in Novi Sad in October (*Danas*, 6 October, p. 5), while unidentified perpetrators demolished the LDP offices (*FONET,* 27 October) and attacked its activists in Belgrade (*Danas*, 16 October, p. 7). The same month, two SRS members were assaulted in Leskovac (*Večernje novosti*, 24 October, p. 4) and their party colleagues in Belgrade insulted and assaulted their political opponents (*Blic*, 7 October, p. B2).

The Kragujevac school inspection filed misdemeanour charges against the Trstenik Technical School for political organisation and activities. The school was the venue of a local DSS convention in October 2005, in violation of the Education Act. The school principal confirmed a gathering had been held at the school, but said he had not known what it would be about and that the school had rented out its school hall on a non-working day (*Danas*, 9 August, p. 7).

341 The BCHR condemned such conduct, concluding that "police polemics on who is a hero and who a traitor are two separate issues. Policemen can forward any remarks they have about the events in the recent past to Serbia's topmost officials, only in their private capacity, as citizens, but not in their capacity of law enforcement officers." (*Blic*, *Politika* and *Danas*, 14 July, pp. 2, 7 and 7).

During the parliamentary election campaign in November and December, the media recorded attacks by SRS members on LDP activists in Zrenjanin and Belgrade (*Danas*, 1 December, p. 37 and *Blic,* 9 December, p. 4) and an assault by unidentified men on LDP activists in Belgrade (*Blic,* 3 December, p. 3). Serbian Deputy Refugee Commissioner Nikola Vukojević called on refugees to vote for the DSS-led coalition at the elections if they wanted "to get out of political anonymity". He claimed Koštunica's government had built and allocated over 3,000 apartments to refugee families (*Politika*, 21 December, p. 6 and *Danas*, 22 December, p. 9). He failed to mention that these apartments had been built thanks to foreign donations.

2.11. Special Protection of the Family and the Child

The year 2006 was characterised by more systematic and frequent reporting on domestic violence and sexual abuse of children, a trend that began in 2005 and that finally put these problems, which had been ignored and swept under the carpet for decades, into the public limelight.

Some of the Government moves belied its declarative vows that its priority was to ensure greater care of the family and the child. It first deprived children suffering from diabetes of necessary quantities of insulin and syringes free of charge,[342] and subsequently decreed that at-risk pregnant women would from now on have to pay for the prenatal medications they needed to carry their babies to full term (*Vreme*, 2 February, p. 34). It also decided to stop fully reimbursing the salaries of pregnant women unable to work, cutting the payments down to 65% of the base salary under the explanation that the Republican Health Bureau needed to cut costs, above all by curtailing non-medical expenses (*Politika*, 2 February, p. 9 and *Danas*, 3 February, p. 6).

2.11.1. Domestic Violence. – According to one survey, the ratio of reported and unreported instances of violence stands at 1:20; most violence occurs amongst spouses (*Blic*, 13 January, p. 12 and *Večernje novosti*, 27 January, p. 10).

Criminal law provisions on domestic violence are restrictively applied, according to a survey conducted by two women's NGOs in Belgrade, Novi Sad, Niš, Leskovac and Subotica. Although domestic violence warrants a penalty of up to five-year imprisonment under the law, offenders are usually handed down suspended sentences or fines; the injuries they incurred are most often qualified as "light bodily injuries". The survey also showed that the authorities restrictively interpret the concept "family member" as meaning spouses living together and not divorcing each other, but not extramarital partners or former spouses as well (*Danas*, 24 February, p. 21).

Men account for 92% of the offenders in domestic violence cases (*Večernje novosti*, 1 March, p. 6). According to Victimology Society of Serbia data, one out of two woman in Serbia is subjected to violence and intimidation, while one out of four is abused by more than one family member. Most of them (80% according to

342 See I.4.1.

various surveys) do not report domestic violence (*Politika*, 15 March, p. 10 and *TANJUG*, 22 February). Only 18.4% of the abused women leave their violent husbands (*Politika*, 23 March and 1 April, p. 11).

None of the 450 offenders, who have been criminally charged with domestic violence, have been convicted, said Director of the Safe House for Women in Belgrade Vesna Stanojević (*Blic*, 7 August, p. B5). In Belgrade alone, 156 criminal charges against perpetrators of domestic violence were filed in the first five months of 2006 (*BETA*, 9 August).

The media reported on a number of proceedings regarding domestic violence in 2006. Criminal charges were raised against a Slađan Dulić in Požarevac in January for physically and psychologically abusing his grandparents (*BETA*, 20 January). Radiša Jokić was arrested in Žagubica in April on suspicion that he had beaten his extramarital partner to death (*Blic*, 12 April, p. 11). Slobodan M. was accused of physically abusing his father in Ub in July (*Večernje novosti*, 20 July, p. 16). The Kragujevac prosecutor in August indicted Miloš S. for physically abusing his wife (*TANJUG*, 3 August).

2.11.2. Children without Parental Care. – According to Labour, Employment and Social Policy Ministry data, 1,500 children are living in orphanages while another 3,370 are living in 3,344 foster families. Although experts claim foster care is a better option for children than orphanages, children in foster families face the same problems as orphans when they turn eighteen – the social institutions stop paying the foster families for their upkeep and the youths are forced to begin leading independent lives without any help from the state. Moreover, some foster parents take in orphans and force them to work (*Vreme*, 21 September and 16 March, pp. 71 and 68, and *Večernje novosti*, 13 March, p. 16).

2.11.3. Infanticide, Abandoned and Missing Children. – Sixteen cases of infanticide were discovered in 2004 and two in 2005. The police, however, warn that these figures should be taken with a grain of salt (*Politika*, 12. januar, p. 11).

Sanja R. was arrested in Zrenjanin in March on suspicion that she had killed her newborn child (*BETA*, 23 March). Stanislava M. from Despotovac was arrested on the same charges in April (*Blic*, 4 April, p. 11). Biserka Stojanović and Siniša Todorović, suspected of strangling their newborn baby, were arrested in Zaječar in May (*Blic*, 25 May, p. 15).

Four abandoned but, fortunately, alive newborns were found in Lapovo, Sremska Mitrovica, Mataruška Banja and Vranje (*Blic*, 4 April, p. 11, and 23 April, p. 12 and *Večernje novosti*, 26 April, p. 12). Charges were raised against S. G. in Niš in September for leaving her newborn next to a garbage container (*Blic*, 27 September, p. 14).

Around 180 babies are at an average abandoned in Serbia every year and most are sent to the main orphanage in Belgrade, which is currently home to 914 abandoned children, 280 of whom are under three years of age (*Večernje novosti*, 6 April, p. 24).

The Serbian Assembly in July adopted the report by an enquiry committee that had looked into allegations on the disappearance of babies from maternity wards across Serbia in the past few decades. The committee established that 764 claims were filed with the prosecution offices by parents who, although officially told their newborns had died, still believed their babies were stolen from them; 389 of the claims were dismissed because the statute of limitations had expired. The committee called for amendments to the law to extend the statute of limitations and for the involvement of the special organised crime prosecutor and court in these cases (*Večernje novosti*, 17 July, p. 16).

2.11.4. Sexual Abuse and Violence against Children. – According to some assessments, one out of three girls and one out of seven boys are victims of sexual violence. Police records show the youngest child to have been abused in Serbia was six months old, that family abuse lasts 6 years at an average and that 9 cases of such abuse are reported every week (*Večernje novosti*, 24 July, p. 6).

Courts passed nine sentences against sexual offenders who had abused children in 2006 – three in Niš (*Blic*, 24 January, p. 12, *Večernje novosti*, 18 February, p. 20 and *Blic*, 1 April, p. 10), two in Novi Sad (*BETA*, 23 March and *Blic*, 21 November, p. 15), and one in Lajkovac (*Danas*, 26 April p. 33), one in Zrenjanin (*TANJUG*, 15 July), one in Kragujevac (*Blic*, 7 May, p. 7) and one in Valjevo (*Danas*, 28 June, p. 13)..

Courts also tried those protecting sexually abused children. Natalija Lazić, a nurse, spoke on state RTS in May 2003 about the sexual abuse of an underage Roma boy in Veliko Gradište. The Požarevac police in late 2002 filed criminal charges against Miodrag Radović and Vladimir Petrašković suspected of abusing the boy. The Veliko Gradište Municipal Court deprived the boy's biological parents of guardianship and entrusted him to the town's social welfare centre. The centre, which gave and revoked the HLC lawyers the power of attorney several times, decided on discontinuing the prosecution of the suspects in November 2003 "in the interest of the boy's mental health". The Belgrade District Court in July 06 fined nurse Lazić 50,000 dinars for libel in a lawsuit initiated privately by Radović. Lazić was also ordered to cover the 5,000-dinar court expenses and the 25,000 dinars of the plaintiff's expenses (HLC statement, 27 October, HlcIndexOut: 019–556–1).

Media reported on a large number of child rape and sexual abuse cases and investigations of such cases in 2006. Such cases were recorded in Vranje (*BETA*, 30 March, *Blic*, 29 June and 3 July, p. 14 and 15), Jagodina (*TANJUG*, 6 July), Kuršumlija (*Večernje novosti*, 29 March, p. 20 and *BETA*, 6 April), Kragujevac (*Večernje novosti*, 9 April, p. 8 and *BETA*, 4 October, p. 15), Prokuplje (*Blic*, 15 July, p. 15), Boljevac (*Večernje novosti*, 30 March, p. 12), Belgrade (*Blic*, 29 June, p. 15 *Večernje novosti*, 17 and 24 November, pp. 16 and 30 and *Blic*, 13 December, p. 15), Vrbas (*Večernje novosti*, 10 June, p. 12), Subotica (*Blic*, 17 May, p. 11 and *Večernje novosti*, 5 December, p. 12), Bujanovac (*Večernje novosti*, 20 June, p. 12), Smederevo (*Večernje novosti,* 31 May, p. 13 and *Blic*, 5 June, p. 13), Šabac (*Blic*, 20 June, p. 13 and *Politika*, 13 December, p. 12), Smederevska Palanka (*Blic*, 2

February, p. 11), Kikinda (*Blic*, 15 September, p. 12), Babušnica (*Danas*, 13 October, p. 36) and Novi Sad (*Blic,* 14 December, p. 14).

The public was appalled by the end of the trial of SOC Vranje Bishop charged with sexually abusing four boys in the 1999–2002 period.[343]

The Bishop was charged with sexual abuse in 2003 and the trial, which was moved from Vranje to Niš in 2005, began in June the same year and ended in March 2006. The Niš Municipal Court dismissed two of the four counts in the indictment because of the absolute expiry of the statute of limitations and found the Bishop not guilty on the other two counts (*Danas*, 7 March, p. 1). The District Court rejected the appeal of the prosecutor (*Večernje novosti*, 8 April, p. 12) and declared the facts in the case an official secret "in order to protect the minors" (*Danas*, 11 July, p. 7).

Bishop Pahomije sued the Novi Sad artist Živko Gvozdić because of his sculpture "Bishop Pahomije on Sunset Boulevard" the following month, alleging it was damaging his reputation and seeking 500,000 dinars in compensation for non-material damages. The Novi Sad Municipal Court simultaneously delivered Gvozdić a notice of the lawsuit, instructed him he had a 30-day deadline within which to respond to the charges and handed him the conviction fining him 500,000 to compensate the Bishop (*Danas*, 7 September, p. 29).

Media reported that trials of the accused for violence against children were held in Požarevac (*Blic*, 20 April, p. 11), Pirot (*Tanjug*, 10 August), Vranje (*Večernje novosti*, 7 November, p. 12), Subotica (*Danas*, 23 November, p. 33) and Smederevo (*BETA*, 12 December).

Proceedings on attempted murder of children were in 2006 opened in Belgrade (*Blic*, 11 January, p. 12 and *Večernje novosti*, 12 December, p. 16), Požarevac (*Večernje novosti*, 4 February, p. 10) and Zrenjanin (*Blic*, 29 December, p. 12), while investigations into reports of violence against children were conducted in Majdanpek (*Večernje novosti*, 5 March, p. 8), Negotin (*Blic,* 1 June, p. 11), Vranje (*Blic*, 4 July, p. 15), Šabac (*Večernje novosti*, 20 July, p. 13), Paraćin (*TANJUG*, 22 February), Pančevo (*Blic*, 18 November, p. 1), Subotica (*Večernje novosti*, 13 December, p. 13) and Novi Sad (*BETA*, 14 December).

2.12. Economic, Social and Cultural Rights

Serbia in 2006 still ranked amongst the seven countries with the highest unemployment rates in the world. Media reported on suicides of people who had lost their jobs. Strikes were frequent. The growth of poverty abated slightly.

2.12.1. Unemployment. – According to official National Employment Bureau data, Serbia had 911,735 unemployed in June (*Večernje novosti*, 26 September, p. 30), an unemployment rate none of the countries in transition ever faced (*BETA*, 30 January). However, according to surveys of the labour force conducted under ILO stand-

343 See *Report 2003*, II.2.6.5, *Report 2004*, II.2.10.2. and *Report 2005*, II2.12.3.

ards, 170,000 of these people are actually employed (*Blic*, 6 July, p. 8). Labour, Employment and Social Policy Minister Slobodan Lalović, however, claimed that many people were working on the black market and that the real number of unemployed citizens stood at 550,000 (*Blic*, 6 July, p. 8). Employment data show that 180,000 people are employed and working but not receiving any remuneration. These figures have prompted some economists to assess that the unemployment rate stood at as much as 33.4% (*Politika*, 4 March, p. 1).

The fact that more than one-fourth of the unemployed are in their prime, between 30 and 40 years of age (*Večernje novosti*, 26 May, p. 7), and that one third of the unemployed are under 30 years of age (*Blic*, 22 March, p. 12) gives rise to serious concern.

The Government vowed to cover the pension insurance contributions of all workers whose employers had failed to pay these contributions in the 1 January 1991 – 31 December 2003 period. A total of 308,960 applications were submitted to state bodies by such workers and the Government paid their pension insurance contributions by early 2006 (*Danas*, 17 January, p. 1).

2.12.2. Living Standard. – Statistics show that the average salary in Serbia stood at 23,148 dinars in November (*Večernje novosti*, 21 December, p. 9) and that an average household spent 38% of its total income on food (*Danas*, 2 October, p. 10). A family of four had to spend 52,077 dinars to cover the main living expenses every month, i.e. double the average salary (*Blic*, 19 December, p. 8). However, the differences in salaries by region and branch of industry are extremely big (*Večernje novosti*, 21 December, p. 9).

The 1.3 million pensioners with an average pension of 13,465 dinars also face everyday challenges to make ends meet. Even greater is the plight of 200,000 retired farmers, whom the state still owes ten 2,000-dinar monthly pensions (*Politika*, 4 November, p. 5).

Over 800,000 people in Serbia live below the poverty line. According to the World Bank, the number of poor people in Serbia fell from 9.8% in 2003 to 9.1% in 2006 (*Danas*, 2 October, p. 10). Those living on less than 6,500 dinars a month are considered poor (*Danas*, 13 July, p. 6).

World Bank data show that 650,000 of Serbia's children are poor, while some local sources claim that the number of poor children does not exceed 200,000.

Around half a million people in Serbia receive child benefits and 50,000 families are on welfare (*Danas*, 20 April, p. 8).

2.12.3. Strikes and Labour Disputes. – A large number of strikes, including hunger strikes, were staged in Serbia in 2006. Most were provoked by unpaid salaries, company mismanagement, the workers' opposition to privatisation or dismissals. Suicides caused by loss of job were officially recorded for the first time in 2006 (*NiN*, 11 May, p. 30 and *Večernje novosti*, 19 November, p. B5).

Workers of the Zemun foodstuffs plant PIK went on strike in January because their social programme was cancelled; two of the workers threatened with self-incineration (*Večernje novosti*, 31 January, p. 17). Belgrade Medical High School professors went on strike in January over the principal's unlawful spending of the school funds (*Danas*, 27 January, p. 32). Staff of Niš restaurants also staged a strike that month (*Vreme*, 12 January, p. 4). The 300-day strike of the Kruševac chemical plant Župa workers ended that month (*Politika*, 13 January, p. 14).

Policemen rallied in the Independent Police TU protested in February demanding higher salaries and payment of due benefits. Several hundred policemen *in uniform and under arms* (italics ours) staged a protest walk in Belgrade, telling citizens they did not need to worry about their safety (*Danas* and *Večernje novosti,* 9 February, pp. 5). They staged another protest in Belgrade in late May for the same reasons (*Danas*, 1 June, p. 7).

March saw strikes by staff of the military institution Karađorđevo who had not received their salaries since January 2002 (*Večernje novosti*, 21 March, p. 30), the miners working in the Resavica mine (*Politika*, 11 March, p. 9) and by workers of Kragujevac plants, who had demanded of the authorities to resolve the problems of the local industry, including the announced dismissal of 11,000 workers (*Večernje novosti*, 8 March, p. 7). The Government was greeted by the protests of workers when it arrived to hold its session in Kragujevac (*Večernje novosti*, 23 June, p. 4), just like the previous month in Užice (*Danas*, 30 May, p. 8).

Jagodina brewery workers physically clashed with the owner's private security in April (*Blic*, 8 April, p. 14). Teachers went on strike the same month, demanding higher salaries. Education Minister Slobodan Vuksanović told them there would be no increases and that their salaries would be lower for every day they were on strike (*Danas*, 4 and 20 April, pp. 6 and 5).

The dismissed workers of the Zastava car plant broke into the factory in May, demanding the payment of their overdue wages (*Politika,* 16 May, p. 11), while Belgrade cab drivers protested against unregistered cab drivers (*Danas*, 16 May, p. 29).

Teachers holding instruction abroad to children of Serbian émigrés in June demanded the state pay them the wages it owed them for the past 12 years (*Večernje novosti*, 28 June, p. 10). The management of the plant Milan Blagojević in Smederevo forbade the workers on strike to leave the factory compound and the journalists to enter it (*Danas*, 18 August, p. 6).

Health and social service staff protested in October, demanding a pay rise (*Danas*, 7 October, p. 5); the dismissed workers of the Kragujevac company Azma went on a hunger strike the same month (*Danas*, 4 October, p. 11).

When the workers of the Pirot private plant Budućnost went on strike in November, the management locked them up in the compound (*Večernje novosti*, 2 November, p. 8). Staff of the cinema company Beograd film staged a strike the

same month because they had not been paid their wages for the past 24 months (*Blic*, 17 November, p. B5).

Zastava arms factory workers went on strike in December because of the ban on export of arms to Armenia (*Politika*, 26 December, p. 15). Actors of the Novi Sad Youth Theatre held a strike the same month demanding the dismissal of the theatre director (*Blic*, 17 December, p. 15).

Many of the strikes could have been avoided if the labour market were better regulated, if the labour legislation were clearer and more precise and, notably, abided by.

