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HUMAN RIGHTS IN SERBIA 2007
LEGAL PROVISIONS AND PRACTICE COMPARED TO
INTERNATIONAL HUMAN RIGHTS STANDARDS

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# HUMAN RIGHTS IN SERBIA 2007

LEGAL PROVISIONS AND PRACTICE COMPARED TO INTERNATIONAL HUMAN RIGHTS STANDARDS

Belgrade Centre for Human Rights
Belgrade, 2008

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# Contents

# Abbreviations

ABA/CEELI – American Bar Association/Central European and Eurasian Law Initiative

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

BiH – Bosnia and Herzegovina

CAT – Committee against Torture

CC – Criminal Code

CEDAW – Convention on the Elimination of All Forms of Discrimination against Women

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

CRID – Centre for the Development of an Inclusive Society

DEVD – Decision on the Election of AP Vojvodina Assembly Deputies

DS – Democratic Party

DSS – Democratic Party of Serbia

ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR – European Court of Human Rights

EU – European Union

FA – Family Act

FBI – Federal Bureau of Investigation of the United States of America

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

HPD – Housing and Property Directorate

HPD/CC – Housing and Property Directorate and Claims Commission

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

ICJ – International Court of Justice

ICMP – International Commission for Missing Persons

ICTY – International Criminal Tribunal for the Former Yugoslavia

IDP – Internally Displaced Person

ILO – International Labour Organisation

JNA – Yugoslav People's Army

JSO – Special Operations Unit

KFOR – Kosovo Forces

KLA – Kosovo Liberation Army

KPA – Kosovo Property Agency

KPCC – Kosovo Property Claims Commission

KPS – Kosovo Police Service

KTA – Kosovo Trust Agency

LDP – Liberal Democratic Party

LEA – Local Elections Act

LSV – League of Social Democrats of Vojvodina

MDRI – Mental Disability Rights International

MIA – Ministry of Internal Affairs

MP – Member of Parliament

NATO – North Atlantic Treaty Organisation

NGO – Non-governmental organisation

NS – New Serbia

NUNS – Independent Association of Journalists of Serbia

ODIHR – Office for Democratic Institutions and Human Rights

OMCT – World Organisation Against Torture

OSCE – Organisation for Security and Co-operation in Europe

PISG – Provisional Institutions of Self-Government in Kosovo

PM – Prime Minister

PSEA – Penal Sanctions Enforcement Act

RBA – Republican Broadcasting Agency

REC – Republican Election 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

Report 2006 – Human Rights in Serbia 2006, Belgrade Centre for Human Rights, Belgrade, 2007

RTS – Radio Television of Serbia

RTV – Radio Television
SAA – Stabilisation and Association Agreement with the EU
SAJ – Special Anti-terrorist Unit
SaM – Serbia and Montenegro
SDPO – Serbian Democratic Renewal Movement
SDU – Social Democratic Union
Serbia – Republic of Serbia
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)
SOE – Socially-owned Enterprises
SPC – Serbian Orthodox Church
SPO – Serbian Renewal Movement
SPS – Socialist Party of Serbia
SRS – Serbian Radical Party
SRSG – Special Representative of the UN Secretary General
SVM – Alliance of Vojvodina Hungarians
TU – Trade Union
UBPOK – Organised Crime Directorate
UN – United Nations
UN doc. – United Nations document
UNESCO – United Nations Educational, Scientific and Cultural Organisation
UNHCR – United Nations High Commissioner for Refugees
UNICEF – United Nations Children's Fund
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

UNSC – United Nations Security Council

USA – United States of America

Venice Commission – European Commission for Democracy through Law

VJ – Army of Yugoslavia

W.W.II – Second World War

YIHR – Youth Initiative for Human Rights

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 ten years now. The purpose of this Report is to present and assess the constitutional and legal provisions related to human rights. Serbia is bound by a large number of international treaties, including those by which it has assumed the duty to respect and ensure the respect for human rights. This is why the analysis focuses 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, and its conformity with the European Convention on Human Rights given that Serbia, a member of the Council of Europe, is obliged to conform its legislation to the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights.

As opposed to the 2006 Report, the 2007 Report is divided into two sections.

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 Constitution and laws of Serbia. Texts that had in the previous reports been divided into two sections (*Human Rights in Practice* and *Main Problems*) form one section in the 2007 Report which is entitled *Human Rights in Practice – Selected Topics*. Apart from texts on the degree in which specific human rights are respected in practice, this section includes thematic wholes covering a number of human rights relevant to these themes. Like the previous reports, the 2007 Report also focuses on specific

topics chosen for their strong political implications and effects on the state of human rights in the country. As opposed to the previous reports, Section II opens with the mentioned thematic wholes which give the reader a more appropirate introduction to the broader context in which human rights are realised in 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.

BCHR associates particularly monitored the actions by the state authorities, the events and tendencies in the four areas of major relevance to transitional justice, confrontation with the past, the promotion and development of human rights culture and, in general, the realisation and respect of these rights in Serbia. These four fields include organised crime and war crimes trials, the prohibition of discrimination and domestic violence. The BCHR activities in these fields were conducted within the project "Monitoring and Reporting the Activities of Judical Institutions in Serbia in the Field of Organised Crime, War Crimes, Discrimination and Domestic Violence" supported by the Canadian International Development Agency (CIDA). The project enabled the BCHR associates to more directly monitor the work of judicial and other state authorities and the developments in the four areas in general, by systematically collecting information in the media and NGO reports and especially by personally attending the trials, round tables and panel discussions on these topics, and discussing them with representatives of the state bodies and experts. The results of the one-year work have been presented in three quarterly bulletins entitled *Osmatračnica* (Watch Tower) and monthly reports available on BCHR's website and in the comprehensive overviews of the situation in the four areas published in Section II of the Report, which have been devoted greater attention than the other topics for the above reasons. One of the four topics, which had initially focused mostly on the prohibition of discrimination, has been expanded to include a text on the realisation and protection of minority rights in practice.

The publication of this Report was supported by the OSCE Mission to Serbia and the Embassy of the Federal Republic of Germany in Belgrade. The BCHR takes this opportunity also to thank the Canadian International Development Agency, whose support to the above project has greatly contributed to the informativeness of the Report in the four areas.

The Report was composed by the following associates of the Belgrade Centre for Human Rights: Igor Bandović, Nevena Dičić, Dina Dobrković, Bojan Đurić, Stefano Giantin, Ana Jerosimić, Anđelka Marković, Žarko Marković, Milica Matijević, Gordana Mihajlović, Marina Mijatović, Marko Milanović, Damir Milutinović, Vesna Petrović, Ivan Protić, Duška Tomanović, Miloš Stojković, Miloš Stopić, and Jovana Zorić. They were assisted by Marko Protić, Jovana and Ana Penezić and Tamara Protić.

# Introduction

Serbia entered 2007 as an independent state. It is a fully legally independent state for the first time since 1918, when it joined the Kingdom of Serbs, Croats and Slovenes (which later became Yugoslavia). As mentioned in the *2006 Report*, the new status of Serbia is laid down in its Constitution that was endorsed at the referendum held on 28–29 October 2006.

The Constitution met with many reservations both with respect to its content and the manner in which it was adopted. It was passed in a rush, after absolutely no public debate of its provisions. As per its text, the Constitution is a product of a compromise of diverse political forces. The price that had to be paid to achieve the necessary consensus included the provision in its Preamble binding all political protagonists to insist that Kosovo remain a province within Serbia and to oppose any attempt of it gaining independence. Kosovo Albanians, although formally citizens of Serbia, boycotted the referendum on the Constitution, just as they had boycotted all elections in Serbia since 1989. This fact was not, however, taken into consideration when the electoral body for the referendum was determined.

Although the Constitution came into force, wherefore not even criticisms of it could undermine its legality, its weaknesses became increasingly clear in 2007. Apart from the Kosovo issue, these shortcomings were reflected in the incessant discussions on how the Constitution and the Constitutional Act on its implementation ought to be enforced. The most conspicuous deficiency came to the fore in the dispute over the dates of the presidential and local elections. The Democratic Party of Serbia and all those forces presenting themselves as patriotic were of the view that no elections ought to be held as long as Serbia's territorial integrity is in danger. As could have been expected, such a broad formulation allowed for various interpretations, one of which was that the elections would be postponed for an indefinite period of time, given the views that Serbia's territorial integrity may for a long time be endangered in various ways.

Even without going into the abstract risks to Serbia's integrity, the unresolved Kosovo status issue could definitely have been perceived as reason enough to put the elections off as this problem rose on the political agenda in 2007, for two main reasons. On the one hand, the international community, i.e. the influential states involved in the resolution of Kosovo's status in international organisations and, notably, in the Contact Group for Kosovo, were of the view that it was time to finally address this issue. The Contact Group therefore began focusing on it with greater tenacity and entrusted the representatives of the most important stakeholders – the EU, Russia and the USA – with elaborating a final status proposal in consultation

with the competent Serbian authorities and the Kosovo Interim Government. The so-called Troika completed its work by the set deadline, 10 December 2007. Due to internal disagreements, it was unable to offer a single proposal and the issue was referred back to the UN Security Council. The UNSC was unable to reach agreement on the issue at its 19 December session.

It transpired, however, that many of the relevant governments think that former Finnish President Martti Ahtisaari's proposal envisaging limited ("supervised") independence of Kosovo is the only way forward, notwithstanding the Serbian Government's vehement opposition. Their view led to the belief that Kosovo Albanians and their political representatives would no longer wait for the proclamation of Kosovo's independence and that the only compromise they were willing to make was to agree to implement the Ahtisaari plan and accept the limited independence of Kosovo. From their point of view, further talks with the Serbian Government were pointless and if no solution was found in the UNSC, the decision on recognising the independence of Kosovo ought to be left to the discretion of the individual foreign governments. There have been indications that a large number of states, including most EU members, would recognise Kosovo's unilateral declaration of independence.

On the other hand, the issue of Kosovo's fate, which began rising on the political agenda the previous year, became the crucial and most dramatic domestic political concern in Serbia in 2007. Kosovo remained the topmost priority of the government that assumed power after the 21 January 2007 parliamentary elections, thanks to which the new cabinet no longer needs to rely on the support of Milošević's Socialist Party of Serbia like the previous one. Although most of the ministers in the government come from the Democratic Party, qualified as more moderate and more pro-Western than the other large parties in Serbia, Vojislav Koštunica was re-elected Prime Minister and ministers from his party (DSS), especially the one heading the newly-formed Ministry for Kosovo and Metohija, have been setting the main tone for all talks on Kosovo. The DSS and its "populist" ally New Serbia imposed the Kosovo issue as a priority on the whole state, pushing off the political agenda nearly all other issues that the post-Milošević governments had focussed on.

Various national institutions, especially the media under the control of the government or under the influence of the extreme right, also contributed to imposing Kosovo as the unique political issue. The year 2007 saw a stronger campaign against all those advocating a more rational approach to the Kosovo issue that would take into account not only the territory of the province but the people inhabiting it, i.e. the Albanian majority living there, as well. This intolerant signal was taken as a cue by numerous movements and NGOs, which feel that the time has come to deal with all of Serbia's citizens whom they perceive as nationally unaware or even as "traitors". These organisations, some of which have openly been flirting with Fascism, succeeded in preventing public gatherings of those who do not think like they

do and even used some local authorities to prohibit concerts of musicians whose critical views they dislike. There is growing apprehension, voiced by several NGOs, that Serbia is being enveloped in the atmosphere of the nineties given the similarities between the current propaganda and campaigns and the conduct of Milošević's regime.

The political commotion instigated by the Kosovo issue has also been used in the confrontations between the pro-European and anti-European forces given that the Kosovo debate has been evolving simultaneously with the process of Serbia's accession to the EU. The integration process had been halted in 2006 when the EU suspended the talks because of Serbia's failure to fully cooperate with the International Tribunal for the Former Yugoslavia (ICTY), notably to extradite the remaining indictees at large, especially General Ratko Mladić. The talks resumed after the Government of Serbia furnished proof that it was cooperating with the ICTY on all other matters; the Stabilisation and Association Agreement between Serbia and the EU was initialled on 7 November 2007. There were indications that the SAA would be signed in early 2008 even if Serbia failed to fulfil all its ICTY obligations. The political forces in Serbia opposing EU integration, however, stepped up their activities in 2007, attempting to link the fate of Kosovo with EU accession and assure the public that Serbia would have to renounce its sovereignty over Kosovo if it wanted to join the EU. Statements by some politicians in EU member-states added grist to their mill.

Anti-European forces, which include the strongest party in the country, the Serbian Radical Party, and the DSS, are advocating closer ties with Russia, the government of which has energetically opposed a rapid resolution of the Kosovo issue. These forces only rarely openly speak out against EU accession (which is listed as one of the five priorities of the new government), but rather put blame on others in the West, like NATO, which is quite unpopular in Serbia because of its armed intervention against Yugoslavia in 1999. The resistance to EU integration is seconded by those wielding significant economic clout mostly acquired in the Milošević era wars. They are averse to the stricter rules their businesses would have to abide by in the EU. Gone would be the economic and legal lacunae they have been thriving in. Nor would they any longer be able to wield such strong influence over the political parties and the media.

It is still too early to judge the headway the new government made in other walks of life. It has undoubtedly succeeded in completing the reform of the army, putting it under its control and purging it of nearly all remnants of Milošević's regime. The new Justice Ministry has obviously been trying to reform the judiciary by reducing the number of judges to reasonable proportions and eliminating those unworthy of the profession. It made use of the scandals that broke out over the expiry of the statute of limitations due to judicial negligence, the inconsistent penal policy, which is extremely mild with respect to ordinary crimes, and the general public belief that the judiciary is corrupt. The competent ministries have also been

trying to improve the environment, address the problems of socially vulnerable groups and modernise the state administration. Not much progress has been made in the privatisation of big Serbian state companies that have retained their monopolies over energy, air traffic and the railway system. The impression is that the ruling parties are reaping significant incomes from and employing their members in such companies.

Notwithstanding all its shortcomings, the 2006 Constitution of Serbia includes a modern catalogue of human rights. The political situation in Serbia has improved inasmuch as no political party dares openly oppose human rights as such, but not much more than that. The administration, however, still does not realise the significance of upholding and promoting human rights in a country with an underdeveloped and underrated human rights culture. This lack of awareness and commitment is illustrated *inter alia* by the problems surrounding the establishing of the Constitutional Court of Serbia – only ten of its fifteen judges were elected by end 2007. There have also been difficulties in implementing the decisions of international human rights protection bodies, notably the UN Committees, and the European Court of Human Rights since Serbia joined the Council of Europe. Cultural obstacles include instigating hatred and mistrust of vulnerable minority groups, especially the Roma, members of small religious communities and persons of different sexual orientation.

The status of NGOs focusing on human rights has been affected by all of the above-mentioned factors. The media continued campaigning strongly against non-governmental organisations advocating human rights and democracy, but not against ultra-nationalist and pro-Fascist NGOs. The brand of traitor is stamped on the former, especially those advocating the rights of Albanians and other minorities. Apart from these political disqualifications, these NGOs have been falsely accused of receiving huge amounts of money from the West; its members are said to be guided by lucrative not idealistic motives. This may appear true given that Serbia as a poor country cannot financially back the civil sector, while the wealthiest people and companies still have not embraced the concept of social responsibility. Such attacks are all the more cynical given the foreign donors' conspicuous lack of interest in the civil sector since 2000, which has probably been a consequence of their belief that Serbia finally got a democratic government and that it was more important to help the latter than the NGOs. The civil sector in Serbia has nevertheless continued to develop and, more importantly, to "demetropolise". More and more local and regional NGOs rallying an increasing number of people have been established in the interior of the country. Such form of activity, no longer concentrated in Belgrade and the other big cities, allows for greater social influence, although it often brings the members of these organisations into conflict with the local authorities.

# Summary

## *Human Rights in Legislation*

1. The state of human rights in Serbia and the state authorities' concern with their enjoyment and protection in 2007 were strongly influenced and frequently overshadowed by the turbulent political events. The full blockade of the political institutions, especially the National Assembly, which ensued the minute the campaign for the adoption of the Constitution was launched in September 2006, carried over into 2007 due to the parliamentary elections in January 2007. The Assembly was inactive for almost eight months, while the outgoing Government operated in the capacity of a "technical cabinet". The whole political potential of the country focussed on the major campaigns for the referendum on the Constitution and the elections. Eleven parties and coalitions won seats at the January 2007 elections. Although the parties of the so-called "democratic bloc" were said to have won the elections, it would be fairer to say that the parliament is dominated by the right of centre parties.

The elections were followed by an agonising three months of negotiations between the future coalition parties over some of the principles on which the work of the new executive authorities would be based. The post-election process will be remembered by the election of Serbian Radical Party (SRS) Deputy President Tomislav Nikolić to the post of Assembly Speaker several days before the expiry of the deadline for the forming of the government. His election provoked strong domestic and international reactions; the session at which he was elected will probably be remembered the most by the number of insults and recriminations the political parties that now form the Serbian Government slung at each other. When the political parties finally reached agreement on the new parliamentary majority, Nikolić resigned and a Democratic Party (DS) official was appointed Speaker. The somewhat vague constitutional provisions on the President's powers in the procedure of appointing the designate Prime Minister and, to an even greater extent, the lack of political tradition in similar situations resulted in the entrusting of the mandate to form the government to Vojislav Koštunica, the president of the Democratic Party of Serbia, which came in third at the elections, just a few days before the expiry of the deadline for electing the new Government.

The Government was appointed on 15 May, a few minutes before the deadline expired. Had it not been formed, the still fragile political and legal stability in Serbia would have been additionally undermined – the newly elected Assembly would have had to be dissolved and fresh parliamentary elections would have had to be called.

The Government comprises the Prime Minister, one Deputy Prime Minister (charged with EU integration) and 23 ministers, whereby Serbia has one of the bulkiest governments in terms of size in contemporary European political practice.

2. Although the National Assembly was formally constituted when the mandates of the new deputies were verified on 14 February, the lack of agreement on the new ruling coalition (and parliamentary majority) precluded all legislative activities. The Resolution on Kosovo rejecting all provisions in the Martti Ahtisaari plan perceived as violating Serbia's sovereignty, proposed by the Government, was the only act the Assembly adopted in the first three months. The activities of the highest legislative body were stymied by the obstruction of its work and delays in electing its Speaker in an atmosphere of overall mistrust and behind-the-scenes arrangements. The year 2007 was characterised by delays in the adoption of laws – the National Assembly adopted only 60 or so laws until mid-December. Only about ten of them were totally new and nearly all of them were merely fulfilling the formal obligations laid down in the Constitutional Act on the Implementation of the Constitution. Moreover, nearly all the adopted laws had been submitted and adopted under an emergency procedure, wherefore there were hardly any opportunities for serious debates of the drafts and for making any essential improvements in them through amendments. Major disputes arose over how the requirements and deadlines in the Constitutional Act related to the calling of presidential and local elections ought to be interpreted, even within the ruling parliamentary majority. On 12 December, the Assembly Speaker (from the DS) called the presidential elections for 20 January 2008 (in the event no candidate wins an absolute majority on 20 January, the second round of elections will be held a fortnight later, on 3 February). Prime Minister Koštunica's Democratic Party of Serbia (DSS) challenged the lawfulness of his decision, because not all adopted laws necessary for calling of the presidential elections had come into force by 12 December. The Speaker was also criticised for deciding to call the elections without consulting with DS' coalition partners. However, after the subsequent political agreement among the DS and DSS, the political party of the Prime Minister gave up challenging the legitimacy and legality of the decision on calling presidential elections. As a part of the same „package" of the agreement at the top of the ruling coalition, the majority in the National Assembly, in the end of December adopted the laws necessary for calling of the local and provincial elections so the Speaker of the parliament called these elections for 11 May 2008.

3. The year 2007 was the first year in which the new Constitution of Serbia, adopted on 30 September 2006 and endorsed at the 28–29 October 2006 referendum, was applied. The Constitution had been adopted in a rush, with no public debate or opportunity for the experts to analyse and comment its provisions. Public reaction was fierce. Although it is still too early to give comprehensive assessments of the reach of the constitutional provisions qualified as problematic both by international and domestic experts, there is no doubt that these deficiencies can largely be attributed to the fact that the Constitution had not been put to any public debate

before adoption. Although the Constitution was passed in a manner unusual for democratic countries, it indisputably comprises a much better catalogue of human rights than the previous Constitution of Serbia.

4. A reformed judiciary system with new administrative, appellate and misdemeanour courts was to have begun operating in 2007 but these courts were not constituted by the end of 2007. The deadlines for implementing the reform of the judiciary laid down in the 2001 Act on Organisation of Courts and its subsequent amendments had already been extended several times. The vague and general provisions of the Constitutional Act on the Implementation of the Constitution allowed for yet another delay in establishing the new courts, again bringing into question the reform of the judiciary, which is needed to improve court protection of human rights. Although the Constitutional Act stipulated that the Assembly harmonise laws relating to the application of the constitutional provisions on the courts and public prosecution offices with the Constitution during its second session, these laws were not included in the Assembly agenda by the end of the year i.e. the end of the second parliamentary session. Given that not even the drafts were made public by the end of year, it can be asserted with certainty that this obligation in the Constitutional Act will not be fulfilled.