The Union of Employers of Serbia in February assessed that the TU costs were extremely high; economist Milan Prokopijević estimated these costs at 149 million Euros a year. Questions can undoubtedly be raised about how TU membership fees are spent and why some TU officials have such high salaries; the Union of Employers, however, was campaigning against the Labour Act and General Collective Agreement (*Danas*, 22 February, p. 6 and *Večernje novosti*, 23 February, p. 6).

Delta Holding owner Miroslav Mišković went even further. He said that Serbia's "working class has been spoiled by self-management" at the moment when 200,000 people in Serbia were going every day to work although they had not been receiving their salaries for months. Mišković, who is advocating abidance by the law and regulations, is simultaneously prohibiting his workers from associating in TUs in his company; this is both illegal and leaves 15,800 of Delta's staff without protection (*NiN*, 16 February, p. 29 and *Večernje novosti*, 12 February, p. 13).

Tens of thousands of labour disputes were conducted in Serbia in 2006. The Property and Legal Affairs Directorate of the Defence Ministry received 100,000 salary compensation requests from army members who had in the past three years received less than thrice the average salaries they were entitled to under the Act on the Army. Over 5,000 lawsuits regarding this issue were in progress before municipal courts. The same fate befell retired army officers, several hundred of whom have already sued the Ministry. According to some assessments, the Ministry owes retired and active army members some 100 billion dinars (*Blic*, 21 February, p. 4 and *Večernje novosti*, 16 August, p. 7).

The MIA also owes its staff remuneration for night shifts, overtime and work on holidays. The Independent Police TU assesses the state owes every policemen between 10 and 15 thousand Euros. Some 3,000 policemen have to date sued the Ministry (*Blic*, 21 February, p. 4 and *Danas*, 15 December, p. 5).

A special agency for settling labour disputes has been set up by the state. During its first year of work, it resolved 1,382 individual and 14 collective labour disputes. Such settlement is becoming increasingly popular as it is free of charge i. e. the settlement costs are covered by the state, which founded the agency (*Danas*, 3 June, p. 6).

III
MAIN ISSUES – 2006

1. Adoption of the New Constitution of the Republic of Serbia

1.1. General

The adoption of the new Constitution of the Republic of Serbia was doubtlessly one of the most significant events in 2006. The National Assembly of the Republic of Serbia unanimously[344] adopted the draft of the new Constitution at its special session on 30 September 2006,[345] six years after the democratic forces came to power in Serbia, during which they had made numerous promises that Serbia would get a new and democratic Constitution without delay.[346] A Constitution in conformity with European standards was also mentioned as a short-term priority in the EU Council Decision on Principles, Priorities and Conditions in the European Partnership with Serbia and Montenegro including Kosovo[347] and qualified as such in the Serbian Government Plan for the Implementation of the European Partnership Priorities.[348] Indications that the proposal on Kosovo's final status would be presented by end 2006 were, however, qualified as the crucial reason for stepping up the pace on drafting the new Constitution, which confirms Kosovo as an integral

344 The session was attended by 242 of 250 Assembly deputies. Civic Alliance of Serbia (GSS) and Social Democratic Union (SDU) deputies did not attend the session in protest against the manner in which the draft was adopted. (B92 News, *Referendum 28 and 29 October*, 30 September 2006, http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=30&nav_id=213693&nav_category=11).

345 Decision to Call the Republican Referendum to Endorse the New Constitution of the Republic of Serbia and the Text of the Draft Constitution of the Republic of Serbia, *Sl. glasnik RS,* 83/06.

346 A number of draft Constitutions were published in the meantime. More on drafts proposed by political parties and the civil sector in Z. Lutovac (ed.) *New Serbian Constitution Drafts*, 2004, Friedrich Ebert Stiftung. In addition, two more drafts were proposed by the Government of the Republic of Serbia and a group of independent experts rallied by Serbian President Boris Tadić.

347 Official Journal of the European Union, 2006/56/EC, 7.2.2006.

348 http://www.seio.sr.gov.yu/upload/documents/EP/final_pep2006%20lat.pdf.

part of Serbia.[349] Citizens endorsed the new Constitution at the referendum held on 28/29 October 2006. The National Assembly officially promulgated the Constitution on 8 November 2006.[350]

1.2. Constitutional and Legal Procedure for Amending the Constitution and Holding a Referendum

1.2.1. Amending the Constitution. – The 1990 Serbian Constitution envisaged a difficult procedure for making any amendments to the highest law of the republic. The proposal to amend the Constitution could have been submitted by at least 100,000 voters, 50 deputies, the President of the Republic or the Government. The proposal had to be upheld by a two-thirds majority of all Assembly deputies (Art. 132), a majority also required for the adoption of the act amending the Constitution that then had to be endorsed by over half of *all* Serbian voters at a referendum. Under Article 133, the procedure for amending the Constitution ended with the promulgation of the new act amending the Constitution by the National Assembly.[351]

Under Article 134, a constitutional law had to be enacted for the enforcement of the amendments to the Constitution by a two-thirds majority of all votes in the National Assembly.

On 28 September 2006, the day before the Assembly deputies voted on the draft Constitution, the Assembly Rules of Procedure were amended to allow for the holding of special parliamentary sessions.[352] Under the amended Rules of Proce-

349 See, *inter alia*, B92 News, *Date of Constitution Referendum to be Set Soon*, 20 September 2006 (http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=20&nav_id=212452&nav_category=11); Danas, *Lončar: Work on Text of Constitution Ongoing Round the Clock,* 26 September 2006; B92 News, *Consultations on Constitution Continue,* 27 September 2006 (http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=27&nav_category=11&nav_id=213253); International Crisis Group, *Serbia's New Constitution, Democracy Going Backwards*, 8 November 2006. (http://www.crisisgroup.org/library/documents/europe/balkans/b44_serbias_new_constitution___democracy_going_backwards.pdf).

350 Decision on the Promulgation of the Constitution of the Republic of Serbia, *Sl. glasnik RS,* 98/06.

351 An Act on Amending the Constitution of Serbia was passed to facilitate the procedure of changing the Constitution (*Sl. glasnik RS*, 39/03, 5/04). It envisaged that a new Constitution was ratified if it received the votes of more than half of the voters who turned out (instead of half of the whole electorate) on condition that turnout was minimum 50% (Art. 9 (2 and 3)). The legal grounds for the Act were found in Article 65 of the Constitutional Charter, under which the member states need to conform their Constitutions to the Constitutional Charter, and which the adopters of the Act interpreted as indicating legal and political discontinuity. The Constitutional Court of Serbia, however, found that the Act, as a legal enactment subordinate to the Constitution, cannot alter a constitutionally prescribed procedure and proclaimed the Act unconstitutional (Constitutional Court of Serbia Decision IU No 168/03 of 25 March 2004, *Sl. glasnik RS*, 34/04).

352 Decision to Amend the Republic of Serbia National Assembly Rules of Procedure (*Sl. glasnik RS,* 81/06).

dure, the Assembly Speaker is *inter alia* authorised to call a special session for the adoption of a draft Constitution and the promulgation of the Constitution and the Constitutional Act (Art. 114a (2) of the Decision to Amend the Republic of Serbia National Assembly Rules of Procedure). The deputies are notified of such sessions at least seven days in advance and, exceptionally, sooner. Under the Decision, the Assembly Speaker is obliged to explain why s/he called a special session at the beginning of the session (Art. 84 (2)).

1.2.2. Referendum. – In accordance with the Venice Commission's Guidelines for Constitutional Referendums at National Level, the following principles must be abided by when holding referendums: a) constitutional principles of electoral law (universal, equal, free, direct and secret suffrage); b) fundamental rights, especially the freedom of expression, the freedom of assembly and freedom of association must be guaranteed and protected; c) the use of referendums must comply with a state's legal system as a whole – referendums cannot be held in a state if its Constitution does not provide for them; and, d) judicial review should be available under provisions on referendums.[353] According to the Guidelines, the question posed at the referendum must be clear and unambiguous and must not be misleading or suggesting an answer. Information about the subject of the referendum must be provided by the authorities sufficiently in advance. The explanation of the subject must give a balanced presentation not only of the executive and legislative authorities' viewpoint but also the opposing one. The Venice Commission highlighted that although it is not necessary to completely prohibit the intervention of the authorities supporting or opposing a proposal submitted to referendum, the authorities must not influence the outcome of the vote by excessive, one-sided campaigning. Accordingly, although the Venice Commission does not totally rule out the use of public funds by the authorities for campaigning purposes, it maintains that it must be prohibited in the month preceding the referendum.[354] The supporters and opponents of the proposal voted on must *inter alia* be provided with equal campaigning, advertising and airtime opportunities and equal public funding. It recommends that these issues be regulated by the Constitution or the law.[355]

The referendum procedure in Serbia is regulated by the Act on the Referendum and Popular Initiative.[356] A referendum is called by the National Assembly at

353 Venice Commission, *Guidelines for Constitutional Referendums at National Level,* CDL-INF(2001)010, 11 July 2001. (http://www.venice.coe.int/docs/2001/CDL-INF(2001)010-e.asp); These issues were elaborated in greater detail in the *Guidelines on Holding of Referendums* adopted by the Council for Democratic Elections at its 18th meeting and by the Venice Commission at its 16th Plenary Session, 8 November 2006 (http://www.venice.coe.int/docs/2001/CDL-INF(2001)010-e.asp).

354 *Ibid.*

355 *Guidelines on Holding of Referendums* adopted by the Council for Democratic Elections at its 18th meeting and by the Venice Commission at its 16th Plenary Session, 8 November 2006 (http://www.venice.coe.int/docs/2001/CDL-INF(2001)010-e.asp).

356 *Sl. glasnik RS,* 48/94 and 11/98.

the proposal of at least 50 deputies, the Government or minimum 100,000 voters (Art. 10 (1)). All citizens with suffrage under electoral law and permanently residing in the territory in which the referendum is held are entitled to vote at the referendum,[357] as are the voters outside the territory if the voting at the referendum relates to their rights and obligations as well (Art. 4 (1 and 2)). The referendum results are binding. If the referendum fails, a fresh referendum on the same issue cannot be called within the next six months. (Art. 26).

Under the Act, the question the citizens are voting on at the referendum must be formulated "clearly" so that the citizens can reply by "yes" or "no" i.e. "for" or "against" unless they are to choose amongst more than two options (Art. 19). Citizens are entitled to complain to the referendum commission about irregularities that occurred during the referendum procedure (Art. 19 (1) and Art. 27 (1 and 3)) within 24 hours from the time the irregularity occurred. The commission shall review the complaints within 48 hours (Art. 27 (1 and 3)). Its decisions may be appealed with the Supreme Court of Serbia, which must review the appeals within 48 hours (Art. 29 (2)). As the Act on Referendum and Popular Initiative does not set time limits for appeals to the Supreme Court, the 48-hour deadline prescribed by Article 97 (2) of the Act on Election of People's Deputies[358] applies as set out in Article 42 of the Referendum Act, which stipulates the application of this election law to issues not regulated by the Referendum Act. In their recommendations on Serbian electoral legislation, the Venice Commission and ODIHR/OSCE noted the need to extend the deadlines for filing complaints and appeals in order to take into account any delay between the adoption of a decision and the notification of the decision to the person affected by it.[359]

1.3. Adoption of the New Constitution of the Republic of Serbia

The 1990 Constitution procedure for amending the Constitution was generally respected during the adoption of the new Constitution. However, the adoption of the final draft and the referendum were accompanied by lack of full transparency, irregularities during the voting and strong media pressures on the citizens during the two referendum days. International organisations differently assessed the procedure in their reports. In its periodic report on Serbia's progress towards EU integration in

357 A referendum may be held in the territory of the whole republic or in parts of it, in the territory of an autonomous province, municipality or city (Art. 11).

358 *Sl. glasnik RS,* 35/00, 57/03 – Constitutional Court Decision USRS, 72/03-dr. Act, 75/03-amdt. Act, 18/04, 101/05- dr. Act and 85/05- dr. Act.

359 Venice Commission and ODIHR, *Joint Recommendations on the Laws on Parliamentary, Presidential and Local Elections and Electoral Administration in the Republic of Serbia*, 17–18 March 2006, CDL-AD(2006)013.

2006, the EU Commission qualified the adoption of the new Constitution of Serbia as welcome development, but highlighted the absence of "adequate" public consultation during the final stage of the drafting process.[360] In their report, the CoE Parliamentary Assembly monitors also noted the absence of public debate and use of the lack of media silence to boost the turnout at the referendum, the insufficiencies of the electoral rolls, inadequate technical prerequisites ensuring the secrecy of voting and preventing the abuse of votes. Despite the noted irregularities, the monitors assessed that the referendum was 2006 was, in general, conducted with due respect for Serbia's democratic commitments to the Council of Europe.[361] On the other hand, the International Crisis Group vehemently criticised various aspects of the process and concluded that the irregularities that accompanied the adoption of the new Constitution seriously brought into question the degree of democracy in Serbia today.[362]

1.3.1. Lack of Public Debate. – There was absolutely no public debate at which the general and expert public would have had the opportunity to give their opinions on the provisions of the future Constitution; even the representatives of the Vojvodina authorities and of the minority communities in Serbia were not invited to the consultations on the final draft. The 1990 Constitution did not stipulate public debates, which have in the meantime become a democratic tradition aimed at ensuring the transparency of work of state bodies and civic participation. Under Article 77 (1) of the 2005 State Administration Act,[363] state administration bodies drafting laws substantially changing the legal regime in a specific area or regulating issues of special interest to the public must submit the drafts for public debate. As mentioned above, this obligation, however, had not been explicitly envisaged in the articles on amending the Constitution.

Media first released unofficial news of the imminent completion of the new Constitution in September 2006. The Government and President each delegated a representative to work on the final draft of the Constitution after reaching agreement in principle on some provisions that had until then been disputable.[364] Officials stated that the final text would harmonise the Government and President' drafts presented in 2004 and 2005 and take into account the suggestions made by the Ser-

360 European Commission *Serbia 2006 Progress Report*, SEC (2006) 1389, 8 November 2006. (http://www.seio.sr.gov.yu/code/navigate.asp?Id=48).

361 CoE, Parliamentary Assembly, *Observation of the constitutional referendum in Serbia (28 and 29 October 2006), Report*, *Doc. 11102,* 22 November 2006, (http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC11102.htm).

362 International Crisis Group, *Serbia's New Constitution, Democracy Going Backwards*, 8 November 2006.

363 *Sl. glasnik RS,* 79/05.

364 B92 News, *Date of Referendum on Constitution to be Set Soon,* 20 September, 2006. (http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=20&nav_category=11&nav_id=212452&fs=1).

bian Radical Party (SRS) and the Socialist Party of Serbia (SPS).[365] The final text of the new Constitution was agreed on "behind closed doors" and very soon submitted to the Assembly for adoption. Although the media on 25 September reported that the Assembly may vote on the new Constitution on 29 or 30 September,[366] not only the general public but the Assembly deputies, Vojvodina and Serbian Government officials as well had no idea of what it said in the days preceding the Assembly session.[367] The media managed to gain insight in some of the provisions the day before the special session; the final text of the Constitution was, however, harmonised only a few hours before the session, once the political parties reached agreement on the remaining disputed provisions.[368] Calls by representatives of the civil sector and Vojvodina authorities to put off the vote on the draft until a public debate on the text was held and the Vojvodina Assembly representatives had the chance to comment it went unheeded.[369] Leading Government officials responded to criticisms of the absence of a public debate by claiming that the debate had been ongoing for years and that there was enough time to debate the draft in the month leading up to the referendum.[370] These statements demonstrate the authorities' lack of understanding of the need for a public debate, the very purpose of which is to maximally improve the provisions of draft legislation. Furthermore, any public debate on the draft Constitution after its endorsement by the Assembly was pointless because no changes to the text could have been made. During the Assembly's spe-

365 Statement by Zoran Lončar, the Serbian Government representative who took part in the drafting of the Constitution (B92 News, *Government Earmarked Money for Referendum*, 21 September 2006), http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=21&nav_category=11&nav_id=212666&fs=1).

366 B92 News, *Assembly to Adopt New Constitution on Saturday?* 25 September, 2006, (http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=25&nav_id=213042&nav_category=11).

367 B92 News, *Consultations on Constitution Continue,* 27 September 2006. (http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=27&nav_category=11&nav_id=213253) Statements by Serbian Deputy Prime Minister Ivana Dulić-Marković at the celebration of the International Right to Know Day and by Vojvodina Assembly Speaker Bojan Kostreš, B92 News, *Final Draft of Constitution to Appear Tomorrow*, 29 September 2006, (http://www.b92.net/info/vesti/index.php?nav_category=11&dd=28&mm=9&yyyy=2006).

368 B92 News, *Final Draft of Constitution to Appear Tomorrow*, 29 September 2006 (http://www.b92.net/info/vesti/index.php?nav_category=11&dd=28&mm=9&yyyy=2006); Danas, *Referendum in November,* 30 September 2006.

369 Request of the Civic Initiatives, Helsinki Committee for Human Rights and Lawyers Committee for Human Rights to the chair of the National Assembly Constitutional Commission (Blic, *NGOs Write to Constitutional Commission – Arrogance of Authorities regarding the Adoption of the Constitution*, 28 September 2006, http://www.blic.co.yu/blic/arhiva/2006-09-28/strane/politika.htm) and Vojvodina PM Bojan Kostreš's unofficial request to Serbian PM Vojislav Koštunica (B92 News, *Agreement on New Constitution Forged,* 29 September 2006, http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=29&nav_category=11&nav_id=213509).

370 Danas, *Debate Lasted for Years,* 18 October 2006. (http://www.danas.co.yu/20061018/hronika1.html).

cial session, citizens rallied in front of the building, protesting against the manner in which the new Constitution was being adopted.[371] They were joined by representatives of some political parties and NGOs.[372]

1.3.2. Independence and Impartiality of Authorities Charged with Conducting the Referendum. – Pursuant to Venice Commission Guidelines, the authority charged with implementing the referendum and establishing the results of the voting must be independent and impartial.[373] The composition of the referendum commissions and other bodies organising the referendum ought to be regulated by law.[374] The Act on the Referendum and Popular Initiatives envisages the establishing of bodies that will conduct the referendum but does not contain provisions regulating the composition of these bodies. The Act on the Election of People's Deputies, on the other hand, regulates the permanent and extended membership of the Republican Election Commission (REC) and polling station (PS) boards, but does not envisage commissions at a level between the REC and the PS boards. Under its Decision on the referendum, the Assembly charged the REC with conducting the plebiscite and thus with establishing municipal commissions and PS boards.[375] Although the REC opted for the criterion of proportional representation of parliamentary political parties in the municipal commissions and PS boards, in its Decision on the Appointment of the Republican Referendum Municipal Commission Chairmen, Deputy Chairmen, Members and Deputy Members and Binding Instructions to Constitutional Referendum Municipal Commissions, it only listed the SRS, DSS, DS, G17+, SPS, NS and Independent MPS 9+9 and the SPO as parties that could delegate commission and PS board members and their deputies and thus excluded the other parliamentary parties.[376] Two parliamentary parties that were left out, the GSS and SDU, filed a complaint, underlining that their exclusion was aimed at preventing parties calling for the boycott of the referendum from monitoring the process.[377] Their complaint

371 B92 News, *Assembly Adopts Draft Constitution,* 30 September 2006. http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=30&nav_category=11&nav_id=213654.

372 Čedomir Jovanović, the President of the Liberal Democratic Party (LDP), Nenad Čanak, the President of the League of Social Democrats of Vojvodina (LSDV), and Nataša Kandić, the Director of the Humanitarian Law Centre (HLC), were amongst the protesters (*Ibid.*).

373 Venice Commission, *Guidelines for Constitutional Referendums at National Level,* CDL-INF(2001)010, 11 July 2001. (http://www.venice.coe.int/docs/2001/CDL-INF(2001)010-e.asp)

374 Council for Democratic Elections and the Venice Commission *Guidelines on Holding of Referendums,* 8 November, 2006. (http://www.venice.coe.int/docs/2006/CDL-AD(2006)027rev-e.asp).

375 Decision to Hold a Referendum to Endorse the New Constitution of the Republic of Serbia, *Sl. glasnik RS,* 83/06.

376 See REC, Decision on the Appointment of the Republican Referendum Municipal Commission Chairmen, Deputy Chairmen, Members and Deputy Members (*Sl, glasnik,* 84/06) and REC, Binding Instructions to Constitutional Referendum Municipal Commissions (*Sl. glasnik RS,* 88/06 and 89/06).

377 Civic Alliance of Serbia statement, *GSS Prevented from Monitoring Referendum – Koštunica Trying to Abolish the Opposition,* 10 October 2006 (http://www.gradjanskisavez.org.yu/srp/saopstenja2.php?id=782).

was dismissed because it was filed after the statutory deadline, while the Supreme Court of Serbia dismissed their appeal because Article 9 of the Act on Referendum and Popular Initiative does not entitle political parties but only citizens to complain about irregularities.[378] The REC subsequently amended its decision and allowed the above-mentioned parties to delegate their members to the referendum bodies, but only to an extent. The parties, however, refused in protest.[379] Criteria applied during the appointment of members of the referendum bodies were also subject to criticism and even prompted the resignations of the Pirot Municipal Referendum Commission Secretary and Deputy Secretary. They said that party appointments to the referendum bodies were turning the issue of the Constitution, which was equally important to all citizens of Serbia, into a political issue and that the Pirot referendum bodies did not reflect the real will of the municipality's citizens at all.[380]

REC decisions allowed for barring the opposition parties from membership in referendum bodies. Minority parties, on the other hand, were entitled to delegate one member and deputy only to referendum bodies in municipalities in which the minority parties commanded a majority in the municipality and from amongst the ranks of the strongest minority party.[381] Therefore, minority party representatives were unable to take part in the work of referendum bodies in towns where these requirements were not fulfilled. Some analysts underlined that national minority party representatives were appointed to referendum bodies where such parties "had made a deal with Belgrade".[382]

1.3.3. Kosovo Albanians' Right to Vote. – The issue of the Kosovo Albanians' suffrage also arose during the referendum, as it was conducted in the whole state because the Constitution is an issue concerning all citizens. Moreover, emphasis was laid on the inalienability of Kosovo during the whole Constitution adoption process. Ever since 1999, most of the Albanian population in Kosovo have not fulfilled one of the chief prerequisites for voting – they have not been registered in the electoral rolls. After the referendum was called, Serbian PM Vojislav Koštunica said that the electoral rolls used at all elections since 2000 (and not including Kosovo Albanians) would be used at the referendum.[383] The public explanation was that the

378 Danas, *Referendum Monitored by CeSID and Some Parties,* 10 October 2006.

379 Under the Decision, GSS and SDU were allowed to have members in 1.2% of the referendum bodies, Danas: *Suspicions of Referendum Fraud*, 17 October 2006, (http://www.danas.co.yu/20061017/hronika1.html#1); REC, Decision: 014-182/06 of 13 October 2006.

380 Danas, *Secretary and Deputy Resign,* 16 October 2006.

381 See REC, Decision on the Appointment of the Republican Referendum Municipal Commission Chairmen, Deputy Chairmen, Members and Deputy Members (*Sl, glasnik,* 84/06).

382 International Crisis Group, *Serbia's New Constitution, Democracy Going Backwards*, p. 8, 8 November 2006; B92 News REC, CESiD: *Constitution Endorsed*, 29 October 2006. (http://www.b92.net/eng/news/politics-article.php?yyyy=2006&mm=10&dd=29&nav_category=90&nav_id=37631).

383 B92 News, *Referendum Scheduled for 28 and 29 October,* 30 September 2006. (http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=10&dd=12&nav_id=215138&order=priority).

Kosovo Albanians had deprived themselves of the right to vote by boycotting the elections held to date. The day before the deadline for closing the electoral roll expired, the leaders of the Coordination Centre for Kosovo and Metohija called on the Kosovo Albanians to take part in the upcoming referendum and enter their names in the electoral rolls subsequently.[384] However, their invitation failed to include any information on where and how the Albanians could register. Some analysts qualified the invitation as the Serbian authorities' attempt to blame the Albanians for their non-appearance at the referendum. The International Crisis Group (ICG) underlined that the referendum would have failed "unequivocally" had the Kosovo Albanians been represented in the rolls given the 1990 Constitution requirement on the minimum number of votes needed to amend the Constitution. The Kosovo Albanians were not included in the total electorate eligible to vote at the referendum.[385]

1.3.4. Media on the Adoption of the New Constitution. – The adoption of the new Constitution was accompanied by a strong media campaign. During the campaign, representatives of political parties and NGOs advocating the boycott of the referendum had on a number of occasions complained that they were ignored by the media and that a campaign was being waged against them.[386] The Independent Association of Journalists of Vojvodina (NDNV) called on the Republican Broadcasting Agency (RRA) to react to the biased and partial reporting by the public broadcasters Radio TV of Serbia and RTV of Vojvodina, claiming their programmes were "almost exclusively" carrying the views of the supporters of the new Constitution and thus undermining the rights of those parts of society urging the boycott of the referendum.[387] The RRA replied that it was not within its remit to assess the degree of objectivity and impartiality of the two broadcasters and underlined the law obliged it to monitor their reports only during election campaigns. It explained it was not empowered to interfere in the broadcasters' editorial policy except in cases of hate speech and that all other issues were regulated by the Public Information Act.[388]

384 B92 News, *Kosovo Albanians and Electoral Rolls,* 12 October 2006. (http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=10&dd=12&nav_id=215138&order=priority).

385 Danas, *Referendum Electorate – 6.6 Million,* 16 October 2006. (http://www.danas.co.yu/20061016/hronika1.html).

386 The ICG noted that the views of the Constitution opponents had not been advertised on TV at all and that only the daily Danas ran a paid advertisement calling on the citizens to boycott the referendum. (ICG, *Serbia's New Constitution, Democracy Going Backwards*, pp. 5 and 7, 8 November 2006). Some media, on the other hand, ran articles vilifying the anti-referendum campaigners and accusing them of acting on behalf of Kosovo's independence. The same message was heard at a happening at Belgrade's Main Square staged by Kosovska Mitrovica students and members of the Kosovo-based Serbian National Council (Kurir, *Shiptar Lobby*, 25 October 2006, B92 News, *Insults Hurled at Advocates of Boycott*, 24 October 2006. http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=10&dd=24&nav_category=11&nav_id= 216785&fs=1).

387 NDNV, *RTS and RTV Reporting is Not Objective,* 25 October 2006, (http://www.ndnv.org/saopstenje.php?id=64).

388 Danas, *How to Measure Partiality of Broadcasters*, 27 October, 2006, (http://www.danas.co.yu/20061027/frontpage1.html).

The media campaign did not abate during the two days of voting either. The Act on the Referendum and Popular Initiative does not regulate media silence, while the Act on Election of People's Deputies envisages 48-hour media blackouts and prohibits public assemblies within the 2-day period preceding election-day and until the polls close (Art. 5 (3)). REC decided there was no need to introduce a media blackout during the voting because, as it explained, *all* parliamentary parties had reached a consensus on the new Constitution.[389] This explanation is quite lame (not least because not all parliamentary parties unanimously supported the new Constitution). After it transpired that the turnout on the first day of the referendum, 28 October, was low, media began exerting stronger pressures on the citizens to vote. They kept on reminding them of the Kosovo issue throughout the day. The daily Glas javnosti on 29 October published a readers' letter entitled "Boycott is in the Service of Independent Kosovo", while TV Pink changed its schedule and aired the movie "Battle of Kosovo". TV Palma Plus was reporting that representatives of Albanians in Kosovo were planning celebrations to mark the failure of the referendum in Serbia.[390] Representatives of political parties supporting the referendum kept on appealing to the citizens to vote for the new Constitution at the referendum, emphasising that its failure would be "disastrous for Serbia", have "inconceivable consequences",[391] that it would mean the beginning of a "protectorate and dictatorship".[392] Appeals were broadcast throughout the regular afternoon TV programmes. Reporting on the turnout on the second day of the referendum was marked by an incident when RTS interrupted its live coverage of the press conference by the NGO CeSID, which was monitoring the referendum, when its representatives started reporting on voting irregularities.[393]

1.3.5. Irregularities during Voting. – Voting at the referendum lasted two days, on 28 and 29 October 2006. The National Assembly thus departed from the customary one-day voting, explaining that the referendum would last two days because the issue of the referendum was extremely important and because two-day voting would give those who initially thought they would not vote but changed their minds the chance to vote on the second day.[394] The Act on the Referendum and Popular Initiative merely mentions the *date*, i.e. *day* of the referendum (Art. 12 (1) and Art. 20 (1.2)).

389 CoE, Parliamentary Assembly, Observation of the constitutional referendum in Serbia (28 and 29 October 2006), Report.*Doc. 11102,* 22 November 2006.

390 Vreme, *Turnout at Referendum: Upping the Votes,* 2 November 2006. (http://www.vreme.com/cms/view.php?id=470014).

391 Statements by Vojislav Koštunica and Tomislav Nikolić (Kurir, *Just Barely,* 30 October 2006, http://www.kurir-info.co.yu/Arhiva/2006/oktobar/30/V-01-30102006.shtml).

392 B92, *Marković; Democracy or Dictatorship,* 29 October 2006 http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=10&dd=29&nav_id=217615).

393 Danas, *Shadow of Doubt over Referendum,* 1 November 2006, (http://www.danas.co.yu/20061101/dogadjajdana1.html#top).

394 Danas, *Marković; Two Days to Sleep Peacefully,* 2 October 2006, (http://www.danas.co.yu/20061002/frontpage1.html).

A number of irregularities were reported during the two-day referendum, more on the second day of voting. For instance, a surplus of ballots was found in ballot boxes in a number of towns. An incident broke out in Veliki Trnovac, the Bujanovac Municipality, on 28 October when the villagers established that there was a surplus of 131 ballots and that most of the registered voters had been listed as having voted despite the open referendum boycott by the Albanian population.[395] More ballots than signatures on electoral rolls were also found in a PS in the Sandžak town of Novi Pazar, where it was established on 29 October that the number of cast ballots the previous day had increased by some 20% overnight, while the station was closed.[396] As stipulated by the Regulations issued by the REC, PS members were obliged to constantly keep vigil over the voting material from the closing of the polling stations on the first day until their reopening the next morning.[397]

A significant discrepancy in turnout figures also appeared when data presented by the referendum bodies and those collected by the local parties that had unofficially monitored the turnout were compared. Whereas official bodies claimed turnout in the Sandžak municipalities of Tutin, Sjenica and Novi Pazar had stood at 60%, the Party for Sandžak claimed it had footage from several polling stations proving the turnout there ranged between 5% and 8% during the two days. The Party for Sandžak claimed in its statement that the representatives of the DS and G17+ had on 29 October left the polling stations and stood in front of them until they were closed.[398]

According to CeSID's report, major irregularities were noted on the second day of the voting, mostly in Ruma, Jagodina, Novi Pazar, Tutin, Obrenovac, Trstenik and Čačak.[399] Their monitors observed that some people voted on behalf of other voters, the casting of ballots in place of absent voters, as well as family voting; some monitors noted that the UV lamps were not used in several polling stations and that some voters were allowed to vote although they had not first producied their IDs. CeSID qualified the work of the referendum bodies as the "worst" in the past six years.[400]

395 ICG, *Serbia's New Constitution, Democracy Going Backwards,* 8 November 2006, p. 8; B92 News, *REC, CeSID: Constitution Endorsed,* 29 October 2006, (http://www.b92.net/eng/news/politics-article.php?yyyy=2006&mm=10&dd=29&nav_category=90&nav_id=37631).

396 CoE, Parliamentary Assembly, *Observation of the constitutional referendum in Serbia (28 and 29 October 2006), Report*, *Doc. 11102,* 22 November 2006.

397 Article 14 (2) Regulations on the Work of the Serbian Constitution Referendum Boards, *Sl. glasnik RS,* 84/06.

398 Danas, *Murić: Results in Novi Pazar, Tutin and Sjenica Forged,* 3 November 2006, (http://www.danas.co.yu/20061103/dogadjajdana1.html#6).

399 CeSID's monitors were present at 600 of the 8,401 polling stations in Serbia (Danas, *Who did not Turn out at the Referendum*, 31 October 2006, http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=10&dd=31&nav_category=11&nav_id=217912).

400 B92 News, *Two Steps Back,* 31 October 2006, (http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=10&dd=31&nav_category=11&nav_id=217972).

A group of NGOs also reported the above and other irregularities.[401] They were notified that members of one "referendum commission" in Pančevo were reportedly visiting some registered voters exhorting them to come and vote and that one commission member allegedly circled YES on a number of empty ballots during the vote count.[402] It was also observed that party symbols had been put up near some polling stations, which is in contravention of the law and the Regulations on the Work of the Serbian Constitution Referendum Boards.[403] During the referendum, an activist of the Liberal Democratic Party (LDP) monitoring the turnout at the Jagodina polling station No. 74 was physically attacked by a member of the PS board, while another LDP activist in Niš was taken into custody.

Of 182 appeals filed with the Supreme Court regarding the voting, 15 were dismissed because they were filed too late, while the rest were rejected as unfounded. The appeals challenged the lawfulness of municipal commission decisions on complaints about the manner in which the citizens voted at the polling stations or the commissions' non-consideration of the complaints.[404]

1.3.6. Lack of Control of the Constitutionality and Legality of Enactments. – The Constitutional Court of Serbia was effectively not functioning at the time of the referendum. Its work, rendered difficult due to the lack of judges in the preceding months, was paralysed by the mandatory retirement of Court President Slobodan Vučetić in October. Neither the 1990 Constitution nor the relevant legislation prescribe that a deputy or acting Court President can perform the duties of Court President, whose term in office has terminated.[405] The situation could have been remedied only by the President of Serbia nominating a candidate for the post and the National Assembly electing him or her. A new Court President was, however, not appointed, although the President nominated a candidate in early October.[406] Hence, the Constitutional Court did not even consider the motion to assess the legality and constitutionality of the Assembly Decision to Call the Republican Referendum to Endorse the New Constitution of the Republic of Serbia and its compliance with the Serbian Constitution and the Act on the Referendum and Popular Initiative filed by

401 Youth Initiative for Human Rights, Helsinki Committee for Human Rights, Humanitarian Law Centre and Lawyers Committee for Human Rights, *Analysis of the Irregularities that Occurred during the Referendum Organized for the Purpose of Confirming Republic of Serbia's Constitution*, November 2006. www.yihr.org.yu.

402 *Ibid.*

403 Article 55 of the Act on Election of People's Deputies and Article 5 (2) of the Regulations on the Work of the Serbian Constitution Referendum Boards (*Sl. glasnik RS,* 84/06). Under the Regulations, members of the boards were duty-bound to remove such symbols or notify the competent communal inspection about them.

404 RTS News, 7 November 2006, (http://www.rts.co.yu/jedna_vest.asp?belong=&IDNews=166519).

405 B92 News, *Constitutional Court President Withdrawing,* 13 September 2006, (http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=13&nav_category=12&nav_id=211568& fs=1).

406 Articles 73 (10) and 83 (2) of the Constitution of the Republic of Serbia, *Sl. glasnik RS,* 1/90; Blic, *Constitutional Court Still Blocked,* 21 October 2006, (http://www.blic.co.yu/blic/arhiva/2006-10-21/strane/politika.htm).

the Centre for Cultural Decontamination, the Helsinki Committee for Human Rights in Serbia, the Youth Initiative for Human Rights and the Lawyers Committee for Human Rights. These organisations also requested of the Court to take interim measures and halt the enforcement of individual enactments and actions taken in accordance with the Decision.[407]

1.3.7. Outcome of the Referendum. – Despite some discrepancies in the final referendum turnout figures, both REC and CeSID confirmed that enough ballots had been cast to endorse the new Constitution. Turnout was low on the first day and both REC and CeSID reported that some 17.5% voters had voted that day.[408] The sudden increase in turnout was recorded on 29 October after 1400 hrs. Estimates are that the turnout from that time until the stations closed averaged 4% per hour.[409] REC's final report states 54.91% of the voters turned out at the referendum, 53.04% of whom had voted for the new Constitution. According to CeSID, the turnout totalled 53.3% and 51.4% of the voters voted for the new Constitution.[410] The referendum failed in Vojvodina, where the overall turnout stood at merely 46%.[411] Representatives of some political parties and analysts in Vojvodina noted that the province's citizens thus demonstrated their disapproval of the way the new Constitution was adopted and its provisions on Vojvodina.[412]

2. Freedom of Access to Information of Public Importance

The Serbia and Montenegro Charter on Human and Minority Rights and Civil Liberties had ranked the right to free access to information of public importance within the fundamental human rights in Article 29 (2). When the state community disintegrated, this right found itself in a legal vacuum for a while.

407 YUCOM – statement, *NGOs file motion for assessment of constitutionality and legality of Assembly Decision to Call the Republican Referendum to Endorse the New Constitution of the Republic of Serbia* (http://www.yucom.org.yu/SrpskaVerzija/KomitetPravnika.asp).

408 CeSID, *Referendum on New Draft Constitution of Serbia* (http://www.CeSID.org/rezultati/sr_okt_2006/index.jsp); REC Statements, *Fourth Regular Press Conference,* 28 October 2006, (http://www.rik.parlament.sr.gov.yu/cirilica/saopstenja_frames.htm).

409 B92 Poligraf, *Post-Referendum Lessons and Messages,* 30 October 2006, (http://www.b92.net/info/emisije/poligraf.php?yyyy=2006&mm=10&nav_id=217894).

410 REC, *Report on Results of Republican Referendum Endorsing New Draft Constitution of the Republic of Serbia,* 2 November 2006, http://www.rik.parlament.sr.gov.yu/cirilica/propisi/ReferRezul28-291006.htm.