5. The new Constitution introduced in Serbia's legal order the institute of constitutional appeal as a human rights protection mechanism. The effectiveness of this legal remedy has not been tested yet, because the new Act on the Constitutional Court was adopted only in late November. The adoption of this law allowed for overcoming the year-long blockade of the Court and for initiating the extremely complex procedure of appointing the Court's judges. Ten of the fifteen Constitutional Court judges were appointed by the end of the year and, pursuant to the Constitutional Act, the Court can now operate because two-thirds of its members have been appointed. The remaining five judges will be appointed only upon the constitution of the Supreme Court of Cassation, the High Judicial Council and the State Prosecutors Council, which, again, can be established only once the valid laws are harmonised with the Constitution and the new laws are adopted. The Constitutional Court will therefore have to operate wihout one third of its judges. The even number of judges, unfortunately, carries the risk of deadlocks and the blockade of the Court's work. The shortcomings and imprecise provisions in the Constitution on the nomination and appointment of the Constitutional Court judges became apparent already during the drawing up of the National Assembly list of candidates. The Constitution and the Constitutional Act obviously failed to lay down clear and efficient rules on the appointment of the Constitutional Court judges or proper guarantees of the Court's independence. The opportunity to rectify some of the constitutional deficiencies in the Constitutional Court Act was, unfortunately, missed. The part of the Act regulating the appointment of judges, the duration and termination of tenures mostly merely reiterates the sparse and vague provisions in the Constitution.

6. Although the Act on the Protector of Citizens, passed in September 2005, envisaged the election of the ombudsman within six months from the day the Act

comes into force, Serbia's first ombudsman was elected only in mid-2007. The imperfections of the system laid down in the Act came to the fore on this occasion as well. In addition, the election of the Protector was hastily conducted to harmonise the existing laws with the new constitutional order wherefore the opportunity was missed to consolidate the position of the new institute by devoting enough attention to the election of the first ombudsman. The first few months of the Protector's work were accompanied by problems similar to those faced by other independent institutions in Serbia. The year ahead will show what role the Protector will play in Serbia's legal order. The Government submitted the Draft Act on the Protector of the Rights of the Child to the parliament in December 2007.

7. Serbia's legal order still lacks an efficient legally defined mechanism for the execution of binding decisions of international human rights protection bodies. The hitherto non-implementation of decisions taken by some UN Committees corroborates the necessity of making amendments to a whole set of (not only procedural) laws in order to ensure the effective and full implementation of the decisions taken by international bodies. The challenges that the state authorities will face in implementing the decisions of the European Court of Human Rights could well indicate which amendments the Serbian legislation is in need of.

8. Serbia's legislation does not comprise an effective legal remedy against unjustifiably long proceedings and violations of the right to a trial within a reasonable time guaranteed by Article 6 (1) of the European Convention on Human Rights, which constitutes one of the greatest problems with respect to the right to a fair trial in Serbia. As appellate courts have not been set up yet, the district courts and the Supreme Court are burdened by huge caseloads, which is one of the reasons why trials extend beyond "a reasonable time". Moreover, the enforcement of final judgements, once they are delivered, takes a very long time. Most of the applications Serbia's citizens filed with the European Court of Human Rights relate to overly long proceedings. In 11 of the 15 judgements it delivered against Serbia, the Court found violations of the right to a fair trial due to long proceedings or the non-enforcement of final judgements. Judicial dilatoriness has also led to the expiry of the statute of limitations in cases. The work of the courts was in 2007 additionally blocked by a strike of the judicial staff, which demanded higher salaries and the signing of a collective agreement. The courts provided only "minimum process of work" during the strike and most of the trials were put off.

9. Serbia still has no law regulating the opening of state security files on citizens, an issue of extreme relevance with respect to the right to privacy and the realisation of two vital needs of its society – to confront its authoritarian past and reverse the effects of the grave human rights violations and protect the right to privacy and other important individual rights.

10. Insight in state security files is closely linked to taking to task persons who had violated human rights in the past (so-called vetting or lustration). The law on lustration (Act on the Responsibility for Human Rights Violations) enacted back in 2003 has not been applied at all. Instead of vetting the judiciary in accordance

with this Act, the Constitutional Act on the Implementation of the Constitution foresees the re-appointment of all the judges in Serbia.

11. Other segments of the security services have not been reformed either. The Security Services Act, passed in late 2007, provides for democratic civilian oversight of the services by the National Assembly, the President, the Government, the public and a new body, the National Security Council, which shall *inter alia* ensure that the regulations and standards related to the protection of personal data and other regulations protecting human rights which may be violated by exchange of information or other operational activities are applied. Article 19 of the Act, however, lists the issues about which the competent Assembly committee members may not seek information; some of the grounds are impermissibly broad and essentially undermine the possibility of overseeing the work of the secret services.

12. The long-awaited Asylum Act was also adopted in 2007. Although it represents a positive step towards improving protection in this area and includes a large number of guarantees for the rights of persons it relates to, this Act, like many others recently adopted in Serbia, was put in the parliament pipeline without having undergone a proper public debate, which may be one of the reasons why some of its provisions are not fully in accordance with international standards. The Asylum Act and the Travel Documents Act, also adopted in 2007, brought Serbia closer to the EU's 'positive visa' list.

13. National and international NGOs continued operating in an atmosphere of insecurity given that a law on associations of citizens was not adopted in 2007. The Draft Act on Associations was submitted by the Government to the parliament after a public debate. It governs the work of both domestic and international associations, which is extremely important given that international organisations active in Serbia have been operating in a legal vacuum for years now.

14. Serbia has not adopted a general, systematic and comprehensive anti-discrimination law defining the main legal concepts, regulations and standards binding on the courts and specific mechanisms for the protection of victims of discrimination yet, notwithstanding extensive expert debates and repeated recommendations by international organisations that it do so for several years now. Several drafts of a corresponding act had been produced in the past few years, including the 2006 Government bill, but only one of them, submitted by the opposition Liberal Democratic Party (LDP), had formally been submitted to the Assembly for adoption by end 2007. It still remains uncertain when Serbia will have systematic and comprehensive anti-discrimination legislation.

## *Human Rights in Practice*

1. The substandard work of institutions charged with protecting human rights still stymied the protection and realisation of human rights in 2007. Public prosecutors extremely rarely reacted to human rights violations. Police investigations were mostly overly long and ineffective. Court proceedings on human rights violations

were also unjustifiably extended. The courts have considerable discretion in handing down punishment given the extensive scope of penalties afforded by the law, which has led to an inconsistent penal policy in Serbia.

2. The impression prevails that the executive frequently interferes in the work of the judiciary and legislative authorities and that the laws being adopted are the fruit of compromise between political parties, not part of the endorsed legal and economic reform strategies. This has led to difficulties in applying laws, which, in turn, has exacerbated the citizens' feelings of insecurity.

3. The enjoyment of the right to freely access information is still dissatisfactory notwithstanding certain positive trends in the implementation of the Act on the Free Access to Information of Public Importance. The main problems hindering the effective enjoyment of this right lie in the absence of oversight over the implementation of the Act and in mere misdemeanour penalties for its violation.

4. The International Court of Justice in February 2007 rendered its judgement in the genocide case of Bosnia and Herzegovina (BiH) filed against the Federal Republic of Yugoslavia, i.e. Serbia, for the crimes committed during the armed conflicts in BiH in the 1992–1995 period. In the judgement, delivered after proceedings that lasted over 14 years, the Court found that the crime of genocide had been committed "only" in Srebrenica in July 1995, when the Bosnian Serb Army forces killed over 7,000 Bosnian Moslems. The ICJ had thus rejected the main thesis of the BiH's legal team that all crimes in BiH on the whole constituted genocide. The Court established that Serbia was not responsible for the genocide and that it had not been an accomplice to the crime, but that it had violated Article I of the Convention on Genocide because it had done nothing to prevent the act, although it must have been aware of the serious risk of it occurring, and because it had not punished the perpetrators as it had not handed over to the ICTY the persons indicted for the genocide, notably General Ratko Mladić. The ICJ rejected BiH's reparations claim. Most of the public in Serbia and Bosnia and Herzegovina misinterpreted the ICJ judgement as a judicial exoneration of Serbia for its involvement in the war in BiH. Such interpretations can be ascribed solely to the lack of understanding of ICJ's jurisdiction, which was in this case limited only to genocide and did not extend to other international crimes, and to the lack of understanding of the extremely strict legal defition of genocide, a concept extremely susceptible to inflation and political manipulation. Although the ICJ judgement fully affirmed the ICTY findings and the volume and gravity of crimes committed in BiH, it was limited in scope for formal reasons. Serbia failed to act as instructed by the ICJ and had not handed Ratko Mladić over to the ICTY or established full cooperation with this international tribunal by the end of 2007. The attempt by some political parties and NGOs to have the Serbian Assembly adopt a declaration condemning the Srebrenica genocide also failed. Little has been done in other areas of transitional justice, above all in the field of institutional reform (lustration and vetting) and on establishing the truth about the past. Initiatives for confronting the past are not institutionalised and state

institutions have shown no interest in them. Serbia's cooperation with the ICTY intensified in 2007 over 2006 inasmuch as generals Vlastimir Đorđević and Zdravko Tolimir, indicted before the Tribunal, were arrested and transferred to The Hague.

5. The work of state bodies prosecuting international crimes intensified somewhat in 2007. The war crimes prosecutors' powers were expanded to include the prosecution of persons abetting war crimes indictees. Before the adoption of the amendments, abettors of fugitive indictees had been tried in municipal courts, but these trials were inefficient. The amendments will not eliminate all problems unless cooperation with the Ministry of Internal Affairs (MIA) further improves. The forming of a War Crimes Investigation Service within the MIA was a step in the right direction although the capacities of this small body are modest. The Special War Crimes Chamber of the Belgrade District Court also lacks both human and infrastructural capacities. Public resistance and the executive's insufficient support to war crimes trials has contributed to a climate deterring injured parties and other witnesses from testifying, which has additionally hindered the proceedings. The War Crimes Prosecution Office has been exposed to political pressures since its inception. Some media have also taken part in the campaign and, as a rule, fail to publish statements by war crimes prosecution officials denying false allegations. The Prosecutor, his deputies and the Office spokesperson have been exposed to threats, verbal assaults and even physical attacks. The war crimes judiciary delivered four judgements, raised three indictments and conducted a number of war crimes trials in 2007. Cooperation between the prosecutors in the region was intensive.

6. The first-instance judgement against the assassins of Serbia's first democratic Prime Minister Zoran Đinđić was delivered in May 2007. The court established that a conspiracy had been forged with the intention of undermining the constitutional order and security of the state with the aim of gaining influence over the leading state officials by creating insecurity and unrest by assassinating the PM and several other senior officials and by other acts of violence. The organisers of the assassination and the assassins were convicted to maximum sentences on the basis of abundant and incontestable evidence presented against them at the trial. The proceedings, however, failed to provide answers to a number of questions related to the PM's assassination and the events that preceded and followed it. Although the judicial panel's explanation of the judgement and some statements made by the special prosecutors indicate that they recognised the importance of shedding light on the political background of Đinđić's assassination for establishing the rule of law in Serbia, the lack of courage of the prosecutors and the court to shed light on these events cannot be justified by the lack of political will and support of other state institutions. The executive's indirect pressures on the bodies fighting organised crime in 2007 were apparent *inter alia* in their absence to effectively investigate the threats and assassination attempts against judges trying organised crime cases. Some of the trials before the Organised Crime Chamber of the District Court may be described as a form of confrontation with the past but the Supreme Court of Serbia

jurisprudence, however, serves as a stark reminder of how difficult such confrontation is and how much the Serbian judiciary is in need of reform if it is to fight organised crime effectively. The year 2007 was marked also by numerous arrests and proceedings against alleged perpetrators of organised crime.

7. Violations of the prohibition of torture and other prohibited forms of ill-treatment, apparently the consequence of systemic problems plaguing society, ranked high on the public agenda in 2007. The violations of the prohibition of torture have become more evident since the adoption of new legislation related to the prohibition of torture, the ratification of international treaties and the adoption of subsidiary legislation. Many of these problems have originated from the lack of readiness of the state authorities, above all the police, to radically change their attitude towards this civil right and the absence of effective legal mechanisms for preventing and punishing torture. The situation in prisons and other detention facilities also leaves a lot to be desired. The dismal conditions in psychiatric institutions noted by both international and domestic organisations were also frequently in the public limelight in 2007.

8. Tolerance of discrimination in practice is above all reflected in inefficient investigation, prosecution and punishment of its perpatrators and in the lack of systematic and comprehensive legislation. Discrimination against the Roma ethnic minority, frequently accompanied by physical violence, remained widespread. The courts, on the other hand, tended to convict the assailants on Roma to mild sentences.

The election of minority deputies to the Assembly marked a major headway after their three-year absence from the parliament but the question of whether they were able to genuinely actively partake in the work of the Assembly remained open given that they were still unable to use their native languages despite the legal provisions affording them that right.

Hate speech is still widespread in Serbia, both in media and in publishing. It was even heard in parliament. A large number of neo-Nazi movements, responsible for various incidents, have been active in Serbia.

Although the Act on the Prevention of Discrimination against Persons with Disabilities was adopted in 2006, the national and local authorities have mostly failed to fulfill their obligations and the Act is not adequately applied.

The Act on Churches and Religious Communities, passed in 2006, governs the field of religious freedoms and religious organising. Many of its provisions are, however, extremely problematic from the viewpoint of the freedom of religion and the constitutional principle of equality of religious communities. Some religious communities have been the target of attacks for years but the police have failed to identify the perpatrators. Discrimination against women still exists, especially at work, but information on such violations is rarely available. Perpetrators of discrimination are rarely criminally prosecuted; the criminal law provisions invoked in such cases are insufficient to ensure full protection of criminal law. The key prob-

lem in court still lies in the challenge of proving discrimination. This problem could be eliminated for the most part by the adoption of adequate legal provisions.

9. Violations of the freedom of expression and of media codes of conduct have been on the increase for the fourth year running. The situation in the field of electronic media was further exacerbated by the relations between the media, the judiciary and the Republican Broadcasting Agency (RBA) Council. The unclear application of the criteria set by the RBA again came to the fore during the allocation of regional TV frequencies in 2007. The year was marked by the further tabloidisation of the media, violations of the professional and ethical codes of conduct and of the fundamental principles relating to the independence of the judiciary, especially with respect to investigations and trials of cases with political connotations or dealing with violations of rights during the wars in the former Yugoslavia. Kosovo final status talks prevailed over all other media topics in 2007; reports on the work of the ICTY were the second most frequent topic. Journalists were also exposed to threats and attacks in 2007.

10. Although domestic violence is a criminal offence under Serbian law, research indicates that the victims are not adequately protected and that much of domestic violence remains unreported mostly because the victims fear the reactions of their community and the offender and mistrust the legal system. The law does not sufficiently guarantee the urgency of the proceedings and most victims tend to abandon the proceedings they had initiated. Prosecutors, on the other hand, rarely take legal action against persons suspected of domestic violence. Jurisprudence indicates that courts hardly ever order the protection measures envisaged by the Family Act and that the sentences pronounced for violations of the Criminal Code are extremely lenient.

11. Economic and social rights remained the most endangered, like in other countries undergoing political and economic transition. The situation in Serbia is somewhat specific because most attention had been devoted to the systematic years-long violations of civil and political rights, which resulted in the neglect of economic, social and cultural rights. 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. Risks of grave violations of economic and social rights increased in 2007 because a new General Collective Agreement had not been adopted yet again, although the former Agreement had expired quite a while ago. 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 in the country's economic transformation processes. The unemployment rate in Serbia remained high and poverty was one of its greatest concerns in 2007. Abuse and harrasment in the workplace (mobbing) was widespread and gaining increasing public attention. Social dissatisfaction continued growing, as illustrated by the large number of strikes in the public sector and, to a somewhat lesser degree, in the private sector.

# 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 with respect to the civil and political rights guaranteed by international treaties binding on Serbia, 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 standards established by the jurisprudence of the UN Human Rights Committee and the European Court of Human Rights (ECtHR). Where relevant, the report also reviews Serbia's legislation with respect to standards established by the International Covenant on Economic, Social and Cultural Rights (ICESCR), specific International Labour Organisation (ILO) treaties and other international treaties dealing with specific human rights, such as the UN Convention against Torture and the Convention on the Rights of the Child.

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.

The 2007 Report reviews legislation that was in force in 2007 but also comments laws that were to come into force in 2008 and draft laws submitted to parliament for adoption.

## 1.2. Constitutional Provisions on Human Rights

The year 2007 was the first year of application of the new Constitution of Serbia,[1] adopted on 30 September 2006 and endorsed at the 28–29 October 2006 referendum. The Constitution was adopted within a very short period of time; it had not undergone any public debate nor had the experts had the opportunity to analyse and comment its provisions, which met with fierce public reaction.[2] Until the adoption of the new Constitution, human rights were enshrined in the 1990 Constitution of Serbia, which included a much smaller catalogue of human rights than the new Constitution, and the Charter on Human and Minority Rights, which was in force until the dissolution of Serbia and Montenegro (SaM). The question which of the two catalogues of human rights would apply in Serbia that arose after SaM's disintegration actually went unanswered[3] and Serbia in the meantime adopted its new Constitution.

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.[4] 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[5] 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

1 *Sl. glasnik RS*, 83/06.

2 More on the procedure under which the Constitution was adopted in *Report 2006*, III.1.

3 In July 2006, the Government submitted for adoption a draft law under which SaM laws, including the HR Charter, would remain in effect in Serbia. It was, however, 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 was quite problematic given that the 1990 Constitution regulated human rights in a much more restrictive fashion than the Charter wherefore much of the Charter would have been qualified as "not in accordance with the Constitution" and citizens would have enjoyed less human rights protection.

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

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.

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.[6] 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 nonetheless 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.[7]

Under the 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 hierarchy of legislation as it stipulates the compliance of the ratified international treaties with the Constitution (Art. 16 (2) and Art. 194 (4)).[8] 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

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

7 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.

8 In its Opinion on the Constitution of Serbia, the Venice Commission, too, concluded that this provision raised important issues. See European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitution of Serbia*, Opinion No. 405/2006, CDL-AD(2007)004, 19 March 2007, paras. 15–17.

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 although it has been observed that judges have in the recent years begun to invoke ECHR provisions in explanations of their judgements.

In 2003, the SaM presented the first reports after the 2000 democratic changes to the UN treaty bodies – the reports under ICCPR[9] and the International Covenant on Economic, Social and Cultural Rights.[10] The Human Rights Committee adopted its Concluding Observations on the implementation of ICCPR in SaM in July 2004.[11] 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.[12] The UN Committee for Elimination of All Forms of Discrimination against Women in early 2007 reviewed Serbia's initial report for the 1992–2003 period. After a long delay, Serbia in 2007 submitted to the Committee for the Rights of the Child its initial report on the realisation of the Convention on the Rights of the Child in the Republic of Serbia in the 1992–2005 period. The report shall be reviewed by the Committee in April 2008.

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.[13] On 22 June 2001, the

9 CCPR/C/SEMO/2003/1.

10 E/1990/5/Add.61.

11 CCPR/CO/81/SEMO.

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

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

FRY ratified both the Optional Protocol to the International Covenant on Civil and 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.[14]

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.[15]

FRY in 2002 ratified the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women[16] whereby it accepted the Committee's competence to monitor the implementation of the Convention, receive and review communications submitted by or on behalf of individuals or groups of individuals regarding violations of rights guaranteed by the Convention.

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,[18] 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.[19] 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.[20] The reservation regarding mandatory detention is also no longer in effect.[21]

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

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

16 *Sl. list SRJ (Međunarodni ugovori*), 13/02.

17 More in I.2.2.

18 *Sl. list SCG (Međunarodni ugovori)*, 5/05.

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

20 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.

21 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.

The Decree on SaM's Agent before the European Court for Human Rights in Strasbourg was adopted in early 2005.[22] The Decree regulates the appointment and dismissal procedures and the powers and actions of the Agent. Slavoljub Carić was appointed Agent.[23]

The SaM Parliament on 26 December 2003 also ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[24] 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.[25] The Framework Convention for the Protection of National Minorities was ratified back in 1998 by the then FRY.[26]

The National Assembly in 2007 ratified the Convention on Police Cooperation in South East Europe,[27] the European Charter of Local Self-Government,[28] the Kyoto Protocol to the UN Framework Convention on Climate Change,[29] the Additional Protocol to the Criminal Law Convention on Corruption,[30] the Civil Law Convention on Corruption,[31] the Convention on Environmental Impact Assessment in a Transboundary Context,[32] Serbia's visa facilitation[33] and readmission[34] agreements with the EU and the agreement on amending and accessing the Central Europe Free Trade Agreement – CEFTA 2006.

In 2007, Serbia signed the UN Convention on Rights of Persons with Disabilities. Of the treaties adopted within the Council of Europe, it signed the European Convention on the International Validity of Criminal Judgements, the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, the revised European Convention on the Protection of Archeological Heritage, the European Convention on Landscape, the CoE Framework Convention on Value of Cultural Heritage for Society and the CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.

22 *Sl. list SCG (Međunarodni ugovori)*, 7/05 and *Sl. glasnik RS*, 49/06.

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

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

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

26 *Sl. list SRJ (Međunarodni ugovori)*, 6/98.

27 *Sl. glasnik RS*, 70/07.

28 *Sl. glasnik RS*, 70/07.

29 *Sl. glasnik RS*, 88/07.

30 *Sl. glasnik RS*, 102/07.

31 *Sl. glasnik RS*, 102/07.

32 *Sl. glasnik RS*, 102/07.

33 *Sl. glasnik RS*, 103/07.

34 *Sl. glasnik RS*, 103/07.

# 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. 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 in mid 2007 put off the enforcement of the 2006 Criminal Procedure Code until 31 December 2008[35]. The old Criminal Procedure Code (hereinafter "the old CPC") thus remains in force. The Serbian Justice Minister said in late December that he formed two working groups, one to draft a new CPC and the other to harmonise the old CPC with the new Constitution.

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.

35 Act amending the Criminal Procedure Code, *Sl. glasnik RS*, 49/07.

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 Constitution, under which the Constitution shall guarantee and directly apply human and minority rights enshrined in international law. This deficiency was not eliminated by the Constitutional Court Act[36] adopted in November 2007. The Act does not include a provision ensuring 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 intro-

36 *Sl. glasnik RS*, 109/07.

duces 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.[37] 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" (italics added) (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.

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.

## *2.3. Ombudsperson*[38]

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.[39] In addition to ombudspersons

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

38 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)).

39 The introduction of the institute of ombudsperson in a legal system is preceded by its constitutional or legal regulation. 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

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.

*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.[40] The Government accepted some of the recommendations made by international and non-governmental organisations, but had in some areas deviated from specific key principles vital for ensuring the ombudsperson's independence and impartiality.[41]

On 7 April 2006, the Serbian Government endorsed the Plan for the Implementation of European Partnership Priorities. The section relating to the reform of the state administration lists as a short-term priority "implementation 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.

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, 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. [42]

Saša Janković was elected the first Protector of Citizens by the Serbian National Assembly at its first session in mid-2007. The imperfections of the system laid down in the Act again came to the fore during his election. In addition, the election of the Protector was conducted in a "rush" to harmonise the existing laws with the new constitutional order wherefore the opportunity was missed to consolidate

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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.

40 *Sl. glasnik RS*, 79/05

41 For a more detailed analysis of the Act, see *Report 2005*, I.2.4.1.1.

42 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.

the position of the new institute by devoting enough attention to the election of the first Protector. The first few months of work of the new Protector have been accompanied by problems similar to those other independent institutions in Serbia have been facing. The year 2008 will show how seriously his work is taken and how effectively the Protector can discharge the duties entrusted him.

*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[43] and the Vojvodina Statute.[44] At its 23 December 2002 session, the AP of Vojvodina Assembly adopted a Decision on the Provincial Ombudsperson[45] and on 24 September 2003 elected Petar Teofilović its first Provincial Ombudsman, who began processing complaints in mid-January 2004.[46] 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 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.

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.

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

44 Article 21 (1.1).

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

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

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. 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).[47] 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 interna-

47 *Sl. glasnik RS*, 125/04.

tional 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.

The non-implementation of decisions taken by some other international bodies (Committee against Torture, Human Rights Commitee) corroborates the necessity of making amendments to a whole set of (not only procedural) laws in order to ensure the effective and full implementation of the decisions taken by international bodies. The challenges that the state authorities will face in implementing ECtHR decisions could well indicate which amendments the Serbian legislation is in need of.

## 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 but 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. It must, however, be borne in mind that the Constitution does not use the wording in the ECHR that the restriction must have a *legitimate* aim; it states that rights may be derogated for any purpose allowed by the Constitution. Under the Constitution, when imposing restrictions on human and minority rights and interpreting these restrictions, all state agencies, courts in particular, are obliged 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),[48] but the Constitution does not explicitly state that the aim of the restriction must be legitimate. This shortcoming can be partly overcome by a general interpretation clause in Article 18, under which "Provisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation". Given the ECtHR's practice, a legitimate aim would have to be prerequisite for the acceptability of restricting human rights.

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.

48 In its Opinion on the Constitution of Serbia, the Venice Commission commented Article 20 of the Constitution related to restrictions of human and minority rights (paras. 28–30 of the Opinion). Apart from criticising this provision for not requiring the existence of a legitimate aim for the restrictions to be allowed, the Commission also opined that the excessively complicated drafting of these Articles risked leading to many issues of interpretation. See European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitution of Serbia*, Opinion No. 405/2006, CDL-AD(2007)004, 19 March 2007.

In the first case, the Constitution admits 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, however, the Constitution does not explicitly state which rights may or may not be exercised directly and leaves that assessment to the legislature. This may create potential for abuse and the restriction of directly exercisable rights by laws.

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 and minority rights.[49] The Constitution strictly lays out the principle of proportionality. Standards for evaluating proportionality are in keeping with the jurisprudence of the European Court of Human Rights.[50]

As opposed to the Charter on Human and Minority Rights, 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, 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 Constitution on the freedom of thought, conscience and religion and freedom of expression introduce a category unknown in interna-

49 The wording of the new Constitution is nearly identical to that in the Charter on Human and Minority Rights, which was the first to introduce the principle of proportionality in Serbia's legislation.

50 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).

tional 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 (1)). The wording used is milder than the one in the ECHR, which allows for derogation only in "to the extent strictly required by the exigencies of the situation". It remains unclear why some other rights were left out of the list of non-derogable rights (Art. 202 (4)).[51]

The Constitution envisages two preconditions for derogations from human and minority 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 public danger threatening the survival of a state or its citizens is prerequisite for the declaration of a state of emergency under the Constitution (Art. 200 (1)). 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 (Art. 202 (3)).

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, 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.

51 More in European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitution of Serbia*, Opinion No. 405/2006, CDL-AD(2007)004, 19 March 2007, paras. 97–98.

### *3.2.2. State of War*[52]

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 and minority 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.[53] 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*[54]

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 and minority 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 and minority 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 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 and minority 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)).

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52 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.

53 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).

54 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.

Measures derogating from human and minority 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,[55] 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,[56] 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.

55 *Sl. glasnik RS*, 19/91.

56 *Sl. glasnik RS*, 98/06.

(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)[57] and the UNESCO Convention against Discrimination in Education.[58]

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

57 *Sl. list FNRJ (Dodatak)*, 3/61.

58 *Sl. list SFRJ (Dodatak)*, 4/64.

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. the Act on Churches and Religious Communities[59] (Art. 2), the Labour Act (Arts. 18–23), the Employment and Unemployment Insurance Act (Art. 8), Act on the Bases of the System of Education, the 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. This shortcoming was noted both by the UN Committee for Human Rights in July 2004[60] and the UN Committee on Economic, Social and Cultural Rights in May 2005[61] in their concluding observations after their reviews of the then SaM state reports on the implementation of the ICCPR and the ICESCR respectively. Both Committees called on the authorities to enact comprehensive anti-discriminatory legislation. The failure of the Serbian authorities to pass such a law brings into question Serbia's willingness to heed the recommendations of the bodies of the international organisation it is a member of. An anti-discrimination law drafted by the Anti-Discrimination Coalition several years ago was submitted to the Assembly for adoption in early October 2007 by the opposition Liberal Democratic Party (LDP).[62] The Serbian Government anti-discrimination bill drafted in 2006 has been withdrawn from the parliamentary procedure and submitted for CoE expertise. It still remains uncertain when Serbia will have systematic and comprehensive anti-discrimination legislation.

### *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.[63] 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 spe-

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

60 Para. 23 of the Concluding Observations of the Human Rights Committee: Serbia and Montenegro, CCPR/CO/81/SEMO, 12 August 2004.

61 Paras. 11 and 39 of Concluding Observations by the Committee on Economic, Social and Cultural Rights: Serbia and Montenegro, E/C.12/1/Add.108, 23 June 2005.

62 See www.parlament.sr.gov.yu, accessed on 13 December.

63 *Sl. glasnik RS*, 33/06.

cific 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.

This Act, which marks a major turnabout in the legal regulation of this field in Serbia, also has some shortcomings. The burden of proof rests with the defendant. However, the lawsuits may be filed only by the victims of discrimination. Certain organisations (e.g. those providing assistance to persons with disabilities) should also be allowed to file suits if the rights of persons with disabilities are to be sufficiently protected.

In December 2007, Serbia signed the UN Convention on the Rights of Persons with Disabilities, endorsed by the UN General Assembly in December 2006. The Convention has to date been signed by 119 and ratified by 12 states. It will come into force once twenty states have ratified it.[64]

## 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 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.

64 *B92*, 19 December, www.b92.net.

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.[65] 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.[66]

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.[67]

International documents do not allow derogations of the right to life (Art. 4 ICCPR and Art. 15 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.

Offences against the right to life are defined in the Criminal Code,[68] 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.

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

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

67 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).

68 *Sl. glasnik RS*, 85/05.

In Article 119, the CC defines as punishable incitement to suicide and assisting a person to commit suicide which 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.[69]

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.[70] 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.[71] 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.[72] 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.[73]

The Act on Police[74] 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 they cannot accomplish their tasks by the application of other means of coercion

69 See *Report 2005*, I.4.2.1.

70 General Comment 6/16, n. 1, para. 3.

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

72 See *Burrel v. Jamaica*, App. 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).

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

74 *Sl. glasnik RS*, 101/05.

and only if the use of firearms is absolutely necessary to achieve one of the goals listed in Article 100.[75] It is not simple to protect certain people or facilities in real life and at the same time meet the test of "strict proportionality"[76] wherefore the implementation of this Act ought to be monitored. 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.[77]

In that respect, the 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.[78] The Penal Sanctions Enforcement Act[79] (in effect since 1 January 2006, hereinafter PSEA) lays down the conditions in which coercion may be applied against convicts (Arts. 128–132) and guarantees prisoners free health care (Art. 101).[80]

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.[81]

### *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.[82] The new Constitution of Serbia provides special protection to families, mothers, single parents and children (Art. 66 (1)) and prescribes that health care of children, pregnant women, mothers on mater-

75 More on powers of police officers in *Report 2005*, I.4.2.2.

76 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).

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

78 See I.4.3.

79 *Sl. glasnik RS*, 85/05.

80 More on the protection of the lives of detainees and prisoners in *Report 2006*, I.4.2.3.

81 *Sl. glasnik RS*, 105/06. See I.4.3.

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

nity 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)).[83]

The Act on Environmental Protection[84] 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 (Arts. 78 (2) and 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.[85] ECtHR confirmed that an embryo/foetus may have the status of a human being in terms of

83 See I.4.18.

84 *Sl. glasnik RS*, 135/04.

85 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 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)).

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.[86] Under the Act, abortion may be performed only at the request of the woman,[87] 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.

The CC (Art. 120) envisages the criminal offence of illegal termination of pregnancy or abortion committed, initiated or assisted in contravention of regulations.[88]

## 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.

### *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. 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

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.

86 *Sl. glasnik RS*, 16/95.

87 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).

88 More on termination of pregnancy and abortion in *Report 2006*, I.4.2.5.

an efficient system of supervising prison and detention units. SaM ratified the Protocol in December 2005.[89]

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,[90] 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. Moreover, the ICC Statute defines torture as a crime against humanity.[91]

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),[92] 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 Articles 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.

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 com-

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

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

91 *Sl. list SRJ (Međunarodni ugovori)*, 5/01.

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

plicity 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), light 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 mal-

treatment committed at the explicit order or with the consent of a public official as well. 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 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 administration of anything 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[93] 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

93 *Sl. glasnik RS*, 35/99.

the Constitution, *ratified international documents, generally accepted rules of international law* and this Act (Arts. 7 and 8).[94]

A new Rulebook on Measures for Maintaining Order and Security in Penitentiaries was adopted in late November 2006[95] 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[96] and is explicitly prescribed by Article 3 of the Convention against Torture.[97] A similar provision is found in Article 33 of the Convention Relating to the Status of Refugees.[98] This right has been reconfirmed by the ECtHR on a number of occasions as well. The ECtHR applied the same principle also to deportation.[99]

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 absence of an international agreement or 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.

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94 On provisions of the PSEA see more in *Report* 2006, I.4.3.3.

95 *Sl. glasnik RS*, 105/06.

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

97 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.

98 *Sl. list FNRJ (Dodatak)*, 7/60.

99 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.[100]

Use of force by the police is regulated in greater detail by the Regulations on Circumstances and Manner of Use of Means of Coercion[101] 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[102] 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[103] 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.

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

101 *Sl. glasnik RS*, 133/04.

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

103 *Sl. glasnik RS*, 41/03.

# 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.[104] 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.[105]

### *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.[106]

104 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, 18/05), 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).

105 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 2007.

106 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.[107]

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).[108]

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.[109]

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.[110]

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 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

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

108 See *Report 2005,* I.4.4.2.1.

109 See *Report 2005,* I.4.4.2.1.

110 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, CPC).

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.[111] 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.[112]

The Movement and Residence of Aliens Act (Art. 34 (4)),[113] 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 needs to be modernised and conformed to relevant international standards to provide a higher degree of protection.[114]

After two and a half years of work on a plan for combating human trafficking, the Government in 2006 adopted the Strategy for Combating Human Trafficking in the Republic of Serbia.[115]

*4.4.2.2. Trafficking in Human Organs*. – The law lists the removal of a body organ as one of the purposes of the crime of human trafficking (Art. 388 (1) CC). A prison sentence ranging from 3 months to 3 years 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.[116] The national criminal legislation needs to comprehensively regulate this issue in accordance with contemporary international standards.[117]

111 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.

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

113 *Sl. list SRJ*, 68/02.

114 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.

115 *Sl. glasnik RS*, 111/06. See *Report 2005,* I.4.4.3. and Report *2006,* I.4.4.2.1.

116 Arts. 24–26, *Sl. list SFRJ*, 63/90, 22/91 and *Sl. list SRJ*, 28/96.

117 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 med-

*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,[118] 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).[119]

The Act on the Protection of Participants in Criminal Proceedings,[120] which came into force on 1 January 2006, prescribes extraordinary protection measures to be applied only in the event of the most severe criminal offences, including organised crime cases.[121]

The National Assembly in 2005 also adopted the Health Protection Act, 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.

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ical 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).

118 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.

119 See *Report 2005,* I.4.4.3.1.

120 *Sl. glasnik RS*, 85/05.

121 See *Report 2005,* I.4.4.3.1.

*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.[122] The Assembly of Serbia had not ratified this Convention by the end of 2007.

The state must undertake measures ensuring victims receive information on relevant procedures (criminal and civil procedures),[123] free legal aid in exercising commensurate compensation of sustained damages[124] 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.[125]

### *4.4.4. Forced Labour*

Forced or compulsory labour encompasses every work done under threat or punishment.[126] 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 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 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*[127] ruled that convict labour that did not contain elements of rehabilitation was not in accordance with Article 4 (2) of the ECHR.

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

123 See Article 6 of the First Protocol.

124 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.

125 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.

126 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)).

127 ECHR, App. No. 2832/66 (1971).

In the provisions on work obligation of convicts, the PSEA (Arts. 86–100),[128] 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 Serbian Army Act[129] in its part on military service sets that Serbian 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. 32). The obligation in the Serbian Army Act is not considered compulsory work,[130] only if it is purely military in character (Art. 2 (2.a) Convention ILO No. 29 on compulsory labour).

The Act on Defence[131] prescribes the work obligation of citizens during the state of war and state of emergency (Art. 50 (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. 55 (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 duration of compulsory work obligation during a state of war and state of emergency, 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.[132]

In addition, Article 55 (1) of the Act on Defence prescribes the work obligation for all able-bodied citizens over 15 years of age. This provision is not in keep-

128 *Sl. glasnik RS*, 85/05.

129 *Sl. glasnik RS*, 116/07.

130 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)).

131 *Sl. glasnik RS*, 116/07.

132 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.

ing 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,[133] which is in keeping with the standard set in Article 8 (3c (iv)) of the ICCPR.[134]

## 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.

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;

133 *Sl. list SRJ*, 24/98, 26/98, 69/00, 11/02 and 72/02.

134 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)).

(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*

By adopting the Act Amending the Criminal Procedure Code[135] in mid-2007, the National Assembly put off until 31 December 2008 the enforcement of the Criminal Procedure Code (hereinafter CPC)[136] passed in mid-2006. This postponement has created a problematic situation in the legislation of Serbia – until the new CPC, which substantially changes the criminal procedure, comes into force, the provisions of the old CPC[137] shall remain in effect. Some of the changes in the new CPC relate to the essence of realising the right to liberty and security of person.[138]

135 Act Amending the Criminal Procedure Code, *Sl. glasnik RS*, 49/07.

136 *Sl. glasnik RS*, 46/06. This Report quotes the Articles of the new CPC and refers to provisions in the valid CPC as to "old CPC" Articles.

137 *Sl. list SRJ*, 70/01, 68/02 and *Sl. glasnik RS*, 58/04, 85/05, 115/05, 49/07. This Act was also amended in 2007 so as to allow the extension of detention until the judgement becomes final. Such detention may not exceed the term of imprisonment pronounced in the first-instance judgement.

138 The Justice Ministry has in the meantime been working on the adoption of a new CPC.

*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.[139]

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.[140] 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 order detention only in cases prescribed by the law if the purpose of detention 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 within 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 reviewed 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 given to the

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

140 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).

person deprived of liberty at the time of detention suffices for him to understand the reasons for which he has been deprived of liberty.[141]

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.

The application of the new Act on Misdemeanours, adopted in November 2005,[142] began on 1 January 2007. 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.[143] 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.

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

142 *Sl. glasnik RS*, 101/05.

143 A state administration authority may ask 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.[144] "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.[145]

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.[146]

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

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

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

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

have the obligation to promptly bring this person before an investigating judge. If more than eight hours have passed before the person was brought before the investigating judge, this delay must be explained to the judge and the investigating judge shall make an 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 a judicial panel it can be extended another two months at most. The Supreme Court's judicial panel (in cases of criminal offences carrying minimum 5 years in prison) 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 custody by a non-judicial body.[147] The Human Rights Committee took the stand that judicial control must be provided immediately, not after the decision by the second-instance administrative body.[148]

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)[149] provides the measure of detention in a closed psychiatric institution. It is applied to persons whose freedom of movement and communication with the outside world need to be restricted due to the nature of their illness (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

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

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

149 *Sl. glasnik RS*, 25/82 and 48/88.

temporarily but no longer than three months, if in the doctor's opinion this would be necessary in order to determine his/her mental state, unless extended blacement may have harmful consequences to the person's health (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)).

*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).[150] 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".[151] 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 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.).

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

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

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.[152] 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 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.[153]

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 no-

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

153 *Sl. glasnik RS*, 42/02, 27/03, 39/03, 67/03, 29/04 and 58/04.

tify 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 2001 Act on Organisation of Courts and its subsequent amendments[154] set the foundations for reforming the judicial system and introduced the Appellate Court as a court of general jurisdiction, in addition to the existing municipal and district courts. Under the Act, the specialised courts shall comprise trade courts, the Administrative Court and the misdemeanour courts. 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 deadlines for the implementation of the reform laid down in the Act on Organisation of Courts and its amendments were extended on a number of occasions. The unclear and general provisions of the Constitutional Act allowed for yet another delay in establishing the new courts, again bringing into question 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.[155]

### 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.[156] 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.[157] Although Article 5 (2) of the Constitutional Act stipulated that the National Assembly harmo-

154 *Sl. glasnik RS*, 63/01, 42/02, 17/03, 27/03, 29/04, 48/05, 101/05 and 46/06.

155 See *Report 2005*, I.4.6.1.1.

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

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

nise laws relating to the application of the constitutional provisions on courts and public prosecution offices with the Constitution during its second session upon the constitution of the Government, these laws were neither included in its second session agenda nor adopted by end 2007. Therefore, the above two bodies did not begin work in 2007. Given that the drafts of these laws were not made public by the end of the year, it can be asserted with certainty that this obligation in the Constitutional Act will not be fulfilled.