411 *Ibid.*

412 Danas, *Disagreements over Constitution May Lead to Break-Up of Ruling Coalition in Provincial Parliament*, 31 October 2006, (http://www.danas.co.yu/20061031/hronika1.html); Deutsche Welle, *Analysts: Insufficient Autonomy for Vojvodina Prompted its Citizens to Boycott Referendum, (http://www.yihr.org/Srpski/ustav/linkovi/ANALITICARI%20VOJVODJANI%20BOJKOTOVALI%20ZBOG%20MALE%20AUTONOMIJE.php).*

The new Constitution of the Republic of Serbia regulates the freedom of access to information under a partly unusual (and inappropriate) title "Right to Information". Article 51 (1) of the Constitution guarantees persons within the state's jurisdiction the right to receive true, full and prompt information on issues of public importance and envisages the corresponding duty of the media to enable the exercise of this right. The formulation of the provision is «left hanging» as it corresponds neither to the freedom of expression, from which the freedom of access to information derives (Art. 46 (1) of the Constitution), nor to the right to participation in the administration of public affairs (Art. 53), as this *sui generis* right may be qualified as the expression of participative democracy. The freedom of access to information in the true sense of the word is regulated by para. 2 of Article 51, although this definition of the bodies from which information may be requested is much more restrictive than the one in the Act on Free Access to Information of Public Importance.

Experts expressed concern over the objective of the provision in Article 5 (1) of the Constitutional Act on the Implementation of the Constitution, under which the new Parliament will at its first session harmonise with the Constitution "the law regulating the realisation of the right of citizens to information and appoint... the authority charged with monitoring the realisation of the public's right to information...". This provision is extremely vague and allows for various interpretations even *prima faciae*. Moreover, there is clearly no need to harmonise the Access to Information Act with the Constitution as the provision on access to information was included in the draft after the Commissioner intervened. Moreover, the provision reduces the current administrative powers of the Commissioner for Information of Public Importance regarding the implementation of the Act to the mere monitoring of the realisation of this right, normally an Ombudsman's competence. The current Commissioner believes the authors of the Constitutional Act included the provision to "repudiate the very institution of Commissioner".[413]

The Serbian Assembly passed the Act on Free Access to Information of Public Importance on 5 November 2004 and it came into effect on 13 November 2004 (*Sl. glasnik RS*, 120/04). Serbia thus joined the group of 68 countries (as of November 2006)[414] that recognise the right to access information held by public authorities.

Article 2 of the Act defines information of public importance as information held by a public authority created during its work or related to its work and regarding anything the public has a justified interest to know. It is, however, unclear why the legislator opted for defining information of public importance rather than for accepting the internationally acknowledged standards and regulating access to official documents.[415]

413 "If I'm really such a nuisance, they could have resolved the issue in another way", *Blic*, 10 November 2006, p. 4.

414 David Banisar, Freedom of Information and Access to Government Records Law Around the World 2006, http://www.freedominfo.org/countries/index.htm.

415 See Committee of Ministers Recommendation Rec (2002) 2E on access to official documents.

The Act commendably includes the National Assembly and courts within the list of authorities that must provide access to information, although the CoE Committee of Ministers' Recommendation Rec (2002) 2E allows member-states to prescribe a somewhat different legal regime for these bodies. The legislator however failed to expand the scope of the Act to include natural persons entrusted with the exercise of administrative public powers (Art. 3).[416]

The formulation of the provision in Article 4 in conjunction with Article 2 introduces the justified interest clause. This clause may not be derogated from only if information regarding the risk to i.e. protection of the population's health or environment is at issue. In all other circumstances, the public authority may disregard the clause, whereupon it must take into account also the provisions in Articles 5, 8, 9, 13, 14 and 15, para. 4, of the Act and establish whether the public has the justified interest to know the information in each specific case.

Article 5 of the Act affords everyone the right to know whether a public authority holds specific information, to have access to the information by insight in the document that contains it, and to be issued a copy of the document, i.e. to have a copy of the document s/he requested forwarded to him or her by post, fax, electronic mail or in another manner. Article 6 stipulates that the rights in the Act may be exercised by all natural and legal persons under equal conditions, while Article 7 prohibits the discrimination of journalists and media in the exercise of the right to access information.[417] The Act contains progressive norms in para. 8 of Article 16 (allowing for a person unable to access information without an escort to be assisted by an escort when accessing an official document), Article 17 (4) (allowing for exemptions from the obligation to reimburse the necessary costs of document reproduction and forwarding), Article 18 (4) (obliging the public authority to enable access i.e. copy the document in the language in which the request for access to information was made, even if the language in the specific case is not the official language of the authority, if the public authority is in possession of a document with the required information in the language in which the request was submitted). However, the provision in para. 2 of Article 18 diminishes the importance of these liberal provisions by limiting the right of the applicant to freely choose the medium in which s/he will be issued a copy of the document (in writing, audio, video, digital or another form).

Access to information of public importance is guided by the principle that exemptions from the exercise of this freedom must be established clearly and precisely. Provisions in Article 9 setting conditions under which free access to informa-

416 *Ibid.*

417 The fact that the government favours specific media in contravention of this legal provision drew public attention with respect to an official memo on the conversation the Police Minister and the Director of the Security Intelligence Agency (BIA) had with the prime accused in the trial of Zoran Đinđić's assassins the night he turned himself in; the copy of the alleged document was published in the daily *Press* just before the Police Minister forwarded it to the journalist of *RTV B92,* who had filed the request to access this piece of information of public importance.

tion can be denied fall short of internationally recognised standards in that respect. For instance, the provision in para. 1 allows a public authority not to provide access to information if such access would endanger "another vital interest of a person". The public authority is thus given excessive discretionary power to interpret what falls within the scope of that phrase. The same applies to the following formulations "seriously imperil international relations" (para. 3) – because each state activity can ultimately be linked to its international relations; and "substantially undermine the government's ability to manage national economic processes or significantly impede the fulfilment of justified economic interests" (para. 4). The provision in para. 5 allowing for prohibition of insight in classified documents is especially controversial given that Serbia still lacks complementary legislation that regulates the classification of secrets, wherefore public authorities' access to information officers do not have a mechanism to help them assess whether the required information is classified.

The lack of complementary legislation is evident also with respect to the application of Article 14 of the Act, which allows for withholding access to information that would violate another person's right to privacy. The Data Protection Act adopted in May 1998 by the then FRY Federal Assembly, on the one hand, deviates significantly from contemporary standards applied in this area; on the other hand, even the authorities, which are to apply it, are unaware of its existence. The necessity to enact a new law on the protection of personal data arises also from the facts that Serbia ratified the CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data[418] and that the new Constitution regulates this right in Article 42.

Under Article 15, the request for access to information is filed in writing and the applicant need not list the reasons therefor (paras. 1 and 4). The public authority is obliged to provide access to information also on the basis of an oral request registered in the minutes (para. 7).

The Act lays down a dual regime of deadlines within which the access to information requests must be met. Under the general regime, the authority is duty-bound to act on the request without delay, within a maximum of 15 days from the day it was filed; this deadline may be extended to a maximum of 40 days from the day of filing for justified reasons but the authority must notify the applicant thereof as soon as it establishes that it is unable to fulfil the request within the original deadline (Art. 16 (1 and 3)). A special regime applies to «privileged information» regarding the risk i.e. protection of public health and the environment, when the authority must provide access to information within 48 hours (Art. 16 (2)). The length of the initial 15-day deadline was heavily criticised by the media, which, as a rule, need access to information immediately.

Under the Act, insight in a document comprising the requested information is free, while the public authority shall charge the applicant only the necessary costs

418 Act on the Ratification of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, *Sl. list SRJ (Međunarodni ugovori*), 1/92 and *Sl. list SCG (Međunarodni ugovori*), 11/05.

of duplication and shipment of the copy of the document (Art. 17 (1 and 2).[419] Hitherto, only a few public authorities have charged the applicants, although some have charged fees exceeding the necessary costs several times over.[420]

Article 22 regulates the right to a complaint. The clauses in paras. 1.1 and 2 are interesting with respect to the application of these provisions. The former affords the applicant the right to complain if the authority refuses to notify him or her about whether it possesses the required information or to provide insight in the document containing the information or to issue or forward him or her a copy of the document, or fails to do so within the prescribed deadline. Article 46 (1 (6)) qualifies the failure of a public authority to provide access to the required information as a misdemeanour. In fact, most complaints the Commissioner received in 2005 regarded this very issue.[421] The provision in Article 22 (2) exempts the six topmost state bodies from the jurisdiction of the Commissioner and their failure to provide access to information can be challenged only by filing administrative complaints to the Supreme Court of Serbia. This provision groundlessly reduces the powers of the Commissioner, weakens the transparency of these institutions and deters the citizens from seeking information from them given the costs and duration of court proceedings. Hence, an initiative has been launched to pass an Act amending the Act on Free Access to Information of Public Importance which would revoke the provisions in Article 22 (2 and 3).[422]

Another important initiative on amending the Act regards the introduction of the institute of the so-called "whistle-blower", which would afford protection to persons who breach confidentiality and allow access to a document if there is an overriding justified interest therefor (e.g. if the document contains information on a crime, corruption, et al).[423]

Provisions regarding access to information in other, notably procedural laws, also affect the implementation of the Access to Information Act. Most of these laws (the CPC, General Administrative Procedure Act, the Misdemeanour Act) regulate insight in case files but the person, who wishes to exercise this right, must prove s/he has a legal interest in accessing such information. The Police Act also contains provisions negating the freedom of access to information (Art. 5, *Sl. glasnik RS*, 101/05), as does the draft Act on Foreign Investments (Art. 28 (4)). The provision in the latter draft law, which explicitly envisages that information on investments shall not be publicly available within the meaning of the law on access to

419 As envisaged by the Act, a price list was adopted by the Decree on Reimbursement of Necessary Costs of Duplicating Documents with Information of Public Importance, *Sl. glasnik RS,* 120/04.

420 Report on the Implementation of the Act on Free Access to Information of Public Importance, Commissioner for Information of Public Importance of the Republic of Serbia, March 2006, p. 18.

421 *Ibid.*

422 Application of the Act on Free Access to Information of Public Importance – Monitoring Report, Fund for an Open Society, Belgrade, June 2006, p. 18.

423 *Ibid.*

information, is, ironically, laid down in an article entitled „Efficient Communication". On the other hand, the State Administration Act (*Sl. glasnik RS*, 79/05) and the Civil Service Act (*Sl. glasnik RS*, 79/05, 81/05 and 83/05) are rare laws the provisions of which (Art. 11 (2) and Art. 8 respectively) oblige the state authorities i.e. state employees to provide the public with information about their work in keeping with the provisions in the law regulating free access to information of public importance. The Joint Declaration adopted on 6 December 2004 by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression needs to be mentioned in this respect as it includes a principle envisaging that the access to information law should, to the extent of any inconsistency, prevail over other legislation.

The Act on Free Access to Information of Public importance establishes the institute of Commissioner, a second-instance authority vis-à-vis the public authority bodies, which are duty-bound to provide required access to information, and empowered to undertake a number of other measures required for the proper and efficient implementation of the law. The Commissioner and Deputy Commissioner are appointed to seven-year terms in office by the National Assembly and may be reappointed (Arts. 30 and 33). The Commissioner is an autonomous and independent institute; this status is additionally guaranteed by the provision on remuneration equalling that of a Supreme Court judge (Art. 32 (1 and 3)).

However, the authorities' commitment to the free access to information is best reflected by the fact that the competent Government bodies provided the Commissioner with the offices, basic equipment and other material and technical facilities he needed six months after he was appointed, wherefore he only began to work in July 2005. His office is to have 21 employees, but only 6 persons are employed at the moment as the premises designated to the Commissioner are too small. Only three of them are processing the cases; the Commissioner's Office reported it was having problems dealing with the huge backlog back in March 2006.[424] When the National Assembly Administrative Committee was due to adopt the book of regulations regarding the Commissioner's Office job systematisation in September 2006, the SDPO deputy Tomislav Kitanović walked out of the session in demonstration, leaving the Committee without a quorum and explaining he was "generally against the interminable increase in administration". The book of regulation was thus not adopted.[425]

The Government took an especially critical view of the Commissioner after he ordered the BIA to comply with the request for information filed by the NGO Youth Initiative for Human Rights (YIHR), which had asked how many wiretapping requests had been filed and how many people were wiretapped in accordance with

424 Report on the Implementation of the Act on Free Access to Information of Public Importance, Commissioner for Information of Public Importance of the Republic of Serbia, March 2006, pp. 5, 6 and 15.

425 "Kitanović: Commissioner Šabić is Amassing Administration", *Danas*, 19 September 2006, p. 5.

such requests in 2005. The Supreme Court of Serbia dismissed the BIA administrative complaint challenging the Commissioner's order. This event prompted Justice Minister Zoran Stojković to accuse the Commissioner of working against the state.[426] As BIA failed to comply with the Commissioner's order even after the Supreme Court decision, conditions in Article 28 (2) of the Act on Free Access to Information of Public Importance were met and the Government of the Republic of Serbia was to have executed the Commissioner's decision. True to form, however, the Government again failed to fulfil this legal obligation.[427]

The authorities' disputable attitude towards the application of the Act, above all of the executive, is also exemplified by the lack of supervision of its implementation. Under Article 45, the implementation of the Act is to be supervised by the Serbian Culture and Information Ministry, which is also charged with initiating misdemeanour proceedings against authorities breaching its norms. The Commissioner's Office submitted 222 cases containing elements of a misdemeanour to the Ministry in the 27 September 2005–27 February 2006 period,[428] but no misdemeanour charges have been filed.[429] This is one of the reasons why the initiative to amend the Act includes the suggestion that the jurisdiction of supervising its implementation be transferred to the State Administration and Local Self-Government Ministry.

Only 46 state bodies have fulfilled the legal obligation to draft and publish information directories on their work.[430] Of the 18 Government ministries, 11 have published information directories; the Government, which belongs to the category of the so-called topmost state bodies in terms of Article 22 (2), has also failed to publish such a directory. The Commissioner assessed that the Ministries of Culture, Capital Investments, alongside the Ministries of Justice, Mining and Energy, Trade, Tourism and Services and Foreign Economic Relations had the greatest problems complying with the Act, as they had *inter alia* failed to publish information directories on their work within the legal deadlines. Culture and Information Minister Kojadinović on that occasion said: "We have held press conferences at which we publicised what the Ministry has been doing... What more need we do now, publish brochures on our work, spend money for no reason?",[431] while the Capital Investments Minister said: "Well, I'm not writing a directory, that is the job of specific services, they should be addressed and no problem. But, there are so many various

426 "Who BIA is Wiretapping is a State Secret", *Blic*, 5 June 2006, p. 8.

427 Report on the Implementation of the Act on Free Access to Information of Public Importance, Commissioner for Information of Public Importance of the Republic of Serbia, March 2006, p. 14.

428 Report on the Implementation of the Act on Free Access to Information of Public Importance, Commissioner for Information of Public Importance of the Republic of Serbia, March 2006, p 13.

429 "Substandard Implementation of the Information Law", B92, 30 June 2006.

430 Report on the Implementation of the Act on Free Access to Information of Public Importance, Commissioner for Information of Public Importance of the Republic of Serbia, March 2006, p 21.

431 "Media Minister Hiding Information", *Blic*, 15 April 2006, p. 2.

controllers and agencies and associations and all kinds of people, believe me, I could spend all day every day receiving them. They're really overdoing it."[432]

The vast majority of state bodies have failed to train their staff in the implementation of the Act, as envisaged by Article 42. In its Report for Serbia, the CoE Group of Countries against Corruption (GRECO) in June 2006 noted this shortcoming and recommended that public authorities provide civil servants with training regarding the public's right under the Act on Free Access to Information.[433]

The fulfilment of the obligation in Article 43, which obliges the public authorities to submit to the Commissioner annual reports on the implementation of the Act, has also been substandard. Although the register of entities obliged to implement the Act has not been set up yet, it is presumed that several thousand bodies ought to be included in it; of that number, only 310 state bodies fulfilled the obligation although the Commissioner extended the initial deadline for submitting the reports.

To conclude, the realisation of the right to freely access information in Serbia is facing serious challenges. Full and high-quality implementation of the Act on the Free Access to Information of Public Importance calls for the fulfilment of a number of requirements encompassing a broad spectrum of measures – from political and legal to administrative, material and technical. Such great resistance to the freedom of access to information and the Act enabling the exercise of this freedom comes as no surprise when the problem is viewed through the prism of the fact that this Act introduces the concept of good governance and transparency of work of public authorities that is to counter the deeply rooted tradition of secrecy shrouding the running of state affairs and ruling people.

3. International Criminal Tribunal for the Former Yugoslavia

3.1. Introduction

The International Criminal Tribunal for the Former Yugoslavia (ICTY)[434] in the Hague was established by UN Security Council Resolution (UNSCR) 827 of 21 May 1993 to try persons responsible for serious violations of international humanitarian law committed on the territory of the former SFRY since 1991. The Tribunal's activities are defined by its Statute, an integral part of UNSCR 827 and the judicial procedure is defined by the Rules of Procedure and Evidence adopted by the ICTY's judges. The Tribunal has three organisationally independent bodies: the Chambers, the Office of the Prosecutor (OTP) and the Registry (Art. 11 of the Stat-

432 "Undisciplined Ministers", *B92*, 19 April 2006.

433 "Evaluation Report on the Republic of Serbia – Joint First and Second Evaluation Round", GRECO, Strasbourg, 12–23 June 2006, http://www.coe.int/t/dg1/greco/evaluations/round2/GrecoEval1-1 (2005)1rev_Serbia_EN.pdf.

434 For basic data on the ICTY and chronology, see *The Activity of ICTY and National War Crimes Judiciary*, Igor Bandović (ed.), Beogradski centar za ljudska prava, 2005.

ute). The ICTY and national courts have concurrent jurisdiction to prosecute war crimes, crimes against humanity and genocide, although the ICTY has primacy and may take cases over from national courts (Art. 9, Statute). Article 7 of the Statute provides for individual criminal responsibility and command responsibility. Given that the ICTY has no coercive mechanism, all states are required to co-operate with it, primarily by apprehending persons indicted by the Tribunal and collecting evidence (Art. 29, Statute). Co-operation with the ICTY and its procedures are regulated by the Act on Co-operation with the ICTY.[435]

The President of the ICTY is Judge Fausto Pocar, while Ms. Carla Del Ponte was re-appointed ICTY Chief Prosecutor by UNSCR 1504.

Pursuant to UNSCR 1503, the ICTY is to complete its work by 2010 and the Prosecutor was to complete all investigations and issue any new indictments by the end of 2004. The ICTY's completion strategy includes several elements. First, the ICTY will try only the most senior perpetrators, who are suspected of being the most responsible for crimes committed in the former Yugoslavia and whom the states are the least capable of bringing to justice due to internal political problems. ICTY Rules of Procedure and Evidence were amended for that purpose. Rule 28 specifies that an indictment that does not meet the standard of seniority shall not be assigned to an ICTY Trial Chamber. Second, the ICTY may refer a certain number of cases to local courts in keeping with Rule 11*bis*; cases may be referred to a court in a state on whose territory the crime was committed, a state in which the indictee was arrested or another state willing and adequately prepared to accept such a case on condition that the indictee is guaranteed a fair trial and cannot be sentenced to death. The Tribunal and the Office of the Prosecutor are actively helping in building the capacities of national courts to conduct war crime trials.