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 the appointment procedure raise concerns about judicial independence from the legislative and executive branches. As the Venice Commission observed in its Opinion on the Constitution of Serbia, the judicial appointment process is "doubly under the control of the National Assembly: the proposals are made by the High Judicial Council elected by the National Assembly and the decisions are then made by the National Assembly itself".[158]

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 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. Why the legislators opted for this solution remains unclear. If the intention was to get rid

158 See European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitution of Serbia*, Opinion No. 405/2006, CDL-AD(2007)004, 19 March 2007, para. 70. See also para. 65.

of the judges who had compromised themselves with the previous regime, they should have been taken to account in accordance with the vetting procedure envisaged by the Act on the Responsibility for Violations of Human Rights, which has, however, never been implemented. The judicial reappointment process is bound to be extremely difficult and there are no guarantees that the elected judges will be better than the current ones.[159] It, of course, goes without saying that the way in which the procedure will be conducted (which criteria will be applied, who will be charged with the procedure and which legal remedies the judges will have at their disposal) will be very important.

*4.6.2.2. Judicial Tenure*. – Under the Constitution, judges are first elected to three-year terms in office and then to permanent tenures. These provisions ought to be interpreted as implying that the three-year term in office will be prerequisite for appointment to permanent tenure although this condition is not explicitly stated in them.[160] The solution in the Constitution, 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.[161] Although it again voiced concern with respect to the independence of judges during the probationary period in its Opinion on the Constitution, the Venice Commission commended the authors of the Constitution for ultimately opting for three-year rather than five-year initial terms in office (as envisaged by the previous Draft it had commented on). It also welcomed the provision under which judges are appointed to permanent tenures by the High Judicial Council and not by the National Assembly as had been foreseen in the previous Draft.[162]

*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)).

159 The Venice Commission also criticised the idea on reappointing the judges, *ibid.*, paras. 72–74.

160 See M. Grubač, "Judiciary in the New Draft Constitution of Serbia", *Serbian Legal Review* No. 5 (2006, extraordinary edition), pp. 36–37.

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

162 More on the Venice Commission's views on the judicial probationary period in European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitution of Serbia*, Opinion No. 405/2006, CDL-AD(2007)004, 19 March 2007, para. 64.

The Constitution 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.[163]

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

*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.[164]

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,[165] 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 Constitution). Although the prohibition of membership in political parties for judges may be qualified as positive, the formula-

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

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

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

tion "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.

*4.6.2.8. Right to Case Assignment on a Random Basis*. – In keeping with the Recommendation of the CoE Committee of Ministers,[166] the Judges Act prescribes the assignment of cases 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.[167]

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 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.[168] 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.[169]

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

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

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

169 See *Osman v. United Kingdom*, ECtHR, App. No. 23452/94 (1998) and *Ashingdane v. United Kingdom*, ECtHR, App. No. 8225/78 (1985). See European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitution of Serbia*, Opinion No. 405/2006, CDL-AD(2007)004, 19 March 2007, para. 54 on the immunity of the Assembly Deputies.

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.[170] This problem could be addressed by resort to the institute of indigence.

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 is the court 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

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

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.[171]

Under the Constitution, everyone shall have the right to a public hearing *within reasonable time* before an independent and impartial tribunal already established 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)) and 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 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. (Art. 204).

The Peaceful Resolution of Labour Disputes Acts[172] and the Act on Mediation[173] 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.

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

172 *Sl. glasnik RS*, 125/04.

173 *Sl. glasnik RS*, 18/05.

### *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. This lapse can actually be ascribed to the authors of the Constitution, given that the Constitution is the supreme piece of legislation, but does not specify that the public cannot be excluded from court proceedings to ensure e.g. the non-disclosure of a secret.[174]

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 and Art. 209 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 Juvenile Justice Act);[175] 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 and 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 and Art. 340 (3) CPA).

174 See M. Grubač, "Judiciary in the New Draft Constitution of Serbia", *Serbian Legal Review* No. 5 (2006, extraordinary edition), p. 34.

175 *Sl. glasnik RS*, 85/05.

The 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.[176] The CPC and CPA prescribe that the panel decision whether to state the reasons for the judgement publicly depends on whether 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 and 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.[177]

Under national regulations, administrative proceedings are held in closed sessions and are only exceptionally public (Art. 32 Act on Administrative Proceedings).[178] 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*[179]

The ECtHR has in its practice set certain criteria by which it can be determined whether a charge is "criminal".[180] 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.[181] Determi-

176 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 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.

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

178 *Sl. list SRJ (Međunarodni ugovori)*, 46/96.

179 More on the protection of minors in criminal proceedings and the Juvenile Justice Act in I.4.15.3.3. and *Report 2006*, I.4.15.3.3.

180 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.

181 *Ibid.*, para. 81.

nation of a charge as criminal also depends on the nature of the offence and the severity of the penalty.[182]

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 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 ought to eliminate most of the shortcomings of the previous Act, 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. 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[183] 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 favour of the accused if his/her 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

182 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 Nuala Mole and Catharina Harby, *Right to a Fair Trial*, CoE, Belgrade, 2003, pp. 30–35, V. Dimitrijević, "What International Human Rights Tribunals Teach Us", *Reč,* 2004, p. 85 ff.

183 *Sl. list SFRJ*, 4/77, 36/77, 14/85, 10/86, 74/87, 57/89, 3/90 and *Sl. list SRJ*, 27/92, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96, 64/01.

proven guilty by a final decision of a competent court (Art. 34 (3) Constitution and Art. 3 (1) CPC). The *in dubio pro reo* principle is listed within the CPC chapter on general principles (Art. 4).

In keeping with European standards,[184] 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, new CPC).

*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 Articles 5 (2) and 95 (2) of 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. 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) and 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 ap-

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

propriate 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 and 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.[185] 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) and 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

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

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 *ex officio* (Art. 73 (1) CPC). Moreover, a court president may dismiss an assigned legal counsel who is not fulfilling his duties.[186] As per indigence, the 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 (Art. 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 report i.e. notification of the crime immediately prior to first interrogation (Art. 74 (3)).

At the defendant's request, the defendant will be allowed to read the criminal report 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 and 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

186 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).

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.[187]

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 and 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 violate the client-attorney privilege. 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.

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

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 (Art. 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 "obviously 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)).

Apart from the protection afforded by the CPC, the Act on the Protection of Participants in Criminal Proceedings[188] also envisages witness protection measures under specific conditions.

*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 "denying the defendant, his counsel... contrary to their request the right to use their own language during trial and to follow the course of the trial in their language" constitutes a serious violation of criminal proceedings (Art. 392 (1.3) CPC and 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)).

188 *Sl. glasnik RS*, 85/05.

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) 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 and 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)).[189] 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.

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 initiated proceedings before a competent court or if the defendant wilfully brought about the judgement by false confession or in another manner, unless under duress exerted by a person employed in a state authority (Art. 533).

189 See I.4.3.

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

*4.6.6.10. Ne bis in idem*. – International standards (Art. 14 (7) ICCPR and 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.

### *4.6.7. Constitutional Judiciary*

The legal opportunity to address the problems arising from the year-long blockade of the Constitutional Court of Serbia arose with the adoption of the new Act on the Constitutional Court[190] in late November 2007. The adoption of the Act also allowed for initiating the extremely complex procedure of appointing the Court's 15 judges. Under the procedure, the President of the Republic and the National Assembly each first nominate their ten candidates for the seats on the Constitutional Court. Then each body chooses five from amongst the other body's list and the ten are thus appointed judges of the Constitutional Court. The remaining five judges are appointed at a session of the Supreme Court of Cassation from amongst the candidates jointly nominated by the High Judicial Council and the State Prosecutors Council (Art. 172 Constitution). Ten of the fifteen judges were appointed by the end of 2007; under the Constitutional Act, the Constitutional Court may begin

190 *Sl. glasnik RS*, 109/07.

work if two-thirds of its members have been appointed (Art. 9 (2 and 3)). The Constitutional Court elected its President at its first session. The appointment of the remaining five judges will, however, have to wait for the establishment of the three above-mentioned bodies, the appointment of which will ensue after the valid laws are harmonised with the Constitution and the new ones adopted, wherefore the Constitutional Court will have to work without them for the time being. It should be noted, however, that the even number of judges carries the risk of deadlocks and the blockade of the Court's work.

Under Article 172 (1) of the Constitution, the Constitutional Court shall have fifteen judges appointed to nine-year terms in office. Constitutional Court judges shall be appointed from amongst "prominent lawyers" who are at least 40 years of age and have at least 15 years of experience in practicing the law (Art. 172 (5)). Under the Constitution, at least one judge appointed from each of the three lists of candidates must be from the territory of the autonomous provinces (Art. 172 (4)).

The shortcomings and imprecise provisions in the Constitution on the nomination and appointment of the Constitutional Court judges became apparent already during the drawing up of the National Assembly list of candidates. Most political parties decided that each party caucus would nominate a specific pre-agreed number of candidates. The opposition SRS and LDP refused to put their "candidates" forward and the list was ultimately drawn up by the ruling coalition member-parties. Moreover, the Assembly Rules of Procedure do not include a provision specifying who the nominator of the list is in such situations. The Assembly list was submitted by the Speaker.

The Constitution and the Constitutional Act obviously failed to lay down clear and efficient rules on the appointment of the Constitutional Court judges or proper guarantees of the Court's independence. The opportunity to rectify some of the constitutional inconsistencies in the Act on the Constitutional Court was unfortunately missed. The part of the Act regulating the appointment of judges, the duration and termination of tenures mostly merely reiterates the sparse and vague provisions in the Constitution.

A Constitutional Court judge shall be dismissed in the event s/he has become a member of a political party, violated the prohibition of conflict of interests, permanently lost the ability to work, been convicted to a sentence of imprisonment or convicted for an offence rendering him or her unfit for discharging the duty of a Constitutional Court judge (Art. 15 (1) Act on the Constitutional Court). The Constitutional Court shall assess whether any of these conditions have been fulfilled in a procedure initiated by the bodies authorised to nominate the Court judges (Art. 15 (2 and 3)). The Act prohibits the Constitutional Court judges from discharging "another public or professional function or job with the exception of professorship at a law college in the Republic of Serbia" (Art. 16 (1)). Public and professional activi-

ties shall not entail "unremunerated activity in cultural and artistic, humanitarian, sports or other associations" (Art. 16 (2)).

## 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*

The right to privacy is commonly perceived as serving to ensure protection from undesired publicity but the right to privacy is more broadly identified with personal autonomy of an individual, or his general freedom to choose his own lifestyle without interference by the 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.[191] According to the jurisprudence of this Court, privacy encompasses, *inter alia*, the physical and the moral integrity of a person, sexual orientation,[192] relationships with other people, including both business and professional relationships.[193]

The Constitution does not protect the right to privacy as such but it does guarantee the inviolability of physical and mental integrity (Art. 25 (1)), of home (Art. 40), of letters and other means of communication (Art. 41).

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

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

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

### 4.7.2. Personal Data – Access and Collection

*4.7.2.1. General Regulations*. – The collection, storage and use of personal data[194] and the possibility of an individual to access data are protected by Article 8 of the ECHR.[195]

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[196] 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.[197]

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 personal data may be denied are very broadly defined and, consequently, give government agencies too much latitude to withhold information. The Ministry of Justice drafted an act on the protection of personal data in 2007. The draft regulates in much greater detail the main concepts, the processing of data with and without the consent of the person they refer to, the inadmissibility of processing data, confidentiality of data, their transfer out of Serbia, collections of documents, etc. The draft expands the powers of the Access to Information of Public Importance Commissioner who shall be charged with the protection of data. It provides for proceedings before and appeals to the Commissioner.[198]

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

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

196 *Sl. list SRJ (Međunarodni ugovori)*, 24/98 and 26/98.

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

198 See *Information on the Personal Data Protection Act*, http://mpravde.mvcore.net/, accessed 1 December 2007.

The Police Act[199] allows the police to collect, process and use personal data and in general envisages the application of the principle of proportionality (Art. 75).[200]

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 other state authorities and listed entities and bans, although it does not punish, requests to citizens to submit proof of prior convictions or a clean record (Art. 102).

The Labour Act[201] for the first time regulates the processing of and access to employee personal data that are kept by the employer. The Act prohibits employees from requiring of the job applicant to provide data which are not directly relevant to the job s/he has applied for.[202]

The Tax Procedure and Tax Administration Act[203] guarantees the tax payers the right to privacy and prescribes that all information about a tax payer is confidential, apart from strictly prescribed exceptions.[204]

The State Administration Act[205] 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).[206] 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.[207]

The 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

199 *Sl. glasnik RS*, 101/05.

200 More on police collection of data and right to access data held by the police in *Report 2005, I 4.7.2.1.*

201 *Sl. glasnik RS*, 24/05.

202 More in *Report 2005,* I 4.7.2.1.

203 *Sl. glasnik RS*, 80/02.

204 More on the protection of privacy of tax payers in *Report 2005*, I 4.7.2.1.

205 *Sl. glasnik RS*, 79/05.

206 More on the right of access to information of public importance in II.2.2.

207 The exceptions include: 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).

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,[208] and, a week later, the Decree amending the previous one.[209] The Constitutional Court of the Republic of Serbia declared both decrees unconstitutional.[210] The Court assessed that they regulated 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.[211]

*4.7.2.3. Powers of the State Security Services*. – The Act on Security Services[212] adopted on 11 December 2007 regulates the security and intelligence system of the Republic of Serbia, the coordination and oversight of the work of the security services. The work of the security services shall be regulated by separate laws; the provisions of the FRY Security Services Act[213] and the Act on the Security and Information Agency[214] not in contravention of the new Act shall be in force until these laws are passed (Art. 22).

The security services shall operate on the basis and within the framework of the Constitution, laws, other regulations and general enactments, Serbia's national security and defence strategies and its security and intelligence policy. Security service staff are duty-bound to act in accordance with the Constitution, the laws, other regulations and general enactments and professional codes and be impartial and neutral (Art. 2).

The work of the security services shall be subjected to democratic civilian oversight by the National Assembly, the President, the Government, the National Security Council and the public (Art. 3). Under the Act, a National Security Council[215] shall be set up and will, *inter alia*, take care that the regulations and standards

208 *Sl. glasnik RS*, 30/01.

209 *Sl. glasnik RS*, 31/01.

210 *Sl. glasnik R*S, 84/03.

211 More on the opening of security service files in *Report 2005*, I 4.7.2.2.

212 *Sl. glasnik RS*, 116/07.

213 *Sl. list SRJ*, 37/02 and *Sl. list SCG*, 17/04.

214 *Sl. glasnik RS*, 42/02.

215 The National Security Council comprises the President of the Republic, the Prime Minister, the Minister of Defence, the Minister of Internal Affairs, the Minister of Justice, the Army of Serbia Chief of Staff and the directors of the security services (Art. 6).

related to the protection of personal data and other regulations protecting human rights which may be violated by exchange of information or other operational activities are implemented (Art. 5).

The National Assembly oversees the work of the security services directly and via the competent Assembly committee which has the jurisdiction *inter alia* to oversee the lawfulness of specific secret data collection procedures and measures. The committee shall also review motions, petitions and complaints regarding the work of the security services submitted to the Assembly by the members of the public and notify them of the measures it proposes to address them (Art. 16). The sessions of this Assembly committee may be held behind closed doors, in which case the committee chairperson shall notify the public of the committee's work in accordance with the decisions reached at such sessions (Art. 17).

The directors of the security services are obliged to submit to the committee regular reports (at least once during the regular Assembly autumn or spring session) and special reports (if necessary or at the request of the committee) (Art. 18).

The committee may also perform direct oversight of the security services. At the request of the committee, the director of a security service is duty-bound to allow committee members access to the premises, insight in its documentation, provide data and information on the work of the service and respond to their questions on the work of the service (Art. 19). Article 19 lists the issues on which the committee members may not seek information[216] but some of the grounds are impermissibly broad and essentially undermine the possibility of overseeing the work of the security services. Committee members and persons participating in the committee's work are obliged to protect and preserve the confidentiality of the information they obtain during the work of the committee both while they work in the committee and afterwards (Art. 20). The remaining provisions on public oversight are less precise. The Act stipulates that the services shall notify the public about their work via bodies to which they submit their reports in a manner not violating the rights of citizens, national security and other state interests. The services may also directly inform the public about specific security-related occurrences and events (Art. 21).

The functioning of security services and their powers to collect information are covered by the FRY Security Services Act, 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 (BIA).

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. The FRY Security Services Act obliges competent institutions and legal entities

216 These include data on the identity of current and former service associates, undercover agents, third persons who may suffer damages if the data are revealed, the methods of obtaining intelligence and security related data, ongoing activities, the manner in which specific procedures and measures are applied, data and information obtained through exchange with foreign services and international organisations, confidential data and information of other state bodies also in the possession of the service.

keeping registers and other records to allow the security services access to them at written request (Art. 26). The Act on the Security and Information Agency prescribes that bodies BIA members may seek and receive information and data from cannot be compelled to disclose information, but that the refusal must be based on valid reasons established by law (Art. 10). The Act does not define what these reasons are.

Both laws oblige the security service members and persons overseeing their work to maintain the confidentiality of the obtained information i.e. specific obtained information in case of BIA.

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). This law envisages a higher degree of protection than the Act on the Security and Information Agency with respect to the manner in which data is collected, the possibilities for citizens to find out about their records kept by the services and with respect to the oversight of the work of the service.[217]

The ECtHR maintains that the law regulating the work of state security services must contain precise rules on the means of collecting data and corresponding guarantees in respect of the supervision over the legality of such activities.[218]

*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.[219]

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

217 More on the powers of the security services in *Report 2005*, I 4.7.2.3.

218 See *Rotaru v. Romania*, App. No. 28341/−95 (2000).

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

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. The ECtHR maintains that searching of a lawyer's office must be strictly proportionate to the aim of suppressing crime and protecting the rights of others and that the professional secrecy in the reviewed material may not be violated.[220] The person whom the search warrant regards may request the presence of a legal counsel or defence counsel.[221]

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 possession 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)).

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.

Under the Amendments to the Act on the Organisation and Jurisdiction of State Bodies in War Crimes Proceedings,[222] at a duly reasoned motion of the War Crimes Prosecutor the court may order the surveillance and recording of telephone and other conversations or communication by other technical means and the optical recording of persons reasonably suspected of committing the crime in Article 333 of the Criminal Code of accessoryship after the fact alone or with other persons if the crime was committed with respect to the criminal offences in Articles 370–386 of the CC and grave violations of international humanitarian law committed in the

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

221 More in *Report 2006*, I.4.7.3.

222 *Sl. glasnik RS*, 101/07.

territory of the former Yugoslavia since 1 January 1991 and listed in the ICTY Statute.[223] These measures may be effective for a maximum of six months and may be extended for a period of three months two times at most (Art. 13a).

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,[224] telex,[225] 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[226] 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)).

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, and, in specific cases, an undercover investigator.

The PSEA allows no restrictions on the right of correspondence of persons serving prison sentences (Art. 75).[227]

Pursuant to the above mentioned Security Services Act, these services are also authorised to secretly collect necessary information. The Act provides for the monitoring of postal consignments and other means of communication as a special means and method of collecting data (Art. 30 (2.1 and 2.2). Such surveillance may

223 Provisions of Arts. 232 and 233 of the CPC shall apply to the ordering and implementation of these measures unless otherwise prescribed by this Act.

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

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

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

227 More on allowed restrictions of the detainees' and prisoners' right to correspondence in *Angell Estella v. Uruguay,* CCPR/C/18/D74/1980 (1983), *Campbell v United Kingdom* App. 13590/88 (1992)

be resorted to 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 in the interest of Serbia's security issue an order based on a prior court decision and request measures that deviate from the principle of inviolability of the privacy of correspondence and other means of communication against specific natural or legal persons (Art. 13).[228] The Act prescribes the following procedure for taking measures restricting 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.[229]

### *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.[230] It comprises a series of relationships, such as marriage, children, parent-child relationships,[231] and unmarried couples living with their children.[232] Even the possibility of establishing a family life may be sufficient to invoke protection under Article 8.[233] Other relationships that have been found to be protected by Article 8 include relationships between brothers and sisters, uncles/aunts and nieces/nephews,[234] parents and adopted children, grandparents and grandchildren.[235] Moreover, a family relationship may also exist in situations where there is no blood kinship, in which cases other criteria are to be taken into account, such as the existence of a genuine family life, strong personal relations and the duration of the relationship.[236]

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

228 More in *Report 2005*, I.4.7.4.

229 *Ibid.*

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

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

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

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

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

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

236 See *X, Y. and Z. v. United Kingdom* (1997), App. No. 21830/93

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".

The provisions of the Family Act[237] are 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 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.[238] 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,[239] and relatively difficult to justify when it concerns consensual intercourse between adults.[240]

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).

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237 *Sl. glasnik RS*, 18/05.

238 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].

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

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

# 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.

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 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.[241] 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 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

241 See I.4.8.2.

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,[242] while Article 45 guarantees the right to conscientious objection.[243]

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[244] and the Act on Restitution of Property to Churches and Religious Communities.[245] The Rulebook on the Content and Keeping of the Register of Churches and Religious Communities[246] is the most relevant of the subsidiary legislation.

### *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.[247] 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.[248] Human rights and public order can be violated in the field of material law as well.[249] The scope of Article 7

242 See I.4.8.3.

243 See I.4.8.5.

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

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

246 *Sl. glasnik RS*, 64/06.

247 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.

248 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*).