Pursuant to the ICTY completion strategy, the prosecution was to have raised all indictments by the end of 2004. Some of these indictments were, however, unsealed in 2005. All proceedings initiated in 2005 – Delić (IT–04–83), Perišić (IT–04–81), Haradinaj et al (IT–04–84) – are in the trial stage.

3.2. Judgments Passed in 2006[436]

Momir Nikolić (IT–02–60/1)

Momir Nikolić was convicted to 27 years' imprisonment by the Trial Chamber for crimes committed in Srebrenica. The Appeals Chamber reduced the sentence to 20 years in jail as it found that a translation error had a negative influence on the determination of Momir Nikolic's sentence.

435 The Act on Co-operation of Serbia and Montenegro with the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (*Sl. list SRJ*, 18/02; *Sl. list SCG*, 16/03). More on the Act in *Report 2005*, IV.2.5.1.

436 ICTY judgments and convictions are available at http://www.un.org/icty/cases-e/index-e.htm

Enver Hadžihasanović and Amir Kubura (IT–01–47)

Enver Hadžihasanović and Amir Kubura, high-ranking commanders in the Bosnia-Herzegovina Army, were sentenced to five and two and half years in jail respectively. The Tribunal established they had omitted to take the necessary and reasonable measures to prevent or punish the perpetrators of crimes that were committed by the troops under their command in Bosnia in 1993 and early 1994.

Milomir Stakić (IT–97–24) – "Prijedor"

The Trial Chamber found Milomir Stakić guilty of murder, extermination, persecution and deportation of the non-Serb population of Prijedor in 1992. Stakić was convicted to life imprisonment, the maximum sentence the ICTY can pass. The Trial Chamber upheld the conviction on 22 March 2006.

Mladen Naletilić and Vinko Martinović (IT–98–34) "Tuta and Štela"

The Trial Chamber on 3 May 2006 upheld the convictions and sentences pronounced against the Bosnian Croat commanders Mladen Naletilić *aka* Tuta, and Vinko Martinović *aka* Štela. The Trial Chamber had convicted Naletilić to 20 years' imprisonment and Martinović to 18 years in jail for participating in the ethnic cleansing of Bosnian Moslems in the Mostar area in the April 1993-January 1994 period.

Ivica Rajić (IT–95–12)

The Trial Chamber convicted former commander of the Bosnian Croat Army Second Operational Group Ivica Rajić to 12 years' imprisonment. He was found guilty of involvement in an attack on the central Bosnian village of Stupni Do in October 1993, when 31 civilians were killed. The judgment states he was responsible also for the destruction of the village and played a major role in arresting over 250 Moslem men in Vareš, who were later subjected to inhumane treatment.

Naser Orić (IT–03–68)

Naser Orić, former Bosnian Moslem commander in the Srebrenica area, was found guilty and sentenced to two years in jail for failing to take steps to prevent the killing and cruel treatment of a number of Serb prisoners in the former UN Protected Area. The judges established that the ICTY had no other case in which the accused was found guilty of having failed to prevent murder and cruel treatment of prisoners in such a limited manner and in such abysmal conditions as in this case and that the sentence needed to reflect this uniquely limited criminal responsibility.

Momčilo Krajišnik (IT–00–39)

Momčilo Krajišnik, former Republika Srpska Assembly Speaker, was convicted to 27 years in jail for the persecution, extermination, killings, deportation and forcible transfers of non-Serb civilians during the war in Bosnia-Herzegovina. The Trial Chamber acquitted Krajišnik of charges of genocide and complicity in genocide and the charges of murder (violations of the laws or customs of war)

Vladimir Kovačević (IT–01–42/2)

The Trial Chamber declared former Commander of the Third Battalion of the Yugoslav People's Army Trebinje Brigade Vladimir Kovačević unfit to stand trial.

Milan Babić (IT–03–72)

Milan Babić was found dead in his cell in the ICTY Detention Unit on 5 March 2006. The ICTY had convicted Milan Babić to 13 years' imprisonment for crimes against non-Serb civilians in the self-proclaimed Serb political entity in eastern Croatia (which later formed the Republic of Serb Krajina). The conviction had been upheld by the Appeals Chamber. Babić was testifying in the trial of Milan Martić at the time of death. He had also testified in the trial of Slobodan Milošević.

Blagoje Simić (IT–95–9)

Local Bosnian Serb politician Blagoje Simić was found guilty and convicted to 17 years in jail by the Trial Chamber for the persecution of non-Serb civilians in the Bosanski Šamac Municipality in the 17 April 1992–31 December 1993 period. The Appeals Chamber reduced the sentence to 15 years. The Appeals Chamber concluded that Simić was guilty of persecution based upon unlawful arrest and detention of non-Serb civilians and their confinement under inhumane conditions. The Appeals Chamber amended the part of the sentence related to participation in a joint criminal enterprise the objective of which was to persecute non-Serb population in the Bosanski Šamac Municipality and to persecution based upon cruel and inhumane treatment including torture and beatings.

Stanislav Galić (IT–98–29)

The Appeals Chamber upheld the appeal of the Prosecution and replaced Stanislav Galić's 20 years' imprisonment sentence by life imprisonment. Galić, a former Bosnian Serb Army commander, was found guilty of participation in the campaign of sniping and shelling civilians in Sarajevo in the September 1992-August 1994 period. This was the first time the ICTY Appeals Chamber pronounced the maximum penalty.

Tihomir Blaškić (IT–95–14)

The Appeals Chamber dismissed the prosecution's motion to review the conviction of former Bosnian Croat commander Tihomir Blaškić, who had been accused of persecution, unlawful attacks on the civilian population, wilful killing, taking civilians as hostages and using them as "live shields", crimes against Bosnian Moslems in central Bosnia. Blaškić was released on 2 February 2004 after serving his nine-year prison sentence.

Contempt of Court Judgments

The ICTY found Ivica Marijačić, Markica Rebić and Josip Jović guilty of contempt of court in 2006 and fined them between 15 and 20 thousand Euros each.

The ICTY opened contempt of court proceedings against 18 persons, including indictees, lawyers, witnesses, journalists and others. They are accused of violating the provisions related to the administration of justice by revealing the identity of protected witnesses, intimidating the witnesses, publishing confidential court documents and violating protective measures.

3.3. Trial of Slobodan Milošević

The trial of former FRY President Slobodan Milošević was discontinued on 14 March 2006 after Milošević was found dead in his cell in the ICTY detention unit on 11 March. Milošević had been indicted for genocide, complicity in genocide, deportation, murder, persecution on political, racial and religious grounds, inhumane acts, forcible transfers, extermination, imprisonment, wilful killing, unlawful confinement, wilful causing of great suffering, unlawful deportation or transfer, extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, cruel treatment, plunder of public or private property, attacks on civilians, destruction or wilful damage done to historic monuments and institutions dedicated to education or religion, unlawful attacks on civilian objects, wilful infliction of great suffering, all committed in the territories of Croatia, Bosnia-Herzegovina and Kosovo.

3.4. Cooperation in Practice

The Serbian Government persistently avoided cooperation with the ICTY in 2006, entailing the arrest and handover of all ICTY indictees in accordance with national and international law. This led to the suspension of Serbia's talks on the Stabilisation and Association Agreement with the EU.

Serbia still needs to fulfil its main obligation: to arrest and extradite former Bosnian Serb Army Commander-in-Chief General Ratko Mladić, as both the ICTY President and Prosecutor underlined in their reports to the UNSC on 15 December 2006. Six indictees, the most important being Radovan Karadžić and Ratko Mladić, were still at large at the end of the reporting period. The ICTY will continue to work until they are brought to justice.

4. Human Rights Situation in Kosovo and Metohija in 2006

4.1. Introduction

International civilian and military administration in Kosovo and Metohija was set up in accordance with UN Security Council Resolution (1999).[437] The administration rests on four 'pillars': UNMIK, charged with the entire civilian admin-

437 UN doc. S/RES/1244, 10 June 1999.

istration, OSCE, tasked with organising elections and building democratic institution, the European Union, which is in charge of reconstruction and economic development, while the fourth pillar comprises UNMIK police and the Department of Judicial Affairs. The Special Representative of the UN Secretary General (SRSG) heads UNMIK and is the supreme legislative and executive authority.

The SRSG in 2004 delegated more of UNMIK's powers to the local authorities. However, the judiciary, police and legislation remain exclusively within the jurisdiction of UNMIK. As over the preceding years, the tempo and volume of delegating powers remained conditioned by the proper functioning and democratisation of local institutions in Kosovo. On the path to resolving Kosovo's final status, UNMIK continued insisting on the headway which Kosovo as a maturing society needed to achieve, and on the fulfilment of "Standards for Kosovo".[438]

Several changes occurred at Kosovo's helm in 2006.

The President of Kosovo, Ibrahim Rugova died in January and Fatmir Seidiu was elected his successor in February.

Kosovo PM Bajram Kosumi resigned in March and the Kosovo Assembly elected a new Government and Kosovo Protection Corps (KPC) commander Agim Ceku as its Prime Minister. Ceku was nominated for the post by Ramush Haradinaj's Alliance for the Future of Kosovo.

UNMIK Chief Soren Jessen Petersen in June announced he would be leaving Kosovo. UN Secretary General Kofi Annan in August appointed German diplomat Joachim Rucker head of the UN Mission in Kosovo.

In late 2005, Martti Ahtisaari, former President of Finland and one of the architects of the agreement putting an end to air strikes on the FRY and establishing the international mission in Kosovo, was appointed Special UN Secretary-General's envoy for talks on the status of Kosovo. The status overshadowed all other issues in Kosovo throughout 2006.

In the first half of 2006, when the final status talks still had not gained in momentum, several factors helped ease the relations between the Albanian majority and Serbian minority in Kosovo. The fragile stability of the inter-ethnic relations was, however, shaken in the latter half of 2006, when it became clear that the decision on Kosovo's final status was imminent.

The unknown fate of the large number of persons, who have gone missing during the armed conflicts in Kosovo, has not helped the situation any. Headway was made in this area in 2006 with Serbia's and Kosovo's institutions meeting a number of times to discuss this burning issue. Although the results of the meetings were symbolic, the fact that the first steps have been made, albeit with a huge delay, are encouraging.

438 The "Standards for Kosovo" document, presented on 10 December 2003, encompasses a wide range of human rights defining priority Kosovo standards in this area. The document was qualified as unacceptable by most Serbian government representatives soon after it was adopted. *Report 2003*, III 3.5 elaborates in greater detail the "Standards for Kosovo" and the Serbian authorities' stand on the document.

Apart from a few exceptions, perpetrators of serious crimes are still free and there are no indications that they will soon face justice.

The authority of the Kosovo judiciary remains weak notwithstanding efforts to consolidate this branch and increase the number of judges and prosecutors. The Republic of Serbia's judicial system is operating in parallel in the Kosovo enclaves with a majority Serbian population.

The human rights situation in Kosovo has also been adversely affected by the organisation of local government institutions, where party affiliation is the main criterion guiding appointments.

Shortcomings in the work of the Kosovo Police Service (KPS) are still evident, as the large number of unresolved murders and serious crimes corroborates.

The latest example of the obvious weaknesses in the training and work of the KPS was the murder of a suspect the police were taking in a police car to the Peć District Attorney for questioning. This was the second time a suspect died whilst under KPS escort.

The UN Human Rights Committee reviewed the UNMIK report on the implementation of the ICCPR in Kosovo. The Committee welcomed the work of the Ombudsperson Institution and the promulgation of a Provisional Criminal Code, while expressing concern over the continuing impunity enjoyed by perpetrators of war crimes and crimes against humanity committed during the ethnic violence that preceded the UN mission's mandate, as well as the low priority given to cases of missing persons.[439]

4.2. Human Rights in Kosovo Legislation in 2006

According to the procedure under which laws are adopted and promulgated in Kosovo, draft laws are submitted to the Assembly, which debates and adopts them. These laws come into force only upon promulgation by the SRSG. The SRSG, however, promulgates the laws only after an incomprehensibly long bureaucratic procedure during which they have to get the "green light" of the UN Legal Affairs Office in New York.

The enactment of the Law on the Administrative Procedure is a good example of the lengthy procedure applied in Kosovo for nearly seven years now: although the Assembly of Kosovo passed the law on 22 July 2005, it only came into force on 13 May 2006, when the SRSG promulgated it. The Law on Associations and NGOS passed by the Assembly of Kosovo on 23 March 2005, however, still is not in force as the SRSG has not promulgated it yet.

Nearly all issues related to the Kosovo legal system still fall within the so-called reserved rights of the international community. The legal system will appar-

439 Vidi http://www.unmikonline.org/archives/news07_06full.htm#2807.

ently remain within the remit of the international bodies in Kosovo even after the UNMIK mission is replaced by EUMIK.

The sources of law applying in Kosovo remain the same as in 2005, notably:

- Laws in force in Kosovo on 22 March 1989;
- UNMIK Regulations;
- If a subject matter or situation is not covered by laws applicable on 22 March 1989 or UNMIK Regulations, laws adopted in Kosovo after 22 March 1989 shall apply if they are not discriminatory and are in keeping with international human rights instruments.

Moreover, the following seven international legal documents directly apply in Kosovo:

1. The Universal Declaration of Human Rights;
2. European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto;
3. The International Covenant on Civil and Political Rights and Protocols thereto;
4. The International Covenant on Economic, Social and Cultural Rights
5. The Convention on Elimination of All Forms of Racial Discrimination
6. The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment; and
7. The International Convention on the Rights of the Child.

In addition, the laws passed by the Assembly of Kosovo are also in force in Kosovo.

With respect to international instruments, it should be noted that there is a discrepancy between the Constitutional Framework and UNMIK Regulation 1999/24 listing the international treaties directly applicable in Kosovo. The Constitutional Framework does not mention the International Pact on Economic, Social and Cultural Rights and The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment listed in UNMIK Regulation 1999/24, but it does include two new international instruments: the European Charter for Regional and Minority Languages and the CoE Framework Convention for the Protection of National Minorities.

Of the laws passed in 2006, only a few affect the development and protection of human rights in Kosovo, notably:

- Family Law,
- Law on the Freedom of Religion in Kosovo,
- Law on the Use of Languages,
- Cultural Heritage Law, et al.

All in all, the impression is that the relevant authorities strove to improve the state of human rights in Kosovo in 2006. Their efforts, however, have remained in the domain of theory for now; in practical terms, however, there has been no or merely negligent headway in this area.

4.2.1. Court System

The Kosovo court system comprises the Supreme Court, five District Courts, the District Economic Court, 26 Municipal Courts, the Kosovo Public Prosecutor's Office, five District Public Prosecutor's Offices, seven Municipal Public Prosecutor's Offices, High Court of Minor Offenses, 23 Municipal Minor Offense Courts, 5 regional detention centres, the prison in Dubrava and the Lipljan prison for women and juveniles.

In addition, a special chamber was established within the Kosovo Supreme Court under UNMIK Regulation 2002/13 that deals only with disputes regarding the privatisation process conducted by the Kosovo Trust Agency.

The department of the Priština Municipal Court in Gračanica established in 2005 is still operating, but its jurisdiction is quite limited.

4.2.2. Independence and Impartiality of the Courts

In addition to Article 6 of the ECHR that guarantees the right to trial before independent and impartial courts, this right is also envisaged by the Kosovo Constitutional Framework (Art. 9.4.3, Section 4, Chapter 9), under which:

> Each person shall be entitled to have all issues relating to his rights and obligations and to have any criminal charges laid against him decided within a reasonable time by an independent and impartial court.

The judicial appointment procedure is initiated by the publication of a public announcement. The candidates selected on the basis of their examination results proceed to complete several-month training. Their results are assessed by the members of the Kosovo Judicial Council, which forwards the list of selected candidates to the SRSG, who appoints them by a separate special decree (Art. 1.15, UNMIK Regulation. 2005/52).

Although the number of judges has symbolically increased in 2006, Kosovo courts still need many more judges than they currently have. The lack of judges and prosecutors is the consequence of the extremely modest budget allocation for this purpose. Moreover, judicial bodies are to let go a number of staff due to lack of funds.

Judges are overburdened by huge backlogs they cannot adjudicate within a reasonable time. For instance, the Đakovica Municipal Court has a backlog of 35,000 cases and only four judges.

Working conditions remain as substandard as in 2005 and the vast majority of trials were held in inadequate premises in 2006.

Criminal cases in Kosovo are tried exclusively by international judges and criminal indictments and investigations are handled by international public prosecutors. Their status is, much better than that of the local judicial staff. UNMIK Regulation No. 2000/6 on the Appointment and Removal of International Judges and Prosecutors, supplemented by UNMIK Regulation No. 2000/34 addresses the issue of the removal of international judges and prosecutors in case of serious misconduct, failure in the due execution of office or placement by personal conduct or otherwise in a position incompatible with the due execution of office. In practice, however, no international judge or prosecutor has to date been dismissed for unprofessionalism or abuse.

4.2.3. Due Process

In Kosovo, the practical application of the right to a fair trial falls short of the guarantees of this right enshrined both in the international treaties, the national laws and the Constitutional Framework (Chapter 9, Art. 4.3).

4.2.3.1. Adversariness. – The principle of adversariness is guaranteed by Article 10 (2) of the PCPC of Kosovo, under which:

> The defendant has the right and shall be allowed to make a statement on all the facts and evidence, which incriminate him or her, and to state all facts and evidence favourable to him or her. He or she has the right to examine or to have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

Under Article 142 (1) of the Kosovo PCPC:

> At no stage in the proceedings may the defence be refused inspection of records of the examination of the defendant, material obtained from or belonging to the defendant, material concerning such investigative actions to which defence counsel has been or should have been admitted or expert analysis.

Para. 2 of the Article entitles the counsel to inspect, copy or photograph all records or physical evidence upon the completion of the investigation.

The application of the principle of adversariness is the most evident at oral main hearings.

The principle laid down in Article 10 (1) of the Kosovo PCPC, under which the defendant and the prosecutor enjoy the status of equal parties, is elaborated both in provisions on first-instance and second-instance proceedings. Under Article 410 of the Kosovo PCPC, notice of the session of the second-instance court panel shall

be sent both to the competent public prosecutor and to the accused and his or her defence counsel.

If the second-instance court is holding an oral hearing on the appeal, it shall summon both the prosecutor and the accused or his or her defence counsel (Art. 412 (2)). Kosovo PCPC).

4.2.3.2. Trial within a Reasonable Time. – The ECHR (Art. 6) and ICCPR (Art. 14 (3c)), which are directly applied in Kosovo, guarantee the right to a trial within a reasonable time.

This principle is also guaranteed by the Kosovo PCPC. Under Article 5 (2):

> The court shall be bound to carry out the proceedings without delay and to prevent any abuse of the rights of the participants in the proceedings.

Furthermore, under Article 392 (1) of the Kosovo PCPC:

> The judgment shall be announced by the presiding judge immediately after the court has rendered it. If the court is unable to render judgment on the day the main trial is completed, it shall postpone the announcement by a maximum of three days and shall determine the time and place for the announcement of the judgment.

The principle of trial within a reasonable time applies to all types of disputes. Its application is, however, especially vital in so-called "urgent proceedings" entailing criminal proceedings, labour and property related disputes and decisions on temporary measures.

4.2.3.3. Public Hearings and Public Pronouncement of Judgments. – Hearings in criminal and civil proceedings in Kosovo are public in principle. Under the PCPC, the main hearings are public and may be closed to the public in specific cases, *ex officio* or at the request of the parties.

The principle of exempting the public from hearings is regulated by Articles 329–331 of the Kosovo PCPC. The public may be barred from the proceedings for the following reasons: to protect official secrets, to maintain the confidentiality of information which would be jeopardised by a public hearing, to maintain law and order, to protect the personal or family life of the accused, the injured parties or other participants in the proceedings, to protect the interest of children or the injured parties as witnesses as provided for in Chapter XXI of the Code.

The decision on exempting the public from the proceedings is made in a separate ruling and may be appealed only within the appeal of the judgment.

The protection of the injured parties and witnesses is regulated by a whole chapter of the CPC (Chapter XXI). Under provisions in Articles 168–174, a participant in the proceedings may file a written petition with the judge at any stage of the proceedings for a protective measure or an order for anonymity order.

The judge shall uphold the petition and issue an order for protective measure or anonymity if s/he finds there is serious risk to an injured party, a witness or his or her family and that the protective measure is necessary to prevent such risk.

The judge may pronounce one of the following protective measures: omission or expunging of names, addresses, place of work, profession or any other data or information that could be used to identify the injured party or witness; non-disclosure of any records identifying the injured party or witness; efforts to conceal the features or physical description of the injured party or witness giving testimony, including testifying behind an opaque shield or through image or voice-altering devices, contemporaneous examination in another place communicated to the courtroom by means of closed-circuit television; assignment of a pseudonym; orders to the defence counsel not to disclose the identity of the injured party or witness or not to disclose any materials or information that may lead to disclosure of identity; temporary removal of the defendant from the courtroom if a witness refuses to give testimony in the presence of the defendant, or any combination of the above methods to prevent disclosure of the identity of the injured party or witness.

The public character of hearings in civil disputes is still regulated by the provisions in the Civil Procedure Act that was in force on 22 March 1989 in Kosovo as the Assembly of Kosovo has not enacted a new law on civil proceedings.

Article 306 of the CPA prescribes public hearings. The public may be excluded from the hearings only to protect an official secret (Art. 307). The decision to exempt the public is taken by the judicial panel and cannot be appealed.

Provisions on the public pronouncement of judgements in Kosovo are in accordance with Article 6 of the ECHR. Under Article 392 (2) of the Kosovo PCPC.

> The presiding judge shall read the enacting clause of the judgment in open court and in the presence of the parties, their legal representatives and authorized representatives and defence counsel after which he or she shall give a brief account of the grounds for the judgment.

Other provisions allow for the public pronouncement of the judgment in the absence of a party in the proceedings (Art. 392 (3)) and in case the trial had been closed to the public (Art. 393 (4)).

In civil proceedings heard by a judicial panel, the judgment is pronounced by the presiding judge and panel members immediately after the hearing. In more complex cases, the panel may pronounce the judgment within 8 days from the day the trial ended. In such cases, the judgment will not be announced and the court will send the transcript of the judgment the parties.

Kosovo courts, especially those trying civil cases, do not respect the principle on the public pronouncement of judgment at all, i.e. do not comply with the deadlines within which the judgments must be read out or forwarded to the parties. In practice, they exceed the legal deadlines by at least several weeks.

The principles of public hearings and public pronouncement of judgments in Kosovo are mostly respected in Kosovo. Sometimes, however, the judges fail to comply with these requirements for objective reasons, usually because the venues at which civil cases are tried are quite small.

These principles are, however, grossly violated in administrative disputes before the Supreme Court of Kosovo.

4.2.3.4. Presumption of Innocence. – Article 3 of the Kosovo PCPC:

> Any person suspected or charged with a criminal offence shall be deemed innocent until his or her guilt has been established by a final judgment of the court.
>
> Doubts regarding the existence of facts relevant to the case or doubts regarding the implementation of a certain criminal law provision shall be interpreted in favour of the defendant and his or her rights under the present Code.

The burden of proof, therefore, rests on the prosecutor and not on the suspect.

Kosovo's legal provisions on the presumption of innocence are in accordance with international standards and are binding both on the courts and other competent bodies.

In some cases, the judges have obviously been mechanically reaching decisions to extend the detention of the suspects and to dismiss motions for their release from detention even when it was obvious that it would be very hard to establish their guilt on the basis of the submitted evidence. Such conduct can be ascribed to the prejudice of the judges or judicial panels, who thus violate the principle of presumption of innocence.

4.2.3.5. Right of an Accused to be Informed Promptly of the Accusation in the Language He or She Understands. – Under the Kosovo PCPC, an accused must be promptly informed in a language s/he understands and in detail of the nature of and reasons for the charge against him or her.

Under the PCPC of Kosovo, every person deprived of liberty is entitled to be informed in a language s/he understands immediately of the reasons for his or her arrest, the right to legal assistance of his or her own choice, and the right to notify or to have notified a family member or another appropriate person of his or her choice about the arrest. No later than six hours from the time of arrest, the public prosecutor or an authorised senior police officer shall issue to the arrested person a written decision on detention which shall include the all necessary information, including an instruction on the right of appeal.

The Kosovo CPC introduces the institute of indictment confirmation. Under Article 309, the judge shall schedule a hearing for the confirmation of the indictment, to which the accused and prosecutor shall be summoned. The indictment must be served upon the defendant and his or her defence counsel at least eight days before the indictment confirmation hearing.

The summons for the confirmation hearing lists the following rights the defendant is entitled:

- to waive the review of the indictment and of the evidence;
- to waive the confirmation hearing and submit written objections to the indictment or the admissibility of evidence; or
- proceed with the confirmation hearing.

The Kosovo PCPC allows for the use of Albanian, Serbian and English languages and scripts in criminal proceedings.

Any person participating in the proceedings, who does not speak the language of the proceedings, shall have the right to speak his or her own language and the right to be informed through interpretation, free of charge, of the evidence, the facts and the proceedings. Interpretation shall be provided by an independent interpreter (Art. 15 (2)).

Alongside the major practical difficulties arising in court proceedings involving participants of different nationalities, the criminal trials before international judges suffer also from extremely poor translations from English into Albanian and Serbian and *vice versa*, which often gives rise to extremely comical situations in the courtrooms.

4.2.3.6. Right of Appeal. – Kosovo criminal and civil law guarantees the right of appeal.

This right is, however, disrespected by the Special Chamber of the Supreme Court of Kosovo, which hears claims against the Kosovo Trust Agency on privatisation matters.

A party that has claims on the real estate under privatisation is obliged to file the lawsuit in a language s/he knows but also in a language s/he may not know (8 copies in English and 8 copies in Albanian or Serbian). Thus, the claim and all the evidence, which must be translated as well, need to be submitted in 16 copies. The decision of the Chamber is final and may not be appealed against before any national or international judicial authority.

An appeal may be filed with the Chamber only in accordance with Section 4 (2 and 3) of UNMIK Regulation 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters:

> ...the Special Chamber may refer specific claims, categories of claims or parts thereof to any court having the required subject matter jurisdiction under applicable law. No court in Kosovo shall exercise jurisdiction over a claim involving the subject matter described in section 4.1 unless such claim has been referred to it in accordance with this section.
>
> A decision of a court to which a matter has been referred by the Special Chamber pursuant to section 4.2 may be appealed only to the Special Chamber unless the Special Chamber decides otherwise in accordance with the procedural rules to be promulgated under section 7.

Despite UNMIK's endeavour to alleviate violations of the right of appeal by this provision, the decision-making procedure in the Special Chamber represents an illustration of institutional violation of the right of appeal and the right to a fair trial.

4.2.4. Right to an Effective Legal Remedy

Human rights in Kosovo are protected in criminal, civil and administrative proceedings and administrative disputes.

The right to an effective legal remedy is protected by Article 174 of the Kosovo Provisional Criminal Code (PCC), under which:

> Whoever, by use of force or serious threat, prevents another person from using his or her right to lodge a complaint or to use any other legal remedy shall be punished by a fine or by imprisonment of up to one year.
>
> When the offence provided for in para. 1 of the present article is committed by an official person abusing his or her position or authorisations, the perpetrator shall be punished by imprisonment of three months to three years.

Citizens can initiate proceedings to protect their rights before competent judicial and administrative bodies.

A person's right to have his conviction examined by a higher court is prescribed both by international treaties and national law.

With respect to administrative proceedings, the Assembly of Kosovo on 13 May 2006 adopted the Law on the Administrative Procedure that came into force on 13 November 2006. Attention should be devoted to the specific differences in it compared with the Administrative Procedure Act (*Sl. list SFRJ*, 47/86) that had until then been in effect in Kosovo.

Article 35 of UNMIK Regulation 2000/45 on self-government of municipalities still applies to administrative decisions passed by municipal bodies. The procedure has been amended and complaints against administrative decisions may now be filed with the Chief Executive Officer within one month. If the complainant is dissatisfied with the decision of the Chief Executive Officer, s/he may refer the matter to the Central Authority which is obliged to review the complaint and rule on the legality of the administrative decision within two months. Only once these avenues are exhausted may the complainant launch an administrative dispute before the Supreme Court of Kosovo.

In addition to regular legal remedies, Kosovo legislation also envisages extraordinary legal remedies against final court decisions in civil and criminal matters.

Extraordinary legal remedies do not stay the enforcement of final court decisions.

The following extraordinary legal remedies are envisaged in the Provisional Kosovo Criminal Procedure Code (Chapter XXXIX, Arts. 438–460):

– motion for reopening criminal proceedings,

– motion for extraordinary mitigation of punishment, and
– motion for protection of legality.

The following extraordinary legal remedies in civil matters are envisaged by the Civil Procedure Act (*Sl. list SFRJ*, 4/77, Chapter XXV, Arts. 382–432):

– review
– motion for the extraordinary review of a final decision,
– motion for retrial,
– motion for the protection of legality, and
– motion for the protection of legality filed by the Federal Public Prosecutor.

The Supreme Court of Kosovo regularly rules on the submitted extraordinary legal remedies.

4.2.5. Rights of minority communities

Three laws passed by the Assembly of Kosovo in 2006 are expected to have impact on the human rights of minority communities:

1. Law on the Freedom of Religion in Kosovo,
2. Law on the Use of Languages,
3. Cultural Heritage Law.

Three religions are practiced in Kosovo Islam, Catholicism and Serbian Orthodoxy. This is why the adoption of the Law on the Freedom of Religion did not come as a surprise.

The Law on the Use of Languages had been a topic of many a heated discussion. Under the Law, Albanian and Serbian and their alphabets are official languages of Kosovo. Under Article 2.3, in municipalities inhabited by a community whose mother tongue is not an official language and which constitutes at least 5% of the total population of the municipality, the language of the community shall have the status of an official language in the municipality and shall be in equal use with the official languages. Under the Law, Turkish shall also have the status of an official language in the Prizren Municipality, notwithstanding the 5% clause.

This provision provoked fierce debate in the Assembly of Kosovo and was finally included in the Law due to the strong insistence of international factors.

Under Article 3.3 the language of a community constituting over 3% of the population shall have the status of an official language in the municipality and shall be in equal use with the official languages.

Also, a language of a community traditionally used in a municipality shall have the status of an official language in the municipality.

These provisions are fully in compliance with international standards.

The goal of the Law on Cultural Heritage is to legally regulate cultural heritage and its preservation, protection, public access, communication and the provision of the necessary resources to ensure that it is enjoyed by the current generations and handed down to future generations as a historical and cultural document.

Cultural heritage entails architectural, archaeological, movable and spiritual heritage regardless of the time of creation and construction, type of construction, beneficiary, creator or implementer of a work.

In terms of the legal protection of minority rights in Kosovo, Chapter 4 of the Constitutional Framework includes a number of international and regional mechanisms for the protection and promotion of human rights of minority communities.

Under Chapter 4, the catalogue of collective rights of minority communities, which have been taken from international legal documents directly applied in Kosovo's legal system, include: right to education in one's own language; right to access information in one's own language; equal employment opportunities at all levels and equal access to public services at all levels; right to free mutual contacts and contacts with members of one's own community in and outside Kosovo; right to use and display community symbols in keeping with the law; right to form associations to promote the interests of one's community; respect of the traditions of communities; right to guaranteed access and representation in public electronic media and to broadcast programmes in one's own language; right to provide information in one's own language and script, and to found and operate one's own media, et al.

4.3. Human Rights in Practice in 2006[440]

4.3.1. Rights of Kosovo Citizens before the European Court for Human Rights. – Positive headway was made in terms of internationally guaranteed human rights inasmuch as the ECtHR in 2006 for the first time considered two applications regarding Kosovo (Applications No. 71412/01 (*Behrami & Behrami v. France*) and No. 78166/01 (*Saramati v. France, Norway and Germany*)).

The Grand Chamber of the ECtHR debated the two applications together on 15 November 2006. Due to the extremely complex nature of the applications (10 or so countries submitted their observations in the capacity of third parties and in defence of the accused countries), the Grand Chamber decided to put off its decision on their permissibility 3–6 months.

The main issue in this stage of the proceedings is whether a state can rule in the territory of another state via its military troops engaged in peace-keeping missions deployed there.

440 BCHR associates were unable to monitor media in Kosovo and perused only the media listed in section II.1.1.

The European Roma Rights Centre filed an application with the European Court of Human Rights on behalf of Roma living in three camps in the northern part of Kosovska Mitrovica. Large concentrations of lead were found in their blood. The application was filed against UNMIK, which had been aware of the problem but had done nothing for six years to address it. Three people died of lead poisoning. The ECtHR dismissed the application because UNMIK is not a party to the ECHR (*Danas*, 24 February, p. 17, 6 March, p. 7).

4.3.2. Kosovo Ombudsperson. – The status of this institution in Kosovo has faced many challenges for quite a while, and can even be qualified as critical as of 15 December.

The international Ombudsperson ended his mission in Kosovo on 31 December 2005, and the institution was delegated to the local authorities, specifically the Assembly of Kosovo. With this fact in mind, UNMIK on 16 February adopted Regulation 2006/6 on the Ombudsperson Institution in Kosovo. This Regulation prevents the local Ombudsperson from initiating any investigations against UNMIK staff in the absence of a bilateral agreement between the Ombudsperson and the UN SRSG. In addition, the Ombudsperson has no powers over KFOR troops. UNMIK in March set up a body entrusted with examining human rights complaints against it. However, the body lacks autonomy and UNMIK is not bound to act on its findings, which gives rise to doubts about its ability to carry out its mandate.[441]

The nearly one-year long delay in appointing the new local Ombudsperson in Kosovo prompted vehement reactions of the international institutions in Kosovo, especially the OSCE.

The Assembly of Kosovo finally voted on the three nominees at its session on 15 December. The candidate who won the most votes in both rounds of voting was not, however, appointed, as the question arose over what the majority vote entailed: the majority of delegates present at the session or the simple majority of all Assembly delegates

The question was relayed to the Assembly Legislative Commission and the Assembly also sought the advice of the UNMIK Legal Office.

"Procedural ambiguities" are clearly not the issue here and the reasons for the failure to appoint the Ombudsperson should be sought in the interests of specific political forces in the Assembly, which wanted the post of Ombudsperson to go the candidate who had not won enough votes.

4.3.3. Non-Functioning of Rule of Law. – According to the *Human Rights Watch* report*,* Kosovo's criminal justice system remains its weakest institution, fostering a climate of impunity and undermining long-term efforts to establish the rule

441 See HRW World Report 2007.

of law. The shortcomings include: poor case management; passivity on the part of prosecutors and the police, poor coordination between the local Kosovo Police Service (KPS) and UNMIK police, problematic sentencing practices and inadequate witness protection. Due to these problems, insufficient headway has been made in punishing those responsible for the violence in March 2004.

Nothing has changed in 2006 with respect to proceedings against UNMIK and KFOR members. Under UNMIK Regulation 2000/47, they enjoy absolute immunity from local courts notwithstanding the gravity of the offence they are suspected of.

The gravest violations of the right to access courts – the physical inability to access courts – were unfortunately again committed in Kosovo in 2006, but to a lesser extent than over the previous years. Such violations were committed the most in Northern Mitrovica, where all the judicial authorities (Municipal and District Courts and the Minor Offense Court) are headquartered; as is well known, the residents of Southern Mitrovica i.e. Kosovo Albanians encounter serious difficulties in accessing these courts.

Kosovo Serbs living in areas predominantly populated by Albanians face similar difficulties.

Kosovo courts cannot pride themselves in complying with the principle of a trial within a reasonable time.

The large number of cases, the lack of judges and court experts, the inadequate remuneration of judicial staff, et al., are merely some of the reasons why court proceedings, especially those related to civil law, last for years.

The duration of criminal trials is usually shorter, but some trials have been going on much too long. For example, in case P. No. 203/2005, 13 persons have been charged with terrorism; they have been in custody for three years now, but the trial, which began in June 2006, is proceeding extremely slowly. Only seven of over 80 witnesses for the prosecution have testified to date.

Moreover, the events that preceded the trial amounted to grave violations of the law, due to the multitude of regulations in Kosovo. Under Article 329 of the PCPC of Kosovo, the court, within whose territorial jurisdiction a crime was committed, has sole jurisdiction over the case. However, although the Priština District Court is seized of the matter, the trial is held in the Dubrava prison, which falls under the jurisdiction of the Peć District Court, under an SRSG order issued in accordance with UNMIK Regulation 2000/67, which allows for a change in venue of the trial for justified reasons!

Proceedings concerning other urgent matters (labour or property related disputes, et al.) have also faced major delays.

In addition, the Kosovo legal system faces difficulties related to the enforcement of final court decisions. This especially applies to civil suits, notably the enforcement of final decisions on compensation of sustained damages.

4.3.4. Inter-Ethnic Conflicts. – Minorities in Kosovo (including Albanians in areas in which they are the minority population) still live in inauspicious circumstances, although the number of inter-ethnic incidents in 2006 decreased over 2005.[442] Nevertheless, the lower number of incidents in 2006 cannot be ascribed to a relaxation of inter-ethnic tensions, but, rather, to the physical separation of the ethnic groups.