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

(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 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[250] and the republican Act on Legal Status of Religious Communities.[251] 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 benefits other religious organisations can.[252] 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 (Art. 18 (2.1)). The Rulebook on the Content and Keeping of the Register of Churches and Religious Communities specifies that a religious organisation shall be registered if it has 100 founders and that the threshold shall be further harmonised with the law provisions (Art. 7 (3)). BCHR is of the view that the threshold is much too high and considerably deviates from the 0.001% of adult nationals permanently residing in Serbia (for comparison's sake, there are around 6.5 million citizens who have the right to vote) or of foreign nationals with permanent residence in Serbia; the threshold is also 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 problem-

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

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

252 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.

atic 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 provision not allowing the registration of religious organisations the name of which includes the name or part of the name expressing the identity of a church, religious community or religious organisation that has been registered earlier or has filed a request for entry into the Register (Art. 19) is also disputable in terms of the equality of religious communities. 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 Art. 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 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[253] and Article 24 of the Act on Secondary Education[254] 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)).

253 *Sl. glasnik RS*, 50/92, 53/93, 67/93, 48/94, 66/94, 22/02 and 62/03.

254 *Sl. glasnik RS*, 50/92, 53/93, 67/93, 48/94, 24/96, 23/02, 25/02, 62/03 and 64/04.

The Act on Amendments and Changes to the Act on Elementary Schools[255] and the Act on Amendments and Changes to the Act on Secondary Schools[256] 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 between one of the optional 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.[257] 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*, service exacted instead of compulsory military service" (italics added) 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.[258]

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.

255 *Sl. glasnik RS*, 22/02.

256 *Sl. glasnik RS*, 23/02.

257 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.

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

The Act on the Army of Serbia[259] was adopted in mid-December 2007. This law *inter alia* regulates in detail professional military service but does not go into the issues of the obligation to serve the army or into civilian service. Under its transitional provisions, the hitherto Yugoslav Army Act[260] shall no longer be applicable save for its provisions on the military obligation which shall remain in force until new provisions regulating the issue are adopted (Art. 197). Therefore, the hitherto provisions on civilian service also remain applicable.

The Act on Changes and Amendments of the Yugoslav Army Act[261] 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 is not in itself in contravention of 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.[262]

The Yugoslav Army Act regulates the conditions under which the right to conscientious objection can be enjoyed (Arts. 296–300).[263]

Amendments to the Decree on Military Service[264] elaborate the provisions in the Yugoslav Army Act, thus allowing the implementation of the Act in keeping with international standards.

The Decree is a temporary solution, which is sometimes even contradictory to the very Act it supposes to implement. [265]

### *4.8.6. Restitution of Property of Religious Organisations*[266]

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

259 *Sl. glasnik RS*, 116/07.

260 *Sl. list SRJ*, 43/94, 28/96, 44/99, 74/99, 3/02, 37/02 and *Sl. list SCG*, 7/05, 44/05.

261 *Sl. list SRJ*, 44/05.

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

263 More in *Report 2005*, I.4.8.3.

264 *Sl. list SCG*, 37/03.

265 More on the Decree in *Report 2005*, I.4.8.3.

266 This section will focus only on issues relevant to the freedom of religion. More on restitution in I.4.12.5.

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 time-frame 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 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 churches 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 interfer-

ence 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 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[267] 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 pro-

267 *Sl. glasnik RS*, 43/03.

grammes, 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).[268]

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 public parliamentary 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,[269] 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[270] 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 prompt-

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

269 *Sl. glasnik RS*, 42/02, 97/04 and 76/05.

270 *Sl. glasnik RS*, 44/03.

ed the National Assembly to adopt an Act on Amendments to the Broadcasting Act[271] 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.[272] 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

271 *Sl. glasnik RS*, 97/04.

272 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.

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.[273]

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.[274] 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.

The Act also contains provisions prohibiting media concentration,[275] 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.[276]

273 See *Report 2004*, I.4.9.

274 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.

275 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.

276 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 responsi-

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) 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.[277] 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.[278] The ECtHR affirmed the view in its judgement in the case *Lepojić v. Serbia*.[279]

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 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.[280]

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.[281] 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.[282]

Serbian CC prescribes punishment both for "stating" and "spreading false rumours". In the case of *Thoma v. Luxemburg*,[283] the ECtHR found that a journalist must not be held responsible for quoting or conveying the text.

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bility 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).

277 See *Report 2000*, II.2.8.1.

278 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).

279 See *Lepojić v. Serbia,* ECtHR, App. No. 13909/05.

280 See *Prager and Oberschlick v. Austria.*

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

282 See *Lingens v. Austria.*

283 ECHR, App. No. 38432/97 (2001).

### *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.

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 (1) was published 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).

The new Article 20 in the Act on Preventing Violence and Unbecoming Behaviour at Sports Events (Anti-Violence Act)[284] lists as an act of crime an action by a person "who has instigated national, racial and religious hatred or intolerance at a sports event by his/her behaviour or slogans, thus provoking violence or a physical clash with the participants in the sports event". The Article evidently does not incriminate the very act of instigating national, racial and[285] ethnic hatred or intolerance (such conduct towards specific groups is incriminated by the Criminal Code) except when it leads to violence or physical clashes with participants in a sports event. It is, however, an improvement over the initial text of the law, which had only prohibited the participants from bringing in banners and emblems "instigating racial, religious, national or other intolerance and hatred i.e. the content of which is insulting or indecent et al" (Art. 8 (2.5)) and authorised the orderlies to prevent the participants from bringing such objects into the sports facility alongside other items that may interfere with a sports event, such as mirrors, laser indicators, etc. Such conduct is now qualified as a criminal offence, but it is qualified by its consequence. The legislators had probably intended to define such behaviour as a separate criminal act, differing from the offence in Article 317 (1) of the Criminal Code of Serbia, which envisages a term of imprisonment ranging from 6 months to 5 years for instigating or exacerbating national, racial or religious hatred or intolerance amongst peoples or ethnic communities living in Serbia. The Anti-Violence Act envisages the same term of imprisonment for those who violated Article 20. It should have, however, declared instigation of national, racial or religious hatred or intolerance an act of crime *per se,* as it may not necessarily be covered by the CC if it does not lead to the consequences listed in the Anti-Violence Act given that the CC incriminates such conduct only if it is directed at nations or ethnic communities living in Serbia. Such conduct at sports events in Serbia is, however, frequently aimed also against national, racial or religious groups not living in Serbia.

284 *Sl. glasnik RS*, 67/03 and 90/07.

285 This shortcoming of the anti-violence act is probably due to a lapse during the legal editing of the text. It would have been better had the conjunction *or* been used instead of *and* given that *or* is usually used to ensure that as many cases as possible are covered by such prohibitions.

# 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[286] 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".[287] 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.

286 *Sl. glasnik RS*, 51/92.

287 See *Report 2005,* I.4.10.

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 Constitution and still is in the Serbian Act on Assembly of Citizens.[288]

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)).[289]

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 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 Venice Commission also qualified this restriction as "problematic in view of Article 11 ECHR which does not restrict freedom of assembly to nationals. The 'political clause' in Article 16 ECHR seems insufficient as justification since it covers only political activities of aliens whereas there are also assemblies that are not 'political' in a narrower sense." The Commission further notes that most constitutions in Europe do not restrict the right of free assembly to nationals anymore and observes that. "If the text stays as it is, some effort in applying the 'interpretation clauses' in Articles 18 (3) and 19 will be necessary in order to reach a result in conformity with the ECHR."[290]

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.[291]

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 (Art. 5). 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.[292]

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288 See *Report 2005*, I.4.10.2 and *Report 2003*, I.4.10.

289 The HR Charter had guaranteed this right to everyone (Art. 31).

290 See European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitution of Serbia*, Opinion No. 405/2006, CDL-AD(2007)004, 19 March 2007, para. 37.

291 See *Christians against Racism and Fascism v. United Kingdom*, ECmHR, 21 DR 138 (1980).

292 See, for instance, the Decision on Venues for Assemblies of Citizens, *Sl. glasnik grada Beograda*, 13/97.

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.[293] 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.[294]

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 all others as well. Pursuant to the Police Act,[295] 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[296]) (Art. 11 (1)). The organisers must be informed of the ban at least 12 hours before the gathering is sched-

293 *Sl. list SRJ*, 29/96.

294 See *Report 2004*, I.4.10.1. More on Serbian legislation related to the right to strike in I.4.18.4.3.

295 *Sl. glasnik RS*, 101/05.

296 The same grounds were envisaged by the 1990 Constitution.

uled 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.

### *4.10.3. Special Measures Envisaged by the Act on Preventing Violence and Unbecoming Behaviour at Sports Events*

Under the Act on Preventing Violence and Unbecoming Behaviour at Sports Events,[297] amended in September 2007,[298] regulations on the assembly of citizens shall accordingly apply to the organisation of sports events (Art. 5). The Act set outs "the measures for preventing violence and unbecoming behaviour at sports events, the obligations of the organisers and the powers of the competent authorities to apply these measures" (Art. 1). The punitive provisions in Chapter III foresee criminal and misdemeanour penalties and protection measures in case the Act is violated. Apart from a misdemeanour penalty pronounced against a natural person under Articles 21 and 23, s/he may also be subjected to a protection measure prohibiting his or her attendance at specific sports events for a period between six and 24 months under conditions laid out in the Act (Art. 22). This protection measure entails "the obligation of the perpetrator of the misdemeanour to personally report to the nearest local police directorate or station just before the beginning of a specific sports event and to remain there until the sports event ends". If the perpetrator acts in contraven-

297 *Sl. glasnik RS*, 67/03.

298 *Sl. glasnik RS*, 90/07.

tion of the prohibition i.e. obligation or again commits an offence listed in Article 23, this protection measure must be pronounced against him or her (Art. 23 (3)). Under the Act, special measures shall be taken during high risk sports events (Arts. 10–18). At such events, police officers are authorised to order all necessary measures to prevent violence and the unbecoming behaviour of the audience, notably, to prevent a person whose behaviour leads to the conclusion that s/he is prone to violent and improper conduct from arriving at the venue of the event,[299] to prohibit his or her entry into the venue i.e. remove such a person from the sports facility (Art. 17 (1.3)).

## 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.

299 These powers are awarded by Article 5 (3) of the 2007 Act Amending the Act on Preventing Violence and Unbecoming Behaviour at Sports Events.

### 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.[300]

Serbia has two laws: the Act on Social Organisations and Citizens' Associations[301] (hereinafter ASO) regulating the establishment and activities of social organisations and citizens' associations, and the Act on Political Organisations.[302]

The Government in mid-October 2007 submitted to the National Assembly its Draft Act on Associations after organising a public debate about it. The bill regulates the founding, legal status, registration and deletion from the Registry, the membership, bodies, changes in status, dissolution and other issues of relevance to the work of associations and the status and activities of foreign associations. Serbia has lacked legislation regulating the work of foreign associations, which have been operating on the basis of merely a "certificate" issued by the Ministry of Foreign Affairs. Under the Draft Act, an association need not register and shall be deemed founded even if it has not registered. In such cases, though, it shall not have the status of a legal person and shall be liable to regulations on civil partnership. As opposed to the valid legislation under which an association may be registered by 10 people, the Draft allows the establishing of an association by at least three founders. It also allows older minors to found associations, but only with the certified written consent of their legal representatives, whereby the abuse of children in this area is prevented. The Draft Act allows associations to engage in economic and other profit-making activities under specific conditions. It also allows for budget allocations to support or co-fund programmes of associations which are in the interest of the public. These funds may be granted to associations under specific conditions by way of a public competition.[303] The Draft prohibits the work of secret and paramilitary associations and lists the goals an association may not be guided by in its work. These grounds for prohibiting the work of associations correspond to those listed in the Constitution but the Draft Act elaborates some of them in greater detail. It also introduces new grounds for prohibiting the work of an association – goals and activities aimed at violating the territorial integrity of the Republic of Serbia. Under the Draft Act, the Constitutional Court shall decide on the prohibition of the work of associations for reasons foreseen by the law.

300 See *Sigurour A. Sigurjonsson v. Iceland*, 30 June 1993, A-264.

301 *Sl. glasnik SRS*, 24/82, 39/83, 17/84, 50/84, 45/85, 12/89 and *Sl. glasnik RS*, 53/93, 67/93, 48/94

302 *Sl. glasnik RS*, 37/90, 30/92, 53/93, 67/93 and 48/94.

303 See explanation of the Draft Act on Associations, www.parlament.sr.gov.yu, accessed on 10 December.

### *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). 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 Ministry (217 and 238 Labour Act and Art. 4 Rules on Entry of Trade Union Organisations in Register[304]). 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

304 *Sl. glasnik RS*, 6/97, 33/97, 49/00, 18/01 and 64/04.

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).[305]

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.[306] The decision to ban an association may be reached only by the Constitutional Court (Art. 55 (4) Constitution).

ILO Convention 87 on Freedom of Association and Protection of the Right to Organise[307] explicitly envisages in Article 4 that administrative authorities may not dissolve or suspend trade union organisations.[308]

Serbia's laws do not specify that all restrictions with respect to the freedom of association must "be necessary in a democratic society," as laid down by the ICCPR and ECHR.

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

305 Under Article 68 of the new Asylum Act (*Sl. glasnik RS*, 109/07), Articles 44–60 of the Act on the Movement and Residence of Aliens shall cease to be effective on the day this Act comes into force.

306 LSV, an opposition parliamentary party, in October 07 submitted to the Assembly a Draft Law Prohibiting Events Staged by Neo-Nazi and Fascist Organisations and Associations and the Use of Neo-Nazi and Fascist Symbols and Insignia, see www.parlament.sr.gov.yu, accessed on 15 December.

307 *Sl. list FNRJ (Dodatak)*, 8/58.

308 See 4.18.5.

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.

### *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 and 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*,[309] however, the European Court of Human Rights ruled in 1999 that prohibiting police

309 ECtHR, App. No. 25390/94 (1999).

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 ECHR.[310] The Commission considered that states should have a large measure of freedom in judging what measures are required to defend their national security.[311]

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[312] 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.

## 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.

310 See *Council of Civil Service Unions v. United Kingdom*, ECmHR, App. No. 1160/85 (1987).

311 See *Leander v. Sweden*, A-116, 1985.

312 *Sl. glasnik RS*, 63/01, 42/02, 39/03, 44/04, 51/04 and 61/05.

### 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.[313]

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.[314]

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 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[315] 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 exist-

313 See *Holy Monasteries v. Greece*, ECtHR, A-301, 1994.

314 See *Sporrong and Lonnroth v. Sweden*, ECtHR, A-52, 1982.

315 *Sl. glasnik SRS*, 40/84, 53/87, 22/89 and *Sl. glasnik RS*, 6/90, 15/90, 53/95, 23/01.

ence 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.[316]

316 See *Kokkiniakis v. Greece*, ECtHR, A-260 (1993); *Tolstoy Miloslavsky v. United Kingdom,* ECtHR, A-316 (1995).

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.

A number of decisions rescinding expropriation decisions have been passed to date. The authorities have, however, in some cases acted arbitrarily and the administrative proceedings are, as a rule, much too long. The successfulness of the former owners' demands hinges on their persistence and the methods they employ to regain their property.

Fair compensation is the other prerequisite that must be fulfilled to avoid violation of the right to property. The Expropriation Act stipulates that fair compensation may not be lower than the market value of the real estate. The court shall decide on the compensation if the parties are unable to agree on the amount. Due to the length of the proceedings, the awarded compensation often does not reflect the market value of the real estate, because it is set by court experts who are not always able to follow the increases in prices.

The provisions of the Planning and Construction Act[317] regulating the expropriation of the construction land are a significant improvement with respect to the harmonisation of public and private interests and determination of fair compensation for this land. This Act divides construction land into public and non-public construction land. The municipal authorities define which construction land is public in accordance with their urban plans. This land is designated for the building of public facilities of common interest and for public areas and it falls under the state property regime (Arts. 68, 69 and 70 Expropriation Act). Before defining which land is public, the municipal authorities are obliged to issue an enactment excluding the user of this land from possession. The user is compensated in accordance with the Expropriation Act. The remaining construction land, regardless of who owns it, is in commerce.

The division of construction land into public and non-public land gives content to "public interest" at least with respect to public land. The Act therefore allows only the expropriation i.e. exclusion only of land that has fallen under the public regime and largely reduces the possibility of the executive authorities arbitrarily deciding on the existence of public interest. The fact that this construction land is in commerce regardless of who owns it allows for the forming of its market price and thus for fair compensation. The state is equated with the other entities given that Article 80 (2) of the Act allows municipalities to procure, regulate, lease or alienate the rest of the construction land in accordance with the law.

The Act allows for the annulment of the final decision on the exclusion of the city construction land from the possession of the former owner if the beneficiary of the expropriated real property has not put the facilities to designated use within one year from the day this Act came into force (Art. 86 (7)).

317 *Sl. glasnik RS*, 47/03.

### *4.12.3. Transformation of Forms of Ownership in Favour of State Ownership*

The Act on Assets Owned by the Republic of Serbia[318] 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).

Apart from expropriation, change of ownership to the benefit of the state is limited to inheriting property from a defunctus without legal or testamentary heirs i.e. this does not constitute the state's interference into property.

The Planning and Construction Act prescribes that non-public construction land is commercially available. Local self-government bodies are charged with establishing who has the right to use non-public land. State authorities have been known to resort to abuse, especially where property of high value is at issue.

### *4.12.4. Construction of Additional Floors and Condominiums*

This matter is regulated by the Act on Maintenance of Condominiums,[319] which has allowed for numerous violations of the right to property with the consent of the state. Under the Act, owners of more than half of the total area of the apartments and other parts of a condominium may decide to convert the common premises into apartments or to build additional floors on the condominium; condominium residents and members of their family households shall have primacy in bids for conversion of common areas and the building of additional floors (Art. 17). The Act was passed after most of the socially-owned apartments had been bought by the tenants and the right to use common premises became the right of joint ownership. These provisions allow owners of 51% of the joint property to arbitrarily and in their own interest deprive the owners of the other 49% of the joint property without providing them with any compensation. A private deal of some of the condominium residents, often the president of the assembly, i.e. council of the building residents has frequently been behind such contracts. Purely private and not common interest is at issue in such cases. The ratio of the right to property and ownership of the joint parts of the condominium ought to be taken into account, as should the provision in the Act on the Basis of Property Relations[320] requiring the consent of all the owners of the common premises to dispose of them.

The Draft Denationalisation Act envisages that the former owners of the buildings, which had been nationalised, shall regain the garret space and other com-

318 *Sl. glasnik RS*, 54/96.

319 *Sl. glasnik RS*, 44/95, 46/98 and 1/01.

320 *Sl. list SFRJ*, 6/80, 36/90 and *Sl. list SRJ*, 29/96.

mon parts of the building even if restitution of their nationalised apartments is impossible. However, the former owners will probably not be able to regain even the attic area due to the construction of additional floors and the conversion of attics into apartments in the described manner. The question remains whether these owners will have the opportunity to demand compensation for the garret space at market rates for the period since the adoption of the Act on Registration of Arrogated Property, i.e. whether their right since then can be qualified as an anticipated right.

### *4.12.5. 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 certainty 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.[321] 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 2007. A symbolic step towards denationalisation was, however, made in 2005 by the adoption of the Act on Registration of Arrogated Property.[322] 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.[323] 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.[324]

Under the Act, churches and religious communities shall regain the real estate they had owned, notably farmland, forestland, urban building land, residential

321 *Sl. glasnik RS*, 18/91, 20/92 and 42/98.

322 *Sl. glasnik RS*, 45/05.

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

324 More on inequality of religious organisations in I.4.8.

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.

The former owners and their heirs in 2006 accused the state of delaying restitution, warning that it was with that very intent that it had enacted the Act on Registration of Arrogated Property. They allege that such a law is unnecessary given that 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 Euro in its coffers in early 2006.[325]

The latest Draft Denationalisation Act was endorsed by the previous Government but the new Government withdrew the bill for revision. It differs from the previous drafts as it provides for the restitution of construction land to the former owners regardless of the fact who owns the facilities built on that land. This provision will lead to the numerous misunderstandings that will inevitably end up in court. The solution will help the state save a huge amount of money it would otherwise need to spend to compensate the former owners of the land on which someone else built the facilities. However, these owners will in essence regain burdened property, i.e. they will have a title to it but its possession and use will remain in the hands of a third person. The right of disposal will also be burdened by the right of priority in buying. The former owner will have the right to draw rent. The amount of the rent will be also limited in the beginning and difficult to effect in practice.

Under the draft, prohibited contracts on construction land shall be convalidated. This provision is, on the one hand, pragmatic, but, on the other, it is unfair because it will actually lead to punishing citizens who had obeyed the law. Also, citizens who refused to receive compensation for expropriated property will have advantage over those who had received even negligible compensation – the former will enjoy the right to compensation and the latter will be deprived of it because of their "obedience".

325 *NIN*, 19 January 2006, p. 32.