Notwithstanding the fewer incidents, Serbian media reported a number of attacks on minorities. The first happened one minute into the New Year, when stones were hurled at the apartment of Serb Dragica Jovanović, one of the 200 Serbs who have remained living in Priština (*Blic*, 4 January, p. 11).

A bus carrying around 50 Serbs was stoned at Mališevo in January. None of the passengers were injured, but the bus was damaged. The KPS arrested four persons suspected of throwing the stones at the bus (*Danas*, 4 January, p. 7 and *Večernje novosti*, 4 January, p. 15).

An incinerating device was hurled at a bus owned by an Albanian from Obilić and driving the Dragaš-Belgrade route in early January. Twenty six Albanians, 21 Gorani, eight Bosniaks, one Turk and one Chinese were in the bus at the time of attack. None of the passengers were injured (*Politika*, 6 January, p. A9)

Albanians beat up Serbian youths twice in January in the village of Mogila **(***Politika*, 23 January, p. A1).

Unidentified perpetrators hurled a bomb at the house of Slobodan Todorović, the father of Deputy Chairman of the Kosovo Coordination Centre, who lives in the village of Cernica at Kosovska Vitina. There were no victims, but the bomb damaged the house. Milorad Todorović said this was the sixth attack on his parents' house; his parents are one of the six remaining Serb families in the so-called lower Cernica and their house is surrounded by Albanian houses (*Blic*, 24 January, p. 11, *Politika*, 24 January, p. A8).

Unidentified perpetrators broke into the home of a returnee in the village of Svinjare and took off with part of the plumbing and electricity fittings. The returnee's house was rebuilt after it had been damaged in the March 2004 violence (*Večernje novosti*, 14 February, p. 20).

Machine-gun fire was opened at three Serbs from an ambush at the end of the village of Staro Gacko in the Lipljan Municipality in March, but all three men, fortunately, survived (*Politika*, 7 March, p. A8). The same month, three Albanian youths inflicted Milisav Ilinčić grave injuries near the main bridge on the left bank of the Ibar in Kosovska Mitrovica (*Večernje novosti*, 29 March, p. 20 and 30 March, 2006, p. 13).

An incinerating device was thrown at the house of Zorica Mitrović in the northern Kosovska Mitrovica quart of Bosniak Mahalla in April. No one was hurt, but the house sustained minor material damage (*Večernje novosti*, 16 April, p. 5 and *Politika*, 16 April, p. A1).

442 See HRW World Report 2007.

Fire was in May opened at the Raška Prizren Diocese vehicle while priest Srđan Stanković was driving his wife and two underage children down the Kosovska Mitrovica – Priština main road. No one was injured in the attack (*Politika*, 8 May, p. A7).

A group of Albanian children threw stones at a bus with visible UN symbols, which was taking Serbs living in the Metohija enclave of Osojane to northern Kosovska Mitrovica. No one was injured, but the bus was considerably damaged (*Politika*, 10. May, str. A8). Several days later, another bus riding that route was pelted with stones (*Politika*, 13 May, p. A8).

Grabovac residents Jovan Milošević (19) and Jablan Jeftić (21) sustained grave injuries during an armed attack on the gas station Gradina at Kosovska Mitrovica. The station owner said the attackers "did not even try to enter the station and rob it". KPS spokesman Ranko Stanojević, on the other hand, claimed that an armed robbery was at issue because "some money was taken from the station cash register" after the youths were wounded (*Politika*, 12 May, p. A9 and *Blic*, 12 May, p. 14).

Miljan Vesković (23) a resident of the village of Žitkovac at Zvečan, was shot dead from an automatic gun the same month (*Večernje novosti*, 6 June, p. 5 and *Blic*, 2 June, p. 11), while Veselinka Dejanović (52) from Prilužje was wounded in the garden in front of her house (*Večernje novosti*, 5 June, p. 11 and *Politika*, 5 June, p. A7). So was Slavica Dejanović in Vučitrn the same month (*Danas*, 5 June, p. 4).

A UN bus, which regularly takes Serbs from the Metohija villages of Bič and Grabac to Kosovska Mitrovica, was stoned in the Albanian village of Rudnik. None of the passengers were hurt (*Blic*, 9 June, p. 11).

Shots from an automatic rifle were fired at a house in the village of Ljug at Istok in June. The house is home to Serb returnees, whose houses have not been rebuilt yet (*Večernje novosti*, 10 June, p. 12, *Blic*, 10 June, p. 13 and *Danas*, 10 June, p. 4).

Dragan Popović, one of the 50 Serbs who have returned to Klina since mid–2005 and an eminent resident of the town, was shot dead by bullets fired from an automatic weapon (*Večernje novosti*, 21 June, p. 13 and 22 June, p. 21 and *Politika*, 21 June, p. A8).

An explosive device was thrown at the Interturs bus owned by Nebojša Radojčić at Leposavić in June. No one was injured but the bus was damaged (*Večernje novosti*, 22 June, p. 21 and *Blic*, 22 June, p. 11).

Serb sources told news agency Beta in June that at least three rounds of automatic gunfire and a grenade from a mortar were fired at the homes of Serb returnees in Grabac one night, but that only the homes were damaged and that no one was hurt. KFOR troops would not let the Beta journalist who wanted to check the report enter this Klina village, to which 16 Serb families have returned (*Danas*, 6 July, p. 4, *Politika*, 6 July, p. A7 and *Večernje novosti*, 6 July, p. 12).

Windows were smashed by stones hurled at the newly rebuilt home of Svetomir Vuković in the Serb village of Srbobran at Istok. No Serbs have lived in Sr-

bobran since 1999. Five families, including Vuković's, had decided to return to their home village (*Večernje novosti*, 7 July, p. 20).

An Albanian has been suspected of assaulting Ljubiša Janaćković with a knife in the village of Prilužje at Vučitrn (*Danas*, 7 July, p. 3).

The disappearance of a 22-year-old Kosovska Mitrovica law college sophomore Zoran Tomović was reported to the police in Kosovo and the Serbian MIA. He was last seen in northern Mitrovica (*Blic*, 17 September, p. 9).

Four vehicles were destroyed in an explosion in Gnjilane. There were no human casualties in the incident. One of the vehicles belonged to the Kosovo Provisional Government Ministry of Local Government Administration (*Blic*, 18 September, p. 5).

Unidentified perpetrators fired shots at the house of Aleksa Ljušić in Istok, to which 15 Serb returnees have moved back. No one was wounded. (*Blic*, 26 September, p. 3).

4.3.5. Attacks on Religious Buildings. – Serbian Orthodox churches were the target of several attacks in 2006. The Church of St. Apostle Andrej in Podujevo was attacked three times – in April, May and June (*Večernje novosti*, 22 June, p. 5 and 23 June, p. 12), the St. Elijah Church in Podujevo was demolished in May (*Blic*, 13 May, p. 11), while a church in Obilić was destroyed in June (*Večernje novosti*, 19 June, p. 3 and *Blic*, 19 June, p. 13). These churches had been damaged during the March 2004 unrest. The Serb Orthodox church in Babin most was attacked in 2006. This was the first time this church in the ethnically mixed village was attacked since UN troops were deploye in Kosovo in 1999 (*Danas*, 7 August, p. 3).

The Christ the Saviour Temple in Priština was desecrated in February by unidentified perpetrators who wrote the Albanian word for the female sexual organ just below the cross (*Blic*, 25 Februar, p. 3).

4.3.6. Economic Situation and State of Economic and Social Rights in Kosovo. – Unemployment is a social phenomenon increasingly plaguing Kosovo and negatively reflecting on the state of human rights in Kosovo. The lack of investments, the failure of the privatisation process to boost Kosovo's economic development, symbolic production, a low state budget that cannot earmark any funds for capital investments – all these factors have exacerbated the high unemployment in Kosovo.

Electricity supply of some settlements in Kosovo and payment of overdue electricity bills remained oxne of the chief problems in 2006. The Kosovo Electric Company (KEK) several times halted electricity supplies to some, mostly Serb settlements in Kosovo. In January, which was extremely cold, some Serb villages went without electricity for days on end. According to KEK, the transformer had broken down; Serbs speculated that KEK was actually pressuring the Serbs to sign contracts with it; KEK stated that the villages were cut off because the villagers had not been paying their electricity bills (*Večernje novosti*, 20 January, p. 5, *Politika*, 25 January, p. A7, *Blic*, 2 February, p. 3). The Government of Serbia offered to provide round 50 million

kW of electricity for Serbs in Kosovo, but failed to reach an agreement on this with UNMIK and KEK, which insisted on the Serbs signing contracts with the KEK, paying what they owe for electricity before electricity is restored. Serbia, however, would not agree to this as it saw the signing of a contract with KEK as the direct recognition of Kosovo's independence (*Večernje novosti*, 1 February, p. 5). Lack of electricity caused the bursting of water pumps in Kosovska Kamenica and the villages around Kosovska Vitina, which left the population without water as well (*Večernje novosti*, 3 February, p. 5). The electricity situation in Kosovo aggravated in February after the river Sitnica flooded the dam. UNMIK then accepted the Serbian Government offer to supply Kosovo with 50 million kW of electricity over the following month to be distributed to all citizens of Kosovo (*Politika*, 25 February, p. A1)

4.3.7. Protection of Property Rights. – Head of the Kosovo Property Agency (KPA) Belgrade Office Danijela Cemović said that property restitution claims could be filed as of 1 April. The KPA was set up under an UNMIK decree passed on 4 March 2006. KPA partly took over the duties of the Housing and Property Directorate (HPD), which had received claims for restitution of apartments and homes, but its mandate includes also restitution of agricultural and commercial property. As opposed to the HPD, which was an UNMIK agency, the KPA is an independent body. Estimates are that some 11,000 claims for the restitution of agricultural and commercial property will be filed with the KPA (*Politika*, 16 May, p. A8).

4.3.8. Return of Internally Displaced Persons. – No significant headway was made in 2006 with respect to the return of IDPs who had left Kosovo after June 1999. Representatives of the Serbian and Kosovo Governments in June signed an agreement aimed at speeding up IDP returns.[443] However, lack of trust in the local institutions, the legacy of the past, and expectation of an imminent decision on Kosovo's final status, as well as the assaults on Serb returnees, remain the main reasons why larger scale returns have been delayed.

5. Transitional Justice – Confronting the Past in Serbia

Serbia's confrontation with the past has been burdened by the nature of the armed conflicts that swept across the former Yugoslavia in the nineties and the authoritarian regime that had caused them. Wars in the former Yugoslavia were both internal and international in character; victims of human rights violations comprised both citizens of other ex-SFRY republics and of Serbia.

Some headway has been made in war crime trials in Serbia in 2006. Little progress has, however, been achieved with respect to other aspects of transitional justice, above all in the areas of lustration and establishing the truth about the past.

443 See http://www.unmikonline.org/archives/news06_06full.htm#0606a.

5.1. War Crime Trials in Serbia

Some headway has been made in the war crime trials in Serbia in 2006.

The greatest progress was made in regional cooperation on the issue. The Chief State Attorney of Croatia and the War Crimes Prosecution Office of Serbia concluded an agreement on cooperation in the prosecution of perpetrators of war crimes, crimes against humanity and genocide.[444] The greatest significance of this agreement lies in the fact that it has overcome the constitutional barriers prohibiting the extradition to Croatia of Serbia's nationals wanted for war crimes committed in the territory of Croatia. Under the agreement, the Croatian State Attorney shall cede to the Serbian War Crimes Prosecution Office all cases in which it has found enough evidence against war crime suspects who are nationals of Serbia and residing in Serbia.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Serbian judiciary continued cooperating in 2006. The ICTY ceded its first case to the Serbian judiciary on 17 November 2006 in accordance with Rule 11*bis* of the ICTY Rules of Procedure and Evidence. The Serbian judiciary shall try former JNA officer Vladimir Kovačević *aka* Rambo, who has been indicted for shelling Dubrovnik, and is currently on a provisional release.

Notwithstanding the headway, war crime trials in Serbia were in 2006 still plagued by the same problems as before. Notably, investigations of war crimes are still obstructed. Moreover, no indictments have been issued against former high-ranking officials despite evidence against them.

The reversal of the first War Crimes Chamber verdict in the Ovčara case by the Supreme Court of Serbia on 14 December caused much polemic in Serbia.[445] Croatian officials, the representative of the US Embassy in Belgrade and a large number of local NGOs following the trial voiced their disappointment with the decision. According to the Humanitarian Law Centre (HLC), which represented the families of the victims, the Supreme Court decision was "legally and factually groundless".[446] The HLC concluded that the Supreme Court had remained true to its practice of quashing all first-instance war crime convictions and ordering retrials.

When the Supreme Court decision was announced, the War Crimes Prosecution Office stated that it did "not consider the Ovčara case closed yet" and that it was investigating several other people suspected of involvement in the crime. The Office vowed it would persist in its struggle to attain truth and justice.

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444 The agreement was concluded between the Chief State Attorney of Croatia and the War Crimes Prosecutor of Serbia in Zagreb on 13 October 2006.

445 The Belgrade District Court War Crimes Chamber on 12 December 2005 found 14 members of the Vukovar Territorial Defence units and the *Leva sudoperica* volunteers guilty of the war crime against POWs. These men were charged with killing over 200 members of the Croatian armed forces and civilians at the Ovčara farm near Vukovar in Croatia on 20 November 1991.

446 See HLC statement of 15 December 2006 entitled "The Supreme Court of the Republic of Serbia illegally overturned the first instance ruling in the Ovčara case" http://www.hlc.org.yu/english/War_Crimes_Trials_Before_National_Courts/Croatia/index.php?file= 1569.html

The Serbian War Crimes Prosecution Office filed two important indictments regarding crimes committed during the armed conflict in Kosovo in 1999. On April 25, 2006, it charged eight former and active police and state security officers with killing 48 members of the Beriša family in Suva Reka in Kosovo on 26 March 1999. The trial before the Belgrade District Court War Crimes Chamber began on 2 October 2006. This trial is the first regarding the mass graves discovered in Serbia, notably the ones in Batajnica. Moreover, this is the first time indictments have been filed in Serbia against MIA officers, who had held senior positions during the Kosovo conflict.

The War Crimes Prosecution Office in August 2006 also raised an indictment against two members of the special Serbian police units accusing them of complicity in the murder of the three Kosovo Albanian brothers Bitiqi. The Belgrade District Court War Crimes opened the trial on 13 November 2006. Unfortunately, neither the perpetrators of the crime nor the ones who ordered it have been identified or indicted yet. There is evidence indicating that the crime was ordered by the then Serbian chief of police Vlastimir Đorđević, who is at large. The Belgrade District Court War Crimes Prosecutor is investigating his involvement.

The Belgrade District Court War Crimes Chamber in 2006 passed three first-instance judgments for war crimes. Milan Bulić was convicted to eight years in jail on 30 January 2006 for participating in the torture of 200 Croatian POWs at the Ovčara farm in Vukovar on 20 November 1991, i.e. the war crime against POWs. Bulić was tried separately because of his ill health. On 6 September 2006, the Chamber also convicted Saša Radak to 20 years in prison for the war crimes he committed at Ovčara. On 18 September 2006, the Chamber found Kosovo Albanian Anton Lekaj guilty of killing and involvement in the unlawful detention, abuse and rape of a number of Roma and Albanians in Đakovica in June 1999 and sentenced him to 13 years in prison.

5.2. Reparations

According to the definition of the UN Secretary General, states facing widespread human rights violations are obliged not only to act against the perpetrators but to remedy the victims as well, by providing them with reparation. Victim reparation programmes can effectively complement the work of the courts and truth commissions and help create conditions for reconciliation and restore the trust of the victims. In addition to material compensation, reparations include non-material elements, such as restoration of the victims' lawful rights, rehabilitation programmes for victims and symbolic measures, such as official apologies, monuments and memorial services.

However, neither Serbia nor the other countries in the region made significant headway in the area of material and symbolic reparations in 2006.

The end of the hearing in the International Court of Justice in The Hague on Bosnia-Herzegovina's genocide suit against Serbia and Montenegro was the most significant event with respect to material reparations between the states in the region. Bosnia in 1993 charged the then Federal Republic of Yugoslavia with violating the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. This issue is quite controversial, even in Bosnia-Herzegovina where some, like the Bosnian Serbs, perceive the conflict in Bosnia as a civil war, while others qualify it as an international conflict. Republika Srpska representative in the Bosnia-Herzegovina Presidency Borislav Paravac filed a motion for the constitutional revision of the suit, as, he claims, it had incurred damage to the interests of Republika Srpska. The International Court of Justice is to announce its decision on 21 February 2007.

As per material reparations awarded in Serbia, the Humanitarian Law Centre on 16 November 2006 filed a lawsuit with the Belgrade First Municipal Court on behalf of 19 women and minors from Vukovar, nationals of Croatia, whom the JNA troops interned in camps in Begejci and the Sremska Mitrovica prison in Vojvodina after the fall of Vukovar on 20 November 1991. The interned civilians were tortured on a daily basis. The living conditions in both camps were inhuman.[447]

In transitional societies, legitimacy is constituted on new premises and values replacing those of the previous undemocratic regime. The period of transition is qualified by establishing new values and structures to uphold them (by building institutions and adequate legal and political instruments). The speed, efficiency and quality of the process varies from one country to another, depending above all on the inherited problems and capacity of the state authorities to shape and manage the transformation – their ability to legitimise themselves as the ruling authority in a country in transition.

447 See HLC statement of 16 November 2006 entitled "Lawsuit against the Republic of Serbia for unlawful transfer of civilians to camps on the territory of Vojvodina after the fall of Vukovar in 1991" http://www.hlc.org.yu/english/War_Crimes_Trials_Before_National_Courts/Serbia/index.php?file=1562.html.

Appendix I

The Most Important Human Rights Treaties Binding on Serbia

- Act Amending the Act on Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, *Sl. list SCG (Međunarodni ugovori)*, 5/05.
- Convention against Discrimination in Education (UNESCO), *Sl. list SFRJ (Dodatak)*, 4/64.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Sl. list SFRJ (Međunarodni ugovori)*, 9/91.
- Convention against Transnational Organized Crime, *Sl. list SRJ (Međunarodni ugovori)*, 6/01.
- Convention No. 182 Concerning the Worst Forms of Child Labour, *Sl. list SRJ (Međunarodni ugovori)*, 2/03.
- Convention Concerning Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, *Sl. list SFRJ (Dodatak)*, 13/64.
- Convention on the Elimination of All Forms of Discrimination against Women, *Sl. list SFRJ (Međunarodni ugovori)*, 11/81.
- Convention on the High Seas, *Sl. list SFRJ (Dodatak)*, 1/86.
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, *Sl. list SRJ (Međunarodni ugovori)*, 7/02, 18/05.
- Convention on the Nationality of Married Women, *Sl. list FNRJ (Dodatak)*, 7/58.
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, *Sl. list SFRJ (Međunarodni ugovori)*, 50/70.
- Convention on the Political Rights of Women, *Sl. list FNRJ (Dodatak)*, 7/54.
- Convention on the Prevention and Punishment of the Crime of the Genocide, *Sl. vesnik Prezidijuma Narodne skupštine FNRJ*, 2/50.
- Convention Relating to the Status of Refugees, *Sl. list FNRJ (Dodatak)*, 7/60.
- Convention on the Rights of the Child, *Sl. list SFRJ (Međunarodni ugovori)*, 15/90; *Sl. list SRJ (Međunarodni ugovori)*, 4/96, 2/97.
- Convention Relating to the Status of Stateless Persons and Final Act of the UN Conference Relating to the Status of Stateless Persons, *Sl. list FNRJ (Dodatak)*, 9/59, 7/60; *Sl. list SFRJ (Dodatak)*, 2/64.
- Convention on the Suppression of Trade in Adult Women, *Sl. list FNRJ*, 41/50.

- Convention for the Suppression on the Trafficking in Persons and of the Exploitation of the Prostitution of Others, *Sl. list FNRJ*, 2/51.
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, *Sl. list SRJ (Međunarodni ugovori)*, 1/02.
- Criminal Law Convention on Corruption, *Sl. list SCG (Međunarodni ugovori)*, 18/05.
- ILO Convention No. 3 Concerning Maternity Protection, *Sl. novine of the Kingdom of Serbs, Croats and Slovenes*, 95-XXII/27.
- ILO Convention No. 11 Concerning Right of Association (Agriculture), *Sl. novine of the Kingdom of Yugoslavia*, 44-XVI/30.
- ILO Convention No. 14 Concerning Weekly Rest (Industry), *Sl. novine of the Kingdom of Serbs, Croats and Slovenes*, 95-XXII/27.
- ILO Convention No. 16 Concerning Medical Examination of Young Persons (Sea), *Sl. novine of the Kingdom of Serbs Croats and Slovenes*, 95-XXII/27.
- ILO Convention No. 17 Concerning Workmen's Compensation (Accidents), *Sl. novine of the Kingdom of Serbs, Croats and Slovenes*, 95-XXII/27.
- ILO Convention No. 18 Concerning Workmen's Compensation (Occupational Diseases), *Sl. novine Kingdom of Serbs, Croats and Slovenes*, 95-XXII/27.
- ILO Convention No. 19 Concerning Equality of Treatment (Accident Compensation), *Sl. novine of the Kingdom of Serbs, Croats and Slovenes*, 95-XXII/27.
- ILO Convention No. 29 Concerning Forced Labour, *Sl. novine of the Kingdom of Yugoslavia*, 297/32.
- ILO Convention No. 45 Concerning Underground Work (Women), *Sl. vesnik of the Presidium of the Assembly of the Federal People's Republic of Yugoslavia (FNRJ)*, 12/52.
- ILO Convention No. 81 Concerning Labour Inspection, *Sl. list FNRJ (Addendum)*, 5/56.
- ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, *Sl. list FNRJ (Dodatak)*, 8/58.
- ILO Convention No. 89 Concerning Night Work of Women (revised), *Sl. list FNRJ (Dodatak)*, 12/56.
- ILO Convention No. 90 Concerning Night Work of Young Persons in Industry (Revised) *Sl. list FNRJ (Dodatak)*, 12/56.
- ILO Convention No. 91 Concerning Paid Vacations for Seafarers (Revised), *Sl. list SFRJ (Međunarodni ugovori)*, 7/67.
- ILO Convention No. 98 Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, *Sl. list FNRJ (Dodatak)*, 11/58.

- ILO Convention No. 100 Concerning Equal Remuneration, *Sl. list FNRJ (Međunarodni ugovori)*, 11/52.
- ILO Convention No. 103 Concerning Maternity Protection (Revised), *Sl. list FNRJ (Dodatak)*, 9/55.
- ILO Convention No. 105 Concerning Abolition of Forced Labour, *Sl. list SRJ (Međunarodni ugovori)*, 13/02.
- ILO Convention No. 106 Concerning Weekly Rest (Commerce and Offices), *Sl. list FNRJ (Dodatak)*, 12/58.
- ILO Convention No. 109 Concerning Wages, Hours of Work and Manning (Sea), (Revised), *Sl. list SFRJ (Međunarodni ugovori)*, 10/65.
- ILO Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation, *Sl. list FNRJ (Dodatak)*, 3/61.
- ILO Convention No. 121 Concerning Employment Injury Benefits, *Sl. list SFRJ (Međunarodni ugovori)*, 27/70.
- ILO Convention No. 122 Concerning Employment Policy, *Sl. list SFRJ*, 34/71.
- ILO Convention No. 129 Concerning Labour Inspection (Agriculture), *Sl. list SFRJ (Međunarodni ugovori)*, 22/75.
- ILO Convention No. 131 Concerning Minimum Wage Fixing, *Sl. list SFRJ (Međunarodni ugovori)*, 14/82.
- ILO Convention No. 132 Concerning Holidays with Pay Convention (Revised), *Sl. list SFRJ (Međunarodni ugovori)*, 52/73.
- ILO Convention No. 135 Concerning Workers' Representatives, *Sl. list SFRJ (Međunarodni ugovori)*, 14/82.
- ILO Convention No. 138 Concerning Minimum Age for employment, *Sl. list SFRJ (Međunarodni ugovori)*, 14/82.
- ILO Convention No. 140 Concerning Paid Educational Leave, *Sl. list SFRJ (Međunarodni ugovori)*, 14/82.
- ILO Convention No. 144 Concerning Tripartite Consultation (International Labour Standards), *Sl. list SCG (Međunarodni ugovori)*, 1/05.
- ILO Convention No. 155 Concerning Occupational Safety and Health, *Sl. list SFRJ (Međunarodni ugovori)*, 7/87.
- ILO Convention No. 156 Concerning Workers with Family Responsibilities, *Sl. list SFRJ (Međunarodni ugovori)*, 7/87.
- ILO Convention No. 161 Concerning Occupational Health Services Convention, *Sl. list SFRJ (Međunarodni ugovori)*, 14/89.
- European Convention for the Protection of Human Rights and Fundamental Freedoms, *Sl. list SCG (Međunarodni ugovori)*, 9/03.

- European Convention on the International Validity of Criminal Judgments, with appendices, *Sl. list SCG (Međunarodni ugovori)*, 18/05.
- European Convention on Extradition with additional protocols, *Sl. list SRJ (Međunarodni ugovori)*, 10/01.
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Sl. list SCG (Međunarodni ugovori)*, 9/03.
- European Charter on Regional and Minority Languages, *Sl. list SCG (Međunarodni ugovori)*, 18/05.
- Framework Convention for the Protection of National Minorities, *Sl. list SRJ (Međunarodni ugovori)*, 6/98.
- International Convention on the Elimination of All Forms of Racial Discrimination, *Sl. list SFRJ (Međunarodni ugovori)*, 6/67.
- International Convention on the Suppression and Punishment of the Crime of Apartheid, *Sl. list SRFJ*, 14/75.
- International Covenant on Civil and Political Rights, *Sl. list SFRJ*, 7/71.
- International Covenant on Economic, Social and Cultural Rights, *Sl. list SFRJ*, 7/71.
- International Criminal Court Statute, *Sl. list SRJ (Međunarodni ugovori)*, 5/01.
- Optional Protocol to the International Covenant on Civil and Political Rights, *Sl. list SRJ (Međunarodni ugovori)*, 4/01.
- Second Optional Protocol to the International Covenant on Civil and Political Rights, *Sl. list SRJ (Međunarodni ugovori)*, 4/01.
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, *Sl. list SRJ (Međunarodni ugovori)*, 13/02.
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Sl. list SCG (Međunarodni ugovori)*, 16/05.
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *Sl. list SRJ (Međunarodni ugovori)*, 7/02.
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, *Sl. list SRJ (Međunarodni ugovori)*, 7/02.
- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, *Sl. list SRJ (Međunarodni ugovori)*, 6/01.
- Protocol Amending the Slavery Convention Signed at Geneva 25 September 1926, *Sl. list FNRJ (Dodatak)*, 6/55.

- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, *Sl. list SRJ (Međunarodni ugovori)*, 6/01.
- Protocol on Relating to the Status of Refugees, *Sl. list SFRJ (Dodatak)*, 15/67.
- Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *Sl. list SCG (Međunarodni ugovori)*, 5/05, 7/05.
- Slavery Convention, *Sl. novine Kraljevine Jugoslavije*, XI–1929, 234.
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *Sl. list FNRJ (Dodatak)*, 7/58.
- UN Convention Against Corruption, *Sl. list SCG (Međunarodni ugovori)*, 18/05.

Appendix II

Legislation Concerning Human Rights in Serbia

- Act on Conditions for Removal and Transplantation of Human Body Parts, *Sl. list SFRJ*, 63/90, 22/91; *Sl. list SRJ*, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96; *Sl. glasnik RS*, 101/05.
- Act on Cooperation of the FRY with the ICTY, *Sl. list SRJ*, 18/02.
- Act on Churches and Religious Communities, Sl. glasnik RS, 36/06.
- Act on Defence, *Sl. list SRJ*, 43/94, 11/95, 28/96, 44/99, 3/02.
- Act on Economic Offences, *Sl. list SFRJ*, 4/77, 36/77, 14/86, 74/87, 57/89, 3/90; *Sl. list SRJ*, 27/92, 24/94, 28/96, 64/01.
- Act on Movement and Residence of Aliens, *Sl. list SFRJ*, 56/80, 53/85, 30/89, 26/90, 53/91; *Sl. list SRJ*, 16/93, 31/93, 41/93, 53/93, 24/94, 28/96, 68/02.
- Act on Protection of Rights and Freedoms of National Minorities, *Sl. list SRJ*, 11/02.
- Act on the Safety of Foodstuffs and Objects in General Use, *Sl. list SRJ*, 24/94, 28/96, 37/02.
- Act on Security Services of the FRY, *Sl. list SRJ*, 37/02, 17/04.
- Act on Yugoslav Citizens' Travel Documents, *Sl. list SRJ*, 33/96, 46/96, 12/98, 44/99, 15/00, 7/01, 71/01, 23/02, 68/02, 5/03, 101/05.
- Asylum Act, *Sl. list SCG*, 12/05.
- Act on Abortion in Medical Facilities, *Sl. glasnik RS*, 16/95.
- Act on Assets Owned by Republic of Serbia, *Sl. glasnik RS*, 53/95, 3/96, 54/96, 32/97.
- Act on Assembly of Citizens, *Sl. glasnik RS*, 51/92, 53/93, 67/93, 48/94, 29/01.
- Act on the Bases of the System of Education, *Sl. glasnik RS*, 62/03, 64/03, 58/04, 62/04.
- Act on Broadcasting, *Sl. glasnik RS*, 42/02, 97/04, 76/05.
- Act on Companies, *Sl. glasnik RS*, 125/04.
- Act on Elementary Schools, *Sl. glasnik RS*, 50/92, 53/93, 67/93, 48/94, 66/94, 22/02, 62/03.
- Act on Environmental Protection, *Sl. list RS*, 135/04.

- Act Establishing Particular Jurisdiction of the Autonomous Province of Vojvodina (so-called Omnibus Act), *Sl. glasnik RS*, 6/02.
- Act on Expropriation, *Sl. glasnik SRS*, 40/84, 53/87, 22/89; *Sl. glasnik RS*, 6/90, 15/90, 53/95, 23/01.
- Act on Financial Support for Families with Children, *Sl. glasnik RS*, 16/02.
- Act on Financing of Political Parties, *Sl. glasnik RS*, 72/03, 75/03.
- Act on Free Access to Information of Public Importance, *Sl. glasnik RS*, 120/04.
- Act on Health and Safety at Work, *Sl. glasnik RS*, 101/05.
- Act on Judges, *Sl. glasnik RS*, 63/01, 42/02, 17/03, 27/03, 29/04, 44/04, 61/05.
- Act on Labour Relations in Government Agencies, *Sl. glasnik RS*, 48/91, 66/91, 44/98, 49/99, 34/01, 39/02, 49/05.
- Act on Local Self-government, *Sl. glasnik RS*, 9/02, 33/02, 33/04.
- Act on Mediation, *Sl. glasnik RS*, 18/05.
- Act on Misdemeanours, *Sl. glasnik RS*, 101/05.
- Acts on Non-Contentious Procedure, *Sl. glasnik RS*, 25/82, 48/88.
- Act on Organisation and Jurisdiction of State Bodies in Suppressing Organised Crime, *Sl. glasnik RS*, 42/02, 27/03, 39/03, 67/03, 29/04, 58/04.
- Act on Organisation of Courts, *Sl. glasnik RS*, 63/01, 42/02, 17/03, 27/03, 29/04, 101/05, 46/06.
- Act on Peaceful Settlement of Labour Disputes, *Sl. glasnik RS*, 125/04.
- Act on Pensions and Disability Insurance, *Sl. glasnik RS*, 34/03, 64/04, 84/04, 85/05.
- Act on Police, *Sl. glasnik RS*, 101/05.
- Act on Political Organisations, *Sl. glasnik RS*, 37/90, 30/92, 53/93, 67/93, 48/94.
- Act on Prevention of Conflict of Interest in Discharge of Public Offices, *Sl. glasnik RS*, 43/04.
- Act on Prevention of Discrimination against Persons with Disabilities, *Sl. glasnik RS*, 33/06.
- Act on Professional Training and Employment of Disabled Persons, *Sl. glasnik RS*, 25/96, 101/05.
- Act on the Protection of Participants in Criminal Proceedings, *Sl. glasnik RS*, 85/05.
- Act on Protector of Citizens, *Sl. glasnik RS*, 79/05.
- Act on Public Law and Order, *Sl. glasnik RS*, 51/92, 53/93, 67/93, 48/94, 85/05, 101/05.

- Act on Recognition of Rights to and Restitution of Land Transformed into Socially Owned Property by Inclusion in the Farmland Fund or by Confiscation due to the Non-fulfilment of Obligations Arising from the Obligatory Sale of Farm Produce, *Sl. glasnik RS*, 18/91, 20/92, 42/98.
- Act on Registration of Arrogated Property, *Sl. glasnik RS*, 45/05.
- Act on Secondary Schools, *Sl. glasnik RS*, 50/92, 53/93, 67/93, 48/94, 24/96, 23/02, 25/02, 62/03, 64/04.
- Act on the Security and Information Agency of the Republic of Serbia, *Sl. glasnik RS*, 42/02.
- Act on Social Organisations and Citizens Associations, *Sl. glasnik SRS*, 24/82, 39/83, 17/84, 50/84, 45/85, 12/89; *Sl. glasnik RS*, 53/93, 67/93, 48/94.
- Act on Social Security and Provision of Social Welfare, *Sl. glasnik RS*, 36/91, 79/91, 33/93, 53/93, 67/93, 46/94, 48/94, 52/96, 29/01, 84/04.
- Act on Supervision of the Safety of Foodstuffs and Objects in General Use, *Sl. glasnik SRS*, 48/77, 29/88; *Sl. glasnik RS*, 44/91, 53/93, 67/93, 48/94.
- Act on the Restitution of Property to Churches and Religious Communities, *Sl. glasnik RS*, 46/06.
- Act on Voluntary Pension Funds and Pension Plans, *Sl. glasnik RS*, 85/05.
- Civil Procedure Act, *Sl. list RS*, 125/04.
- Constitution of the Republic of Serbia, *Sl. glasnik RS*, 83/06.
- Constitutional Act on the Implementation of the Constitution, *Sl. glasnik RS,* 98/06.
- Criminal Code, *Sl. glasnik RS*, 85/05.
- Criminal Procedure Code, *Sl. list SRJ*, 70/01, 68/02; *Sl. glasnik RS*, 58/04.
- Criminal Procedure Code, *Sl. glasnik RS*, 46/06.
- Decree on Military Service *Sl. list SRJ*, 36/94, 7/98; *Sl. list SCG*, 37/03, 4/05.
- Decision on the Provincial Ombudsman, *Sl. list AP Vojvodine*, 23/02.
- Directive on Updating Election Rolls, *Sl. glasnik RS*, 42/00, 118/03.
- Decree on Opening State Security Service Secret Files, *Sl. glasnik RS*, 30/01, 31/01.
- Directive on Police Ethics and Conduct, *Sl. glasnik RS*, 41/03.
- Election Act, *Sl. glasnik RS*, 35/00, 57/03, 18/04.
- Elections of the President of the Republic Act, *Sl. glasnik RS*, 1/90, 79/92, 73/02, 93/03, 18/04.
- Employment and Unemployment Insurance Act, *Sl. glasnik RS*, 71/03, 83/04.
- Family Law, *Sl. glasnik RS*, 18/05.

- Health Protection Act, *Sl. glasnik RS*, 107/05.
- Higher Education Act, *Sl. glasnik RS*, 76/05.
- Housing Act, *Sl. glasnik RS*, 50/92, 76/92, 84/82, 33/93, 53/83, 67/93, 46/94, 47/94, 48/94, 44/95, 49/95, 16/97, 46/98, 26/01.
- Juvenile Justice Act, *Sl. glasnik RS*, 85/05.
- Labour Act, *Sl. glasnik RS*, 24/05, 61/05.
- Liquidation Act, *Sl. glasnik RS*, 84/04.
- Medical Insurance Act, *Sl. glasnik RS*, 17/05.
- Penal Sanctions Enforcement Act, *Sl. glasnik RS*, 85/05.
- Personal Data Protection Act, *Sl. list SRJ*, 24/98, 26/98.
- Public Information Act, *Sl. glasnik RS*, 43/03.
- Public Prosecutors Office Act, *Sl. glasnik RS*, 63/01, 42/02, 39/03, 44/04, 51/04, 61/05.
- Regulations on Circumstances and Manner of Use of Means of Coercion, *Sl. glasnik RS*, 133/04.
- Responsibility for Human Rights Violations Act, *Sl. glasnik RS*, 58/03, 61/03.
- Rulebook on Measures for Maintaining Order and Security in Penitentiaries, *Sl. glasnik RS*, 105/06.
- Rulebook on Rights of Unemployed Persons, *Sl. glasnik RS*, 35/97, 39/97, 52/97, 22/98, 8/00, 29/00, 49/01, 28/02.
- Rules on Entry of Trade Union Organisations in Register, *Sl. glasnik RS*, 6/97, 33/97, 49/00, 18/01, 64/04.
- Serbian Citizenship Act, *Sl. glasnik RS*, 135/04.
- State Administration Act, *Sl. glasnik RS*, 79/05.
- State of Emergency Act, *Sl. glasnik RS*, 19/91.
- Strategy for Combating Human Trafficking in the Republic of Serbia, *Sl. glasnik RS*, 36/06.
- Strikes Act, *Sl. list SRJ*, 29/96.
- Tax Procedure and Tax Administration Act, *Sl. glasnik RS*, 80/02.
- Telecommunications Act, *Sl. glasnik RS*, 44/03.
- Yugoslav Army Act, *Sl. list SRJ*, 43/94, 28/96, 44/99, 74/99, 3/02, 37/02, 44/05.
- University Act, 21/02.

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