The principle of conscientious disposal of arrogated property enshrined in the Act on Registration of Arrogated Property does not apply to the state and thus to transactions performed within the process of privatisation. Such a solution is unacceptable, because there can be no justification for the actions of the state allowing the privatisation of nationalised property. Such state actions fail to ensure a fair balance between an individual's private interest for property restitution and the state's public interest to sell this property and then, in the process of denationalisation, pay the former owner compensation which does not correspond to the value of the sold property.

In addition, unfair compensation is awarded for the arrogated facilities given that it is established in accordance with the tax base line, which includes amortisation. Namely, it is not fair to award owners, who will not be compensated for lost profit, lesser compensation because the state used their real estate.

Many provisions of the Draft Denationalisation Act will inevitably lead to lawsuits, which per se constitute interference in the right to property. There is no doubt that the former owners will have to wait for several years for the compensation given the length of court proceedings in Serbia and the complexity of the issue that can partly be attributed to the lapse of time and partly to the deficient legal provisions. The Draft Act was not submitted to parliament for adoption by the time this Report went into print.

### *4.12.6. 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 and was transformed into the right of rent but specific administrative restrictions were set, notably with respect to rent amounts and termination of tenancy. The position created in Serbian case-law is that the special protected tenancy on privately owned apartments cannot be awarded to persons born after 1973 notwithstanding the fact that they lived in the joint household with the last holder of the specially protected tenancy right. This institute will therefore naturally "die out" unless the state finds a more rational solution in the meantime. The question remains whether there will be violations of the rights of a person, who was born after 1973 and has lived his whole life in the apartment but got an eviction order after the death of the holder of the special protected tenancy right because he/she was unable to transfer this right to himself/herself. The Serbian Act on Housing[326] regulates for the most

326 *Sl. glasnik RS*, 50/92.

part the manner in which the institute will gradually disappear from the Serbian legal system.[327]

## 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 the most significant universal and regional instruments guaranteeing, directly or indirectly, minority rights and freedoms,[328] including the Framework Convention for the Protection of National Minorities.

Many of the minority protection standards in national law exceeded international ones, but their application had been hindered by various factors, such as the lack of conformity of republican and former state union regulations, notably due to the timing and political circumstances in which they were adopted, the inapplicability of international agreements and constitutional acts in practice and the insufficient effectiveness of the minority protection mechanisms. In view of the circumstances in which Serbia became an independent state and the fact that it has adopted a new Constitution, the state now has the chance to carry out a 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[329] and the Local Self-Government Act[330]) provide local governments and the Autonomous Province of Vojvodina with greater competencies in ensuring minority rights.[331]

The new Constitution of Serbia provides for extensive protection of minorities. Serbia does not have a separate law on minority protection; the federal authorities decided back in 2003 that the Act on the Protection of Rights and Freedoms of National Minorities adopted in 2002,[332] hereinafter: Act on the Protection of Minorities) ought to be taken as a framework law[333] and that specific areas of mi-

327 More on tenancy rights in *Report 2005*, I.4.12.6.

328 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.

329 *Sl. glasnik RS*, 6/02.

330 *Sl. glasnik RS*, 9/02.

331 See *Report 2005*, I.4.13.1.

332 *Sl. list SRJ*, 11/02.

333 See *Report 2005*, I.4.13.1.

nority 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 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).

The Constitution of Serbia includes a normative feature which by its nature resembles the Constitutions adopted by East European countries after the collapse of communism. This feature is evident in how the Constitution defines the state – Serbia is defined first and foremost as the state of the Serbian people. Thus, the ethnic and not the civil definition of Serbia as a state of primarily the Serbian people and, secondarily, all other peoples has prevailed. Although the Venice Commission took a neutral view on this definition in the Constitution,[334] one should bear in mind the fact that comparison of constitutional law practice has shown that such appropriation of the state by the majority nation has frequently impacted on the state bodies' attitude towards minority problems in practice.

There are no definitions of an ethnic minority in the Constitution. However, the Act on the Protection of Rights and Freedoms of National Minorities[335] (hereinafter: Minority Protection Act), which has continued to apply in Serbia after the dissolution of SaM defines a national minority in the following manner in Art. 2 (1).

> a group of citizens of (...)sufficiently representative, although in a minority position on the territory (...), belonging to a group of residents having a long term and firm bond with the territory and possessing some distinctive features, such as language, culture, national or ethnic belonging, origin or religion, upon which it differs

334 The Venice Commission is of the opinion that "While this definition may be criticised for emphasising the ethnic character of the state, no legal consequences should follow from it in practice." (Para. 10 of the *Opinion on the Constitution of Serbia*, adopted at the 70th plenary session of the Commission, Venice, 17–18 March 2007, http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.asp,Opinion, Part I, Art. 1).

335 *Sl. list SRJ*, 11/02.

from the majority of the population, and whose members should show their concern over preservation of their common identity, including culture, tradition, language or religion.

Para 2 of Article 2 goes on to say that national minorities also include "(...) all groups of citizens who consider or define themselves as peoples, national and ethnic communities, national and ethnic groups, nations and nationalities, and who fulfil the conditions specified in paragraph 1 of this Article.

The CoE Advisory Committee is of the opinion that limiting the scope of the term national minority to citizens only is a shortcoming of this Act. No steps have been made in accordance with its recommendation to avoid a negative impact of the shortcoming on the protection of Roma or other persons whose citizenship status following the break-up of the SFRY has not been regularised or who, in the absence of personal documentation, have had difficulties in obtaining confirmation of their citizenship.[336]

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[337] prohibit all activities and any incitement to ac-

336 The views of the Advisory Committee on the Framework Convention for the Protection of National Minorities – Opinion on Serbia and Montenegro, ACFC-/OP/I(2004)002, adopted at the XVIII session on 27 November 2003, at http://www.coe.int/t/e/human_rights/minorities/2._framework_convention_(monitoring)/2._monitoring_mechanism/4._opinions_of_the_advisory_committee/1._country_specific_opinions/1._first_cycle/PDF_1st_OP_SAM.pdf.

337 *Sl. glasnik RS*, 50/92.

tivities 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 also in the Act on the Protection of 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 theretofore, which is certainly a more precise formulation.[338] 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.[339] 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 Act on Churches and Religious Communities, which regulates the status of traditional churches and religious communities in Serbia, also regulates the status of minority churches and religious communities. Although this Act in principle guarantees the equality of religious confessions in the territory of Serbia, a number of its provisions essentially violate the declared equality by unequally treating religious communities.[340]

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

338 The Framework Convention deals with this issue identically (Art. 3 (1)).

339 *Advisory Committee Opinion on SaM*, n. 4, para. 27.

340 This law was criticised both by domestic and international organisations. More in I.4.8.3.

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[341] 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, 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.[342] Individual laws or amendments to existing laws on education, culture, information and use of language are to

341 *Sl. glasnik RS*, 49/92.

342 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 – includ-

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,[343] 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 a number of national councils have in the meantime expired.

*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.

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ing NGOs and associations of national minorities – are brought into the relevant decision-making processes; *Advisory Committee Opinion on SaM*, n. 4, para. 109.

343 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).

### 4.14.1. 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).

The Constitutional Act on the Implementation of the Constitution[344] lays down strict deadlines of the overall reform of Serbia's election legislation. It links the calling of presidential, provincial and local elections to the enforcement of a number of laws (Art. 3), which were adopted in December 2007[345] thus providing the grounds for calling of the presidential (20 January 2007), provincial and local elections (11 May 2008).

### 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 amending the Constitution. 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 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.[346] 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

344 *Sl. glasnik RS*, 98/06.

345 In December 2007, the National Assembly adopted the Act on the Election of the President of the Republic and the Act on the President of the Republic (*Sl. glasnik RS*, 111/07), the Act on Security Services, the Act on Foreign Affairs, the Act on Army of Serbia and the Act on Defence (*Sl. glasnik RS*, 116/07), the Act on the Local Self-government, the Act on Local Elections, the Act on the Capital and the Act on the Territorial Organisation of the Republic of Serbia (*Sl. glasnik RS*, 129/07). Since some of these acts were adopted at the time this Report went into print, their provisions shall be analysed in the next Report of the BCHR.

346 This right is deemed to be implicitly recognised by Article 1 of the First Protocol. *Blackstone's Human Rights Digest*, Blackstone Press Limited, London 2001, p. 336.

to be elected may be subjected to qualification requirements as long as they are not discriminatory.[347]

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.[348]

The Serbian Assembly in 2004 enacted the Act on Prevention of Conflict of Interest in Discharge of Public Offices.[349] 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)).[350] 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 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.[351] 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.[352] 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)).

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347 *Gitonas v. Greece,* (1997) RJD 1997-IV No. 42, ECtHR; *Fryske Nasjonale Partij v. The Netherlands* (1985) 45 DR 240, ECtHR).

348 More about the Act in *Report 2004*, I.4.14.2.1.

349 *Sl. glasnik RS*, 43/04.

350 See *Report 2005,* I.4.14.2.1 for a detailed analysis of this law.

351 More in *Report 2005,* I.4.14.2.1

352 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.

### *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 Act on the Election of Assembly Deputies (AEAD); Art. 7 Local Elections Act (LEA); Art. 2 Act on the Election of the President of the Republic;[353] Art. 3 Decision on the Election of AP Vojvodina Assembly Deputies (DEVD)).

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 and 73a).

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.

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) AEAD).[354] 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.[355] The Serbian Act on the Election of Assembly Deputies partly re-

353 *Sl. glasnik RS*, 111/07.

354 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.

355 According to the Directive on Updating Election Rolls (*Sl. glasnik RS*, 42/00 and 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.

solves 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)).

### *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)[356] and polling committees. The republican commission is also empowered in the first instance to review complaints 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 and 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. Determination of the Election Results*. – The competent election board determines the election results. The election board determines the overall 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 DEVD),[357] or 3% of the overall number of voters who have voted in the electoral district (Art. 40 (4) LEA). Half of

356 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 AEAD and Arts. 11–17 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 Act on the Election of the President of the Republic).

357 The election threshold of 5% does not apply to national minority political parties (Art. 74 (4) DEVD).

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 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.[358]

*4.14.5.3. Cessation of Terms in Office*. – The Constitutional Court of the Republic of Serbia, acting at its own initiative, proclaimed that the provisions in the 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.[359] 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.[360] 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 party at the proposal of which s/he was elected a people's deputy in accordance with the law (Art. 102 (2)).

*4.14.5.4. 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,[361] and guarantees of a fair trial are not applied to the procedures following the revision of legality of the conduct of elections.[362]

358 See e.g. the OSCE/ODIHR Report, *Parliamentary Elections, 28 December 2003, Republic of Serbia*, 27 February 2003.

359 *Sl. glasnik RS*, 57/03.

360 See *Report 2005,* I.4.14.5.4 for a more detailed explanation of the Constitutional Court decision.

361 See *Priorello v. Italy*, ECtHR, 43 DR 195 (1985).

362 See *X v. France*, ECtHR, 82-B DR 56 (1995); *Pierre-Bloch v. France*, ECtHR, App. No. 24194/94 (1996).

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) (Arts. 95 and 48 LEA[363]). 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 and 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.

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 and 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)).

Under the new Constitutional Court Act,[364] motions to review election disputes may be filed with the Constitutional Court within fifteen days from the day the challenged election dispute ended. The whole part of the Act devoted to the decision making on these matters is unclear and unimplementable in the present political circumstances given that the Act foresees that "The Constitutional Court shall annul the whole election procedure or part of the procedure, which shall be precisely specified, in the event an election procedure irregularity that significantly affected the election results has been proven" (Art. 77). This provision may lead to additional legal uncertainty of the election process. It is very difficult to imagine the Constitutional Court annulling elections and the whole election procedure being repeated.

363 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).

364 *Sl. glasnik RS*, 109/07.

# 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*

The Constitution of Serbia affords special protection to families, mothers, single parents and children (Art. 66 (1)), which is regulated in detail in laws, notably the Family Act.[365] Under the Constitution, mothers shall be provided with special support and protection before and after childbirth (Art. 66 (2)).

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

365 *Sl. glasnik RS*, 18/05.

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 on the Rights of the Child[366] and has led to a number of problems in practice.[367]

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 paragraph 1 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,[368] 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).

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. These violations are punished by a fine or by up to six months' imprisonment (Art. 194 (5) CC).

### *4.15.2. Marriage*

The Constitution guarantees the right of all to decide freely on entering or dissolving a marriage, the equality of spouses during a marriage and when contracting or dissolving it. It equates extramarital unions and marriage in keeping with the

366 Committee on the Rights of the Child Report, 5th session, January 1994, CRC/C/24, Annex V, p. 63.

367 See *Report on the State of the Rights of the Child in Serbia*, Child Rights Centre (in preparation).

368 *Sl. glasnik RS,* 85/05, 88/05 and 107/05. Chapter XII, Offences Relating to Marriage and Family, Arts. 187–197.

law and guarantees the equality of children born in and out of wedlock (Art. 62 (1, 3–5)).

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 (Art. 62 (2) Constitution and Art. 3 (1) FA).[369] ECtHR practice and its rulings on marriages of homosexuals and transsexuals are not uniform.[370] 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 in 2005 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*,[371] the ECtHR took the stand that partners of the same sex must be enabled enjoyment of specific spousal rights. The Constitutional Court of Serbia, established in early December 2007 after having not operated for a year, had not reached a decision on the BCHR initiative by the time this Report went into print.

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.[372]

### *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.[373] In July 2002, FRY ratified two optional protocols to the

369 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)).

370 See *Van Oösterwijck v. Belgium*, App. No. 7654/76; *Cossey v. Great Britain*, App. No. 10843/84.

371 ECHR, App. No. 40016/98 (2003).

372 More on FA provisions related to marriage, divorce, the spouses' property relations and proceedings related to family and marital relations in *Report 2005*, I.4.15.2.

373 *Sl. list SFRJ (Međunarodni ugovori)*, 15/90 and 4/96 (withdrawing reservations given at the signing) and *Sl. list SRJ*, 2/97. 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*

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.[374]

Serbia submitted to the Committee on the Rights of the Child its Initial Report on the realisation of the Convention on the Rights of the Child in the Republic of Serbia in the 1992–2005 period with a substantial delay. The Serbian state delegation will attend the review of the Report by the Committee in May 2008. The Belgrade-based NGO Child Rights Centre in September 2007 brought together an *ad hoc* coalition of NGOs which drafted the Report on the State of the Rights of the Child in Serbia (hereinafter: Alternative Report) for the 1992–2005 period, to be submitted to the Committee in the beginning of 2008. Although the state Report largely relies on NGO reports, these organisations were not consulted on the content of the Report.[375]

The Family Act endorses and is based on all the main principles enshrined in the Convention on the Rights of the Child.

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).

The Government of Serbia on 14 December 2007 submitted to the Assembly the Draft Act on the Protector of the Rights of the Child, which is one of its commitments arising from CoE membership. Under the Draft, the main duty of this independent state authority will be to protect and work on promoting and spreading knowledge about the rights of the child (Art. 1). The Protector shall be entitled to submit legislative initiatives and launch proceedings for reviewing the constitutionality and legality of general enactments (Arts. 7 and 8) and shall be elected by the National Assembly (Art. 18).

The Protector shall be entitled to access facilities and have insight in the care of children living or accommodated with natural or legal persons and shall have access to facilities in which children deprived of liberty are residing (Art. 10). The Protector shall also be entitled to access all information related to the rights and protection of children notwithstanding the degree of its confidentiality (Art. 11).

Under the Draft, the Protector shall be accountable for the consistent application of the provisions in the Convention on the Rights of the Child entitling children to the right to free expression.

The Protector is obliged to inform the children of their rights and of ways in which they may exercise them (Art. 6).

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*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. It was submitted in 2007.

374 *Sl. list SRJ, (Međunarodni ugovori)*, 7/02.

375 See *Report on the State of the Rights of the Child in Serbia*, Child Rights Centre (in preparation)..

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.[376]

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.[377]

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,[378] 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).[379]

The Yugoslav Army Act[380] is in accordance with the Protocol in the part that relates to compulsory recruitment, prescribing that the 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)).

376 See *Report 2003*, II.2.15.1. for more on violations of the rights of the child during the wars in the former SFRY.

377 See *Report 2006*, I.4.15.3.1.

378 See I.4.4.

379 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.

380 *Sl. glasnik SRJ*, 43/94, 28/96, 44/99, 74/99, 33/02, 37/02 and *Sl. list SCG*, 44/05. In its concluding and transitional provisions (Art. 197), the new Act on the Army of Serbia, adopted in December 2007, indicates that the provisions of the Act on Yugoslav Army shall be applied in this field until the adoption of a separate law.

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 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 Family Act expands the volume of the rights of the child. It entitles the child to institute action in 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).[381]

*4.15.3.3. Protection of Minors in Criminal Law and Procedure*. – A Juvenile Justice Act enacted in 2005[382] 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.

The inadequate legislation in force prior to the adoption of the Juvenile Justice Act had led to specific problems in the past: the proceedings were not unified and therefore lasted longer, while the punishment of juvenile delinquency, the detention measures and ways in which juveniles served their sentences were not in accordance with relevant international standards in many respects.

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 (Art. 11).

The problem has been arising with respect to specific disciplinary measures, especially those institutional in character – their duration is relatively indeterminate

381 More on FA provisions on the exercising of parental rights and supervision, on the protection of children without parental care, on the property of the child and the child's right to enter into legal transactions in *Report 2005*, I.4.15.3.2.

382 *Sl. glasnik RS*, 85/05.

given that the law specifies only the minimum and maximum duration of such measures.[383]

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.[384] The detained minor must be 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).[385]

Under Article 66 of the Juvenile Justice Act, the juvenile judge may remand a juvenile during the preliminary proceedings to a home, rehabilitation or similar institution, under supervision of a social welfare agency or placement in foster family, if this is necessary to separate the juvenile from his current environment. The Alternative Report notes that the juvenile courts have rarely made use of this legal provision and still tend to place juveniles in detention much too often.[386]

The 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).[387]

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

383 See *Report on the State of the Rights of the Child in Serbia*, Child Rights Centre (in preparation).

384 See *Report* 2006, I.4.15.3.3.

385 More on the provisions in this Act in *Report 2005*, I.4.15.3.3.

386 See *Report on the State of the Rights of the Child in Serbia*, Child Rights Centre (in preparation).

387 *Sl. glasnik RS,* 57/03.

within two months of birth. Under the Serbian FA,[388] 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 (Arts. 342, 344 (1, 3 and 4) and Arts. 345 and 346).

## 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.

### *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[389] adopted within the CoE, sets the basic principles, rules and recommendations concerning citizenship.[390] Serbia has

388 Serbia does not have a law on personal names; provisions on personal names are included in Chapter XI of the Family Act.

389 European Convention on Nationality, Strasbourg, 6. XI 1997, www.coe.int.

390 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

not signed the Convention yet, although the Convention was mentioned by the proposers of the laws in their explanations of the Serbian Citizenship Act adopted in December 2004,[391] and of the Act Amending the Serbian Citizenship Act[392] adopted on 24 September 2007.

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 Serbian Assembly in September 2007 adopted the Act Amending the Serbian Citizenship Act to address the effects of Montenegro's independence and the dissolution of SaM. 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 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.[393] 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 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 na-

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).

391 *Sl. glasnik RS*, 135/04. The Act came into effect 60 days after adoption (Art. 56).

392 *Sl. glasnik RS*, 90/07.

393 The term "non-nationals" not "foreign nationals" is used in the Explanation of the Act Amending the Citizenship Act.

tionals or termination of Serbian citizenship due to acquisition of Montenegrin citizenship. These amendments will 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).

The explanation of the 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)."[394]

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.[395]

The new Constitution does not guarantee the right to citizenship, an attitude which is commonplace and generally accepted.[396] The new Constitution 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".[397]

Acquisition and termination of Serbian citizenship shall be regulated by law (Art. 38 (1)). The Serbian Citizenship Act has been in force since 27 February 2005 and was amended in September 2007. The Act Amending the Serbian Citizenship Act explicitly states that the procedures for acquiring or terminating Serbian citizenship launched before the amendments came into force shall be completed in accordance with the amended provisions (Art. 17).

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394 See Act Amending the Citizenship Act of the Republic of Serbia, Draft, Explanation, Part II, www.srbia.sr.gov.yu, accessed on 20 December.

395 See Act Amending the Citizenship Act of the Republic of Serbia, Draft, Explanation, Part V, www.srbia.sr.gov.yu, accessed on 20 December.

396 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 and 26/05) or the SaM Charter on Human and Minority Rights and Civil Liberties (*Sl. list SCG*, 6/03).

397 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 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.[398]

The Citizenship Act prescribes that citizenship may be acquired by: origin, birth, naturalisation and international agreements (Art. 6).[399]

The 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.[400] 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)) under specific circumstances. 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).

Article 23 of the Serbian Citizenship has been amended in the following manner. Para 1 of the original Article provided that citizenship would be granted to 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. Under the amendments, Serbs without permanent residence in the territory of the Republic of Serbia *are entitled* to acquire citizenship under the above conditions *and need not be released from foreign citizenship*, while persons belonging to other nations or ethnic communities in the territory of the Republic of Serbia *may be granted* Ser-

398 Act Amending the Citizenship Act of the Republic of Serbia, Draft, Explanation, Part II, www.srbia.sr.gov.yu, accessed on 20 December.

399 More on specific provisions on acquisition of Serbian citizenship in *Reports 2004, 2005*, I.4.16.2.

400 See I.4.16.1.

bian citizenship under the same conditions. Therefore former paragraph 1 of Article 23 is now split up into two provisions: one giving the members of the Serbian nation the right to acquire citizenship of the Republic of Serbia under certain conditions and the other giving the other nations and ethnic communities in the territory of the Republic of Serbia the possibility of acquiring citizenship of the Republic of Serbia under the same conditions. Para 2 of the Article has remained the same: it provides for the acquisition of Serbian citizenship under the same conditions to persons born in another former SFRY republic, who had the citizenship of that republic or were citizens of another state created in the territory of the former SFRY and are residing in the territory of Serbia as refugees, expelled or displaced persons or have fled abroad.

Under the Act Amending the Citizenship Act, Article 23 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. A person will therefore be able to hold both Serbian and Montenegrin citizenships in the future.

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.[401] The Act Amending the Citizenship Act deletes acquisition of the other member-state's citizenship (Art. 10 (1)) as grounds for termination of citizenship wherefore Article 35 setting out when citizenship can be terminated on these grounds shall be deleted (Art. 13).

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).[402]

The 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 Act, 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. 16 Act Amending the Citizenship Act). The Act also amends Article 52 of the Serbian Citizenship Act,[403] by adding a provision, under which all Montenegrin citizens, who

401 More on termination of Serbian citizenship in *Reports 2004, 2005*, I.4.16.2.

402 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.

403 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

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. 17 (2)). The proposers of the Act explained 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.[404]

## 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.

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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.

404 See Act Amending the Citizenship Act, Draft, Explanation, Part III, www.srbija.sr.gov.yu, accessed on 20 December.

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)).[405] 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. 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.[406]

405 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).

406 The effectiveness of the provisions regulating the right to asylum and the status of refugees in Serbia (Arts. 44–60) ceased under Article 27 of the Asylum Act passed in March 2005 (*Sl. list*

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))

Expulsion of an alien is a security measure also envisaged by Serbian criminal law (Art. 79 (1.8) 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) 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) CC). The measure may be pronounced for a period between one and ten years (Art. 88 (1) CC).

This security measure may not be pronounced against an offender enjoying protection in accordance with ratified international agreements (Art. 88 (4) 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.

*4.17.2.1. Constitutional Framework*. – Under the Constitution, any foreign national with reasonable fear of persecution 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 (Art. 57 (1)). As opposed to the SaM HR Charter, the 2006 Constitution does no mention fear of persecution on grounds of colour as grounds for granting asylum.

*4.17.2.2. Legal Framework*. – Although the former State Union of Serbia and Montenegro (SaM) had 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 when it became a member of the CoE in 2003 and 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 in 2004, the

*SCG*, 12/05) and the termination of effectiveness of these provisions was again prescribed in Article 68 of the new Asylum Act adopted in November 2007. These issues shall in the future be regulated by the 2007 Asylum Act, which is to be applied as of 1 April 2008 (more on the Asylum Act in I.4.17.2).

Serbian National Assembly finally enacted the Asylum Act[407] only[408] in November 2007.

Under the Constitution, the procedure for granting asylum shall be regulated by law (Art. 57 (2)). Had the Asylum Act not been adopted, the constitutionally guaranteed right to asylum would have remained merely a dead letter.[409]

Although the adoption of the long-awaited Act is a positive step towards improving the protection of asylum seekers, refugees and persons granted humanitarian protection (dubbed subsidiary protection in the Act) and the Act contains numerous guarantees protecting the rights of these persons, this law, like many others adopted in Serbia in the recent years, was put in the parliament pipeline without having undergone a proper public debate, which may be one of the reasons why some of its provisions are not fully in accordance with international standards. Due to lack of space, this Report will not provide a comprehensive and detailed commentary of the Asylum Act, but shall merely indicate some of its more glaring shortcomings.

According to the constitutional terminology, asylum is a concept comprising the provision of refuge (entailing refugee protection) and the provision of subsidiary protection. The Act, however, occasionally uses the word asylum where it is obviously referring only to refuge. For instance, Article 31 lists the reasons why asylum may be denied; however, only refuge but not subsidiary protection ought to be denied on those grounds given that subsidiary protection must be absolute when it entails protection from torture and inhuman or humiliating treatment or punishment.

Under the Act, the state may, *inter alia*, dismiss an asylum application by invoking the concepts of a safe third country and a safe country of origin, if the asylum seeker has the citizenship of a third state, if there is a possibility of him/her moving to a safe part of his/her country or if a third state has already granted him/her asylum (Art. 33). It is crucial that the state is in all these cases reassured that the protection the asylum seeker can enjoy in another state is truly effective; in any case, the state has to offer the individual the opportunity to refute the allegations about the safety of that other state in his or her case. The Asylum Act, however, does not always make such provisions.

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407 *Sl. glasnik RS*, 109/07.

408 The Serbia and Montenegro (SaM) State Union had adopted a framework Asylum Act and the member-states were to have passed republican laws that would regulate the asylum procedure in greater detail. Serbia passed such a law in November 2007, i.e. long after the State Union disintegrated. The validity of the SaM Asylum Act, which mainly consisted of principles and general provisions, shall formally cease with the application of the new Serbian Asylum Act (as of 1 April 2008).

409 Under a 1969 gentlemen's agreement, the UNHCR mission has the mandate to review asylum applications, protect the asylum seekers and provide them with appropriate international protection, i.e. find a state that will take them in. These duties shall fall within the remit of the Serbian institutions once the enforcement of the Act begins on 1 April 2008.

An asylum application shall be dismissed if the asylum-seeker had earlier sought asylum in "another state abiding by the Geneva Convention" and been rejected and "the circumstances on which the application was based have not changed" in the meantime (Art. 33 (1.5)). The danger in this provision lies in the possibility of returning the asylum seeker to the state in which s/he may be persecuted. The state ought to examine the assertions of every single asylum seeker and establish whether their applications are founded or not, not just dismiss applications off handedly.

The Act has a problematic provision under which the concept of a safe third country is based on the state's unilateral decision to invoke the jurisdiction of a third state to decide on asylum applications instead of a bilateral agreement or with the explicit consent of the state to receive his/her asylum application.

The Act unfortunately does not contain the provision that had existed in the draft, under which the provisions of the Act were to have been interpreted in accordance with the 1951 Convention on the Status of Refugees, the 1967 Protocol thereto and the generally accepted rules of international law (although the deleted provision had a problematic definition of the expression "generally accepted rules of international law"). This provision could have helped eliminate at least some of the law's shortcomings in jurisprudence and through its interpretation by the invoking of relevant international instruments.

*Competent authorities*. – The decision to grant asylum is reached by special bodies established under the Asylum Act, notably, the Asylum Office as the first-instance body and the Asylum Commission as the second-instance body reviewing appeals of Asylum Office decisions. The Asylum Office shall be part of the MIA (Art. 19), while the Asylum Commission shall comprise members appointed by the Government (Art. 20).

*Procedure*. – The serious criticisms of the provisions in the draft referring to the asylum granting procedure unfortunately went unheeded.

Appeals of the Asylum Office decisions may be filed within 15 days, which is better than the much too short eight-day period initially foreseen by the draft (even 15 days may not be enough given the asylum-seekers' circumstances and the insufficient capacities of organisations providing them with legal aid). The Act, however, does not provide for the suspensive effect of appeals. This shortcoming may have extremely serious consequences.

Another deficiency of the Act is its failure to stipulate that the regime of administrative silence shall not apply to the procedure for granting asylum[410] and that the first-instance procedure shall last until a first-instance decision is reached.

410 Under Article 208 (2) of the Administrative Procedure Act "in the event an authority whose decision may be appealed fails to reach a decision and notify the party thereof within the prescribed deadline, the party shall have the right to appeal as if its application had been rejected".

The Act ought to be amended by including a provision setting the deadline within which decisions on asylum applications have to be reached.

Article 30 of the Act states that an asylum application shall be rejected as unfounded if the seeker failed to provide true information. It should be borne in mind that one cannot always expect full cooperation from an asylum seeker, not necessarily because s/he has evil intentions but, rather, because of the adverse circumstances such persons are often living in, wherefore failure to provide true information should not constitute grounds for refusing to provide protection.

*Rights of asylum seekers, refugees and beneficiaries of subsidiary protection*. – These rights are regulated in Chapter VI of the Act and include the right to residence, accommodation, fundamental living conditions, health care, education. These provisions, too, suffer from shortcomings, the most significant of which is that specific rights are guaranteed to persons granted the right to refuge but not to beneficiaries of subsidiary protection. Article 42, for instance, guarantees the right to protection of intellectual property, freedom of religion and specific rights in the area of the right to a free trial only to persons granted the right to refuge. The Act also ought to include a provision prohibiting the discrimination of asylum seekers and persons granted asylum *vis-à-vis* nationals of Serbia. It, however, guarantees non-discriminatory treatment only with respect to the mentioned rights in Article 42[411] and, as mentioned, only to persons granted the right to refuge but not to asylum seekers and persons granted subsidiary protection *vis-à-vis* nationals of Serbia.

*Right to family reunion*. – The right to family reunion is not regulated uniformly with regards to all categories of persons provided with protection as it should be. This right is envisaged for persons granted refuge (Art. 48) while persons granted subsidiary protection shall be entitled to this right "in accordance with regulations on the movement and residence of aliens" (Art. 49).[412] Persons granted temporary protection shall have this right only in "justified cases" (Art. 50).

There is also a problem with the definition of "family member". Under the Act, a family member shall signify an asylum seeker's "underage child, adopted child or step-child who are unmarried, spouse in the event that the marriage was concluded prior to arrival in the Republic of Serbia, and the parent and adoptive parent legally obliged to support him or her" (Art. 2). Exceptionally, the law allows other persons to also be considered family members, especially if they had been supported by the person granted asylum. The whole concept of "family member" ought, however, to be interpreted more broadly and definitely include close rela-

411 The Convention relating to the Status of Refugees, for instance, demands of states not to limit the right to work of refugees living in the country for over three years (Art. 17 (2) Convention).

412 Article 9 of the Act foresees that "persons granted *asylum* shall be entitled to family reunion in accordance with the provisions of *this Act*" (italics added) i.e. that provisions on family reunion in the Asylum Act pertain both to those granted the right to refuge and those granted subsidiary protection.

tives who had been the members of the household of the person granted asylum (especially if s/he had supported them), not only in exceptional circumstances. Excluding spouses of asylum seekers who married upon arrival in Serbia from the concept of "family member" is unjustified because the time when the marriage was concluded ought not to be relevant.

*Restriction of movement*. – Given that the right to freedom of movement is a fundamental human right, the state must guarantee this right to all persons in its jurisdiction, and only the exceptions envisaged by international standards are allowed.[413] This right must be granted both to asylum seekers, those granted asylum and all other persons. Therefore, movement of asylum seekers may be restricted only exceptionally.

The grounds for restricting movement in Article 51 are mostly in accordance with international standards, but the restrictive measures ought to be limited until the preliminary hearing in the event they are applied to establish the elements of the asylum application and ought not to be extended to the application review period. In any case, detention ought to be ordered only exceptionally, not as a rule.

*Temporary protection*. – Apart from the right to asylum encompassing the right to refuge and the right to subsidiary protection, the Act also envisages temporary protection which is granted in case of a massive influx of persons from a state "in which their lives, security or freedom are threatened by all-round violence, foreign aggression, internal armed conflicts, large-scale human rights violations or other circumstances seriously undermining the public order" (Art. 36 (1)), when it is impossible to conduct a procedure for granting asylum with respect to every individual. Decisions on temporary protection shall be reached by the Government.

The adopted text of the Act is better than the draft with respect to temporary protection, as the latter stated that the Government would in its decision specify the number of people this protection could be provided to. The final text does not foresee the Government restricting in its decision the number of people the state can take in.

*UNHCR and NGOs*. – Under Article 10 (2) of the Asylum Act, "an asylum seeker may avail himself or herself of the free legal aid and representation provided by the UNHCR and non-governmental organisations the goals and activities of which are directed at providing legal aid to refugees". This provision could have been formulated better; the existing provision may lead to the conclusion that the asylum-seeker's right to UNHCR and NGO aid also binds these organisations to

413 The ICCPR, for instance, allows for restrictions of this right only if they 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 recognized in the present Covenant xxxx" (Art. 12 (3)) while Protocol 4 to the ECHR allows such restrictions them if they are "in accordance with law and (...) 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 rights and freedoms of others" (Art. 2 (3)).

provide such aid. The Asylum Act cannot impose such obligations upon the mentioned organisations.

The Act commendably entitles asylum seekers to legal aid of NGOs. However, although the Act envisages right to access UNHCR and NGOs in Article 10 (2), in Article 12 it guarantees them only the right to contact authorised UNHCR officers, but not NGOs, during all stages of the procedure. Similarly, Article 25 (2) stipulates that an alien shall prior to submitting his or her application for asylum be notified of his/her rights, including the right to access the UNHCR, but the Act does not oblige the authorities to notify him or her of the right to access NGOs. Nor does the Act include the obligation to notify the asylum seekers of data on NGOs involved in the protection of refugees, which would no doubt help improve the efficiency of the aid these organisations can provide.

The Act fails to explicitly prescribe that asylum seekers may have access to the UNHCR and NGOs as soon as they request it and that their contacts may not be hindered.

### *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 Serbian Assembly in late September 2007 passed a new Act on Travel Documents[414] to come into effect six months upon adoption (Art. 57) and replacing the Act on Travel Documents of Yugoslav Citizens.[415] In addition to new legislation on asylum, state borders and aliens, Serbia was required to adopt a new Act on Travel Documents to be included in EU's 'positive visa' list.[416]

Under Article 3 of the new Act, all nationals of Serbia shall be entitled to travel documents under the conditions laid down in the Act and they may possess only one travel document of the same kind.

Under the new Act, only the authorities situated in Serbia shall be authorised to issue travel documents (Arts. 15 and 16), with the exception of travel certificates[417] issued by Serbia's diplomatic or consular office in the country in which the national of Serbia has found himself (Art. 17).

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414 *Sl. glasnik RS*, 90/07.

415 *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 and 101/05. The law prescribed that only Article 56 would apply and only until the adoption of the Act on the Army of Serbia, which was passed in December 2007 (Art. 56).

416 *Danas*, 10 August, www.danas.co.yu.

417 A travel certificate is a travel document issued to a national of Serbia, who is abroad and has no travel document and for the purpose of returning to the Republic of Serbia (Art. 12).

Under the new Act, travel documents will in general continue to be valid ten years (Art. 19) although the Draft Act envisaged five-year validity under the explanation that the travel documents had to be upgraded to keep up with the constant innovations in the automatic reading of data.[418]

Serbia's citizens travelling abroad no longer need to pay exit taxes[419] obtain approval to travel abroad unless such approval needs to be entered in maritime or seaman's books or, in specific cases, in the travel documents of official international staff when issued in accordance with international treaties.[420]

The authorities are now given a 30-day time-limit to decide on an application for a travel document (as opposed to Article 44 of the old law which set a 15-day deadline), with the exception of urgent cases or for justified reasons in which case the applicant must submit proof corroborating the reasons for the urgency. In such cases, the travel documents shall be issued within 48 hours (Art. 34).

The old law on travel documents listed grounds on which the issuance of such documents may be denied, which were in keeping with the constitutional restrictions of the freedom of movement.[421] It stipulated that 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)). Under Article 40 of the new Act, the competent body shall issue a reasoned decision rejecting the application i.e. shall not issue a travel document in the following cases: if an investigation has been opened or charges raised against the applicant and at the request of the competent court or public prosecution office; if the applicant has been sentenced to an unconditional prison sentence exceeding three months i.e. until s/he has served the sentence; if the applicant is prohibited from travelling pursuant to recognised international treaties; if the applicant's movement is prohibited pursuant to valid regulations enforced to prevent the spreading of contagious diseases or epidemics; if the applicant has not obtained approval for travel abroad for reasons related to the defence of the country or if there is another legal obstacle envisaged by the law

418 See "Serbia issuing its own passports for the first time thanks to the adoption of new Act on Travel Documents", Serbian Government website, 17 September, www.srbija.sr.gov.yu.

419 See *Reports 2004, 2005*, I.4.17.3.

420 See Explanation of the Draft Act on Travel Documents, www.srbija.sr.gov.yu, accessed on 15 December.

421 The Act had for a long time provided for the denial of passport in contravention of constitutional provisions. Two 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).

regulating the military obligation in case a state of war or emergency has been declared. An application for a travel certificate may not be rejected (Art. 35). The first reason for denying a travel document is elaborated in greater detail than the corresponding provision in the old law, which sets the initiating of criminal proceedings as grounds for rejecting the application. Under the new Act, a decision on opening an investigation or the filing of an indictment shall be grounds for rejecting the application. The authorities may reject the application at the request of both the competent court and the public prosecutor. The second and fourth reasons are identical to those in the old law, the fifth has been elaborated to an extent, while the third reason is brand new. The explanation of the draft law, unfortunately, fails to clarify the reasons for this provision or list the international documents the law is referring to. This is why these grounds for denying travel documents ought to be elaborated in greater detail in by-laws.

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 of limited validity may be granted at the request of the person whose application had been rejected or whose passport has been seized (with the exception of persons whose passports were seized because they no longer have Serbian citizenship) with the prior consent of the court i.e. public prosecutor which had demanded that the applicant not be issued a travel document (Art. 41).

Review of applications for travel documents that began before the new Act came into effect shall be completed in accordance with the provisions of the new Act (Art. 54).

The new Act on the Army of Serbia adopted in December 2007 obliges professional members of the Army of Serbia to report their travels abroad to their superiors. Under the Act, the Defence Minister shall regulate the conditions under which professional army members and conscripts serving the army may travel abroad (Art. 49). Under the Act, professional members of the Army of Serbia comprise both professional Army of Serbia staff and the civilians employed in the Army (Art. 8 (1)).[422]

### *4.17.4. Readmission Agreement*

In September 2007, Serbia and the European Community (i.e. EU member-states with the exception of Denmark) signed an Agreement on the Readmission of Persons Residing without Authorisation in the territory of the other High Contracting Party.[423]

Under the Agreement, Serbia shall readmit, upon application by a Member State and without further formalities other than those provided for in the Agreement, any person who does not fulfill the conditions in force for entry to, presence

422 See *Report 2006*, I.4.17.3 for provisions in the Act on the Army of Yugoslavia.

423 *Sl. glasnik RS*, 103/07.

in, or residence on, the territory of the Requesting Member State (Art. 2 (1)). Serbia would be obliged to receive its nationals in any case but the Agreement facilitates the procedure

Under the Agreement, Serbia is above all obliged to readmit its own nationals. The citizenship of the person need not be established with certainty but "proved, or (...) assumed on the basis of *prima facie* evidence furnished, that such a person is a national of Serbia" Serbia shall also readmit persons who have renounced the nationality of Serbia since entering the territory of a Member State, unless such persons have at least been promised naturalisation by that Member State (Art. 2 (3)).

Apart from its nationals, Serbia shall also readmit their minor unmarried children regardless of their place of birth or their nationality, and their spouses, holding another nationality provided they have the right to enter and stay or receive the right to enter and stay in the territory of Serbia, unless they have an independent right of residence in the Requesting Member State (Art. 2 (2)).

Under the Agreement, in case the person to be readmitted possesses the nationality of a third state in addition to Serbian nationality, the Requesting Member State shall take into consideration the will of the person to be readmitted to the state of his/her choice (Art. 2 (5)).

Serbia shall readmit all third-country nationals or stateless persons provided that it is proved, or may be validly assumed on the basis of prima facie evidence furnished, that such persons hold, or at the time of entry held, a valid visa or residence permit issued by Serbia or had illegally and directly entered the territory of the Member States after having stayed on, or transited through, the territory of the Serbia (Art. 3 (1)). The readmission obligation, however, shall not apply if these persons had only been in airside transit via an International Airport of Serbia or the Requesting Member State has issued them a visa or residence permit before or after entering its territory unless those persons are in possession of a visa or residence permit, issued by Serbia, which expires later. The readmission obligation shall also not apply if the visa or residence permit issued by the Requesting Member State has been obtained by using forged or falsified documents or if that person fails to observe any condition attached to the visa and that person has stayed on, or transited through, the territory of Serbia. (Art. 3 (2))

Serbia shall also readmit, upon application by a Member State, former nationals of the Socialist Federal Republic of Yugoslavia who have acquired no other nationality and whose place of birth and place of permanent residence on 27 April 1992, was in the territory of Serbia (Art. 3 (3)).

EU Member States shall readmit any person illegally in the territory of Serbia. The conditions that need to be fulfilled for readmission in the EU correspond to those that need to be fulfilled for Serbia to readmit persons illegally in the EU (Art. 4 (1–3) and Art. 5 (1–2)).

Under the Agreement, Serbia and EU Member States have assumed also the obligation to restrict the transit of third-country nationals or stateless persons to cases where such persons cannot be returned to the State of destination directly and at the request of the other Party to the Agreement if the onward journey in possible other States of transit and the readmission by the State of destination is assured (Art. 13 (1–2)). Article 13 (3), however, lists the conditions under which they may refuse transit.[424]

This Agreement explicitly sets out that it shall be without prejudice to the rights, obligations and responsibilities arising from International Law and, in particular, from: the Convention on the Status of Refugees and the Protocol on the Status of Refugees, the international conventions determining the State responsible for examining applications for asylum lodged, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Convention of against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, international conventions on extradition, multilateral international conventions and agreements on the readmission of foreign nationals (Art. 17).

## 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. Serbia, however, still has not ratified the European Social Charter adopted within the Council of Europe. In its 2006 report on Serbia's fulfilment of its CoE commitments, the first since it became an independent state, the CoE noted in its main conclusions and recommendations that Serbia needed to use the period before it took over chairmanship of the Committee of Ministers to secure full implementation of outstanding commitments, including the ratification of the European Social Charter (Revised) as soon as possible.[425]

Economic, social and cultural rights are guaranteed by the Constitution and regulated in detail by laws and subsidiary legislation. Although formally constitu-

424 Transit may be refused if the person runs the real risk of being subjected to torture or to inhuman or degrading treatment or punishment or the death penalty or of persecution because of his race, religion, nationality, membership of a particular social group or political conviction, if the person shall be subject to criminal sanctions in the Requested State or in another State of transit and on grounds of public health, domestic security, public order or other national interests of the Requested State.

425 See Compliance with obligations and commitments and implementation of the post-accession co-operation programme, Document presented by the Secretary General, First Report (January-October 2006), SG/Inf(2006)15, 18 December 2006, para. 84, www.coe.org.yu.

tional, 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.

In its Opinion on the Serbian Constitution published in March 2007, the Venice Commission noted the need to at the least qualify these rights in the Constitution by adding 'subject to available resources'. The Commission notes that their implementation will be dependent upon resources being provided by the legislature and will be subject to review by the courts and that there is little experience in this respect at the European level. The Venice Commission had in its opinions on constitutional reforms in other countries expressed the concern that positive social and economic rights might create unrealistic expectations and advocated drafting them as aspirations rather than rights that can be directly implemented through court decisions. "To include such rights as fundamental rights in the Constitutions risks involving the courts in the evaluation of scarce resources and in infecting the whole section on fundamental rights with the character of a list of aspirations rather than enforceable rights," the Commission observes.[426]

### *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[427] 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 Convention No. 111 Concerning Discrimination in Employment and Occupation.[428]

426 European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitution of Serbia*, Opinion No. 405/2006, CDL-AD(2007)004, 19 March 2007, para. 23.

427 See I.4.4.5.

428 *Sl. list FNRJ (Dodatak)*, 3/61.

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.[429]

The 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.[430]

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.[431] This law establishes the National Employment Agency and regulates also the training and additional training of job-seekers, the employment programme for persons with physical or psychological disabilities 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.[432]

### *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:

429 More in *Report 2005*, I.4.18.3.

430 See I.4.18.5.

431 *Sl. glasnik RS*, 71/03.

432 More in *Report 2005*, I.4.18.3.

(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.[433] As far as equal remuneration is concerned, it 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.[434] 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.

433 See Concluding Observations on Report of Kenya, UN doc. E/C.12/1993/6, para. 12.

434 See D. Harris, *European Social Charter*, 1984, p. 4951 and UN doc. E/C./12/1994/SR12, para. 6.

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).[435]

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[436] and by the 2005 Labour Act.[437]

*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.[438] 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.[439] 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) and Occupational Health Services (No. 161).

435 More in *Report* 2005, I.4.18.4.1.

436 *Sl. glasnik RS*, 84/04.

437 More in *Report* 2005, I.4.18.4.1.

438 See UN doc. E./C.12/1987/SR5, para. 40.

439 See UN doc. E./C.12/1987/SR5, para. 15.

Article 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 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.[440]

The Act on Health and Safety at Work[441] 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.[442]

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 (Art. 60 Serbian Safety at Work Act). 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.[443]

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[444] 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 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 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).

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440 More in *Report 2005*, I.4.18.4.3. See 4.18.6 on special protection of women and youth.

441 *Sl. glasnik RS*, 101/05.

442 More in *Report 2005,* I.4.18.4.3.

443 Chapter XI Health and Safety at Work Act.

444 *Sl. glasnik RS*, 125/04.

*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).[445]

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.[446]

### *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.

445 More in *Report* 2005, I.4.18.4.4.

446 *Ibid.*

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 in 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.[447] 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.[448]

Serbia is a signatory of the following ILO Conventions: Right of Association (Agriculture) (No. 11),[449] Freedom of Association and Protection of the Right to Organise (No. 87), Right to Organise and Collective Bargaining (No. 98),[450] 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

447 General Comment No. 3 (1990), UN doc. E/1991/23 (1991).

448 See UN doc. E/C./12/1994/SR9, para. 33 and UN doc. E./C.12/1994/SR10/Add. 1, para. 1.

449 *Sl. novine Kraljevine Jugoslavije*, 44-XVI/30.

450 *Sl. list FNRJ (Dodatak)*, 11/58.

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.[451] The practice of the ILO Committee on Freedom of Association (CFA) is of particular relevance to this issue.[452] In Serbia, the trade union registration procedure is regulated by the Rules on Entry of Trade Union Organisations in the Register.[453]

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.

451 See UN doc. E/C/12/1994/SR. 9, para. 26.

452 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.

453 *Sl. glasnik RS*, 6/97, 33/97, 49/00, 18/01 and 64/04.

*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. 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 perform 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.[454]

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.[455] 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

454 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).

455 See ILO 1996d, Document 0902, para. 481.

to be found to improve the economic or social policy in the state.[456] 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.[457]

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[458] the right to strike is limited by the obligation of strikers' committee and workers participating in a strike to organise 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 services 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.[459]

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 agreement; 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

456 *Ibid.*, para. 479.

457 *Ibid.*, para. 486.

458 *Sl. list SRJ*, 29/96.

459 Concluding Observations, UN doc. E/C.12/1/Add.108, 23 June 2005.

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 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. In its Opinion on the Constitution of Serbia, the Venice Commission commented that social protection is not granted generally but only to citizens and families by the Constitution.[460]

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.

460 See European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitution of Serbia*, Opinion No. 405/2006, CDL-AD(2007)004, 19 March 2007, para. 41.

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.[461]

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[462] 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.

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.[463]

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.[464]

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

461 *Sl. glasnik RS*, 34/03, 64/04, 84/04 and 85/05.

462 *Sl. glasnik RS*, 85/05.

463 See *Report 2006,* I.4.18.5.

464 See I.4.18.10.2.

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 employed 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 Employment and Unemployment Insurance Act).[465]

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.

465 See *Report 2006*, I.4.18.5.

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.[466] 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 overtime or at night only if they make a written request to this effect (Art. 68 (3), Labour Act).

466 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.

Maternity leave is a basic right of working women.[467]

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.[468]

### *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 en-

467 See *Report 2006*, I.4.18.6.

468 *Ibid.*

joyment of all economic, social and cultural rights.[469] 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'.[470] This right should be viewed as an individual's right to "live somewhere in security, peace and dignity".[471] 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.[472]

The Housing Act[473] 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 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.[474] 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.[475]

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469 General Comment No. 4 UN doc. E/192/23, para. 1.

470 *Ibid*., para. 7.

471 *Ibid.*

472 *Ibid.*, para. 8.

473 More on the housing situation in Serbia in *Report 2004*, I.4.12.7.

474 *Sl. glasnik R*S, 38/97 and 46/97.

475 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).

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.[476]

*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,[477] all the more as the realisation of this right is prerequisite for the realisation of the very right to live.[478]

The Act on the Safety of Foodstuffs and Objects in General Use[479] 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[480] 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.

### *4.18.8. Right to Highest Attainable Standard of Physical and Mental Health*

Article 12 of the ICESCR

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;

476 *Sl. glasnik RS*, 1/01.

477 See UN doc. E/C.12/1989/SR20, para. 26.

478 UN doc. E/C.12/1989/SR20, para. 18.

479 *Sl. list SRJ*, 24/94, 28/96 and 37/02.

480 *Sl. glasnik SRS*, 48/77, 29/99 and *Sl. glasnik RS*, 44/91, 53/93, 67/93, 48/94.

(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.[481] The right to physical and mental health also comprises access to health care services without discrimination.[482]

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[483] and the Health Protection Act.[484]

*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.[485]

*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.[486] Health protection in the above cases may be fully covered from

481 General Comment 14, UN doc. E/C 12/2000/4.

482 *Ibid*., para. 12.

483 *Sl. glasnik RS*, 17/05.

484 *Sl. glasnik RS*, 107/05.

485 On medical insurance see more in *Report 2005*, I.4.18.9.2.

486 The new Act introduces extensive restrictions with respect to dental services.

insurance funds or with the participation of the insured person. The Act enumerates 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.).[487]

*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.[488] 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

487 See Article 50 of the Medical Insurance Act.

488 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[489] 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.[490] The amendments abolished special Councils – for Education, Professional Training, Harmonisation of Stands on Education – and setting 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.[491]

In addition, the Act on Amendments to the Act on Elementary Schools[492] and the Act on Amendments to the Act on Secondary Schools[493] 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 and Art. 89 (2) Act on Secondary Schools[494]). 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)

489 *Sl. glasnik RS*, 62/03, 64/03 and 58/04.

490 *Sl. glasnik RS*, 58/04.

491 See provisions on education objectives: Article 3 (5 and 11).

492 *Sl. glasnik RS*, 22/02.

493 *Sl. glasnik RS*, 23/02.

494 *Sl. glasnik RS*, 50/92, 53/93, 67/93, 48/94, 24/96 and 23/02.

shows that the opinions of the teachers' councils have mostly been disregarded in the nomination of school principals.[495]

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 are 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*).[496] 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 and 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

495 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 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.

496 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)).

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 regardless 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.[497] 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

497 *Sl. glasnik RS*, 76/05.

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.

University circles in Serbia had for two years been discussing whether the status of persons who had acquired bachelor's degrees under regulations valid before this Act came into effect ought to be equated with the status of persons acquiring master's degrees under the Act. Ever since the adoption of the Act, students rallied in the two biggest student organisations, the Student Union of Serbia and the Student Alliance, have been insisting that all former graduates and those now graduating from college be given the status of master without any strings attached.[498] The National Assembly gave an authentic interpretation of Article 127 (1 and 2) of the Act in November 2007 and equated bachelors and masters i.e. the degrees of those who had graduated before and those acquiring university degrees in accordance with the Bologna Declaration. The Belgrade University said the same day that the degrees would not be automatically equated but that their holders would have equal rights with respect to employment and labour-related rights, continuing their studies and specialisation, including doctoral studies, as well as equal opportunities to take the bar and other professional exams.[499] The Conference of Universities of Serbia Assembly in late December decided that bachelors could not automatically be conferred the title of master because the new title was not their acquired right and that each higher educational institution would decide whether its bachelors needed to pass additional exams to be granted the title of Master.[500]

*4.18.9.2. "Gradebook Scandal"*. – The Smederevo District Prosecutor raised charges against 41 people, 29 of whom professors at law colleges in Kragujevac, Belgrade and Niš in mid-August, following a six-month investigation of the so-

498 See http://www.studentskisvet.com/forum/viewtopic.php?t=642.

499 *B92*, 5 November, www.b92.net.

500 See http://studentskisvet.com/info/20071225/diplomirani-i-master-fakulteti-ce-odlucivati-o-master-diplomama.

called Gradebook Scandal.[501] Sixteen people, 13 of them college professors, were detained. They have been charged with accepting bribes, abuse of post and forgery of documents and with enabling their students to enter their grades without taking exams at the Kragujevac Law College in exchange for money.[502] The Smederevo District Court Criminal Chamber in early November declared it did not have the jurisdiction to try the case which, in its opinion, ought to be tried before the Belgrade District Court Special Organised Crime Department. The Special Organised Crime Prosecution Office spokesman responded that the Office had followed the case since the investigation into it had been opened and had established that there were no elements for its jurisdiction over it.[503]

### *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.[504] This Act, which marks a major turnabout in the legal regulation of this field in Serbia, also has some shortcomings. The burden of proof rests with the defendant. However, the lawsuits may be filed only by the victims of discrimination. Certain organisations (e.g. those providing assistance to persons with disabilities) should also be allowed to file suits if the rights of persons with disabilities are to be sufficiently protected. A law on the professional rehabilitation and employment of persons with disabilities has not been adopted yet however.

Serbia signed the UN Convention on the Rights of Persons with Disabilities in December 2007. The Convention strives to establish a universal system of protection of persons with disabilities within the UN system. It promotes the concept of non-discrimination and underlines the need to provide persons with disabilities with access to the physical environment, to transportation and to information. The Convention also provides for a mechanism that will monitor the implementation of its provisions. The Convention was adopted unanimously by the UN General Assembly in December 2006. It has to date been signed by 119 and ratified by 12 states and will come into force once twenty states have ratified it.[505]

*4.18.10.1. Right to Work*. – The Constitution of Serbia 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 disa-

501 *Danas*, 19 December, www.danas.co.yu.

502 *B92*, 17 December, www.b92.net.

503 *B92*, 8 November, www.b92.net.

504 *Sl. glasnik RS*, 33/06. See I.4.1.2.

505 *B92*, 19 December, www.b92.net.

bled are also regulated by the Serbian Employment and Unemployment Insurance Act[506] and the Social Welfare Act[507] and the Act on Professional Training and Employment of Disabled Persons.[508] 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.[509] The 2005 amendments[510] 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[511] 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).[512] A significant shortcoming of the 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

506 *Sl. glasnik RS*, 71/03 and 83/04.

507 *Sl. glasnik RS*, 36/91, 79/91, 33/93, 53/93, 67/93, 46/94, 48/94, 52/96 and 29/01.

508 *Sl. glasnik RS*, 25/96 and 101/05.

509 See *Report 2006*, I.4.18.10.1.

510 Amendments to the Act setting fines for commercial offences and misdemeanours (*Sl. glasnik RS*, 101/05), Article 83.

511 *Sl. glasnik RS*, 35/97, 39/97, 52/97, 22/98, 8/00, 29/00, 49/01 and 28/02.

512 See *Report 2006*, I.4.18.10.2.

(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 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 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 – SELECTED TOPICS

## 1. Introduction

*1.1. National Media as a Source of Data.* – The Serbian print media in 2007 comprised fifteen dailies, three of which appeared fresh on the market at the end of the year. Their total circulation was estimated at around 700,000. Seven of the dailies were sold across the country. Five political weeklies, only two of which had significant political influence, were also published in Serbia in 2007.

BCHR associates had for the 2007 Report perused the following dailies: *Politika*, *Večernje novosti, Blic*, *Kurir* and *Press* and the weeklies *Vreme* and *NIN*. BCHR associates also monitored the wires of the *BETA* and *FONET* news agencies and *B92's* website news.

A total of 6,820 articles were read in preparation of the 2007 Human Rights in Serbia Report (6,676 were perused for the 2006 Report).

Nearly one half of the articles used in this Report were related to what Serbia's readership perceived as human rights violations of Serbs by international factors – the UN administration in Kosovo, the international community with respect to the status of this province and by the ICTY.

The failed talks on Kosovo's status were the reason why 28.65% of the monitored articles were devoted to this issue. The percentage of articles on this topic increased by a third over 2006 (21.05%). Data collected by Media Documentation Ebart, which follows all Serbian print media, corroborate the trend. According to Ebart, over 14,000 articles on Kosovo were published in the first eleven months of the year. Ebart's data show that the ICTY was the second most frequent topic in the press, which devoted 4,500 articles to this issue (*BETA*, 19 December).

The ICTY was also the second most frequent topic of the articles BCHR associates monitored for this Report. Articles on the ICTY accounted for 18.45% of the 6,658 articles, or 25% less than in 2006 (25.42%). The trend of the rapid decline in interest in this topic is evident if one recalls that reports on the ICTY accounted for 29% of the articles used for the 2005 Report.

Articles on political rights in 2007 were fewer in number than in 2006 but still accounted for the third most frequent topic (13.53% in 2007 as opposed to 16.72% in 2006). The continued interest in such issues was the consequence of three-month talks on the forming of the coalition government and the long debate on scheduling the presidential elections and their date.

There were fewer articles on the right to life (5.29% in 2007 over 7.37% in 2006), the freedom of expression (4.92% in 2007 over 5.77% in 2006), the right to a fair trial (4.16% in 2007 over 4.89% in 2006), prohibition of discrimination (3.55% in 2007 over 3.60% in 2006) and minority rights (2.03% in 2007 over 2.26% in 2006).

The greatest increase was registered with respect to articles on the special protection of the child and the family (from 3.54% in 2006 to 7.30% in 2007), which can be attributed to the greater interest in domestic violence cases, which the media have been increasingly reporting on.

Articles on the prohibition of slavery and forced labour have also recorded a similar rise (from 0.77% in 2006 to 1.56% in 2007), as have articles on the prohibition of torture (from 1.43% in 2006 to 2.93% in 2007). The number of articles on economic and social rights has also increased, albeit to a lesser degree (from 2.58% in 2006 to 4.29%), as has the percentage of articles focusing on the freedom of thought and conscience (from 1.04% in 2006 to 1.94% in 2007).

On the whole, it may be assessed that the state of human rights in Serbia has deteriorated in 2007 over 2006. The obsession of most of the public and media with Kosovo and the Serbian authorities' relatively tolerant attitude towards human rights violations have led to the failure of the media to draw the public's attention to the worsening situation; save for their reports on domestic violence, otherwise the focus of the sensationalist and tabloid press. Moreover, articles on domestic violence are also politically neutral, which is extremely important given the current political constellation of forces in Serbia.

*1.2. Other Sources*. – Apart from the press and the reports of the electronic 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), Child Right Centre, Human Rights Watch, Amnesty International (AI), and others. UN, CoE, EU and OSCE materials were also used in the Report.

BCHR associates particularly monitored the actions by the state authorities, the events and trends related to organised crime, war crimes, the prohibition of discrimination and domestic violence. Monitoring the work of the judicial and other state authorities and the developments in these four fields in general entailed the systematic collection of information in the media and NGO reports, personal attendance at the trials, round tables and panel discussions organised on these topics, and discussions with the representatives of the state bodies and experts. The data and assessments in texts devoted to these subjects are based on information in the col-

lected media documentation and have been integrated in the quarterly bulletin *Osmatračnica* (Watch Tower) and the associates' monthly reports. The media documentation, the bulletins and monthly reports are accessible at BCHR's website.[513]

# 2. Selected Topics

## *2.1. Political Rights and Functioning of Institutions*

The total blockade of Serbia's political institutions, especially the National Assembly, which began when the campaign for the adoption of the new Serbian Constitution started in September 2006, continued into 2007. The Assembly had not worked for almost eight months, until mid-May. The Government meanwhile operated in the capacity of a "technical cabinet". The whole political potential of the country focused on the needs of the major campaigns – for the referendum on the Constitution and the election campaign. Not all of the numerous problems that arose in this period were eliminated by end 2007.

*2.1.1. Parliamentary Elections and the Forming of the Government*. – Early parliamentary elections were held on 21 January 2007 after a three-month election campaign. Over four million voters (60.56% of the registered electorate) turned out at the polls. The following parties won seats in the Assembly: SRS (81), DS (64), DSS/NS (47), G17+ (19), SPS (16), LDP/GSS/SDU/LSV (15), SVM (3), List for Sandžak (2), Union of Roma of Serbia (1), Coalition of Albanians for the Preševo Valley (1) and the Roma Party (1).[514]

The elections were followed by months of speculations and discussions on which parties would form the new governing coalition and who the Prime Minister would be. The somewhat vague constitutional provisions on the President's powers in the procedure of choosing the PM designate and the lack of political tradition in similar situations to an even greater extent resulted in the entrusting of the mandate to form the government to Vojislav Koštunica, the president of the party that came in third at the elections, just a few days before the expiry of the deadline for electing the new Government.

The Government was elected on 15 May, a few minutes before the deadline expired. Had it not been formed, the newly elected Assembly would have had to be dissolved and fresh parliamentary elections would have had to be called. The Government comprises the Prime Minister, one Deputy Prime Minister (charged with EU integration) and 23 ministers, whereby Serbia has one of the bulkiest governments in terms of size in contemporary European political practice.

513 www.bgcentar.org.yu.

514 Republican Election Commission statement, 25 January, www.rik.parlament.sr.gov.yu.

*2.1.2. Work of the National Assembly*. – The National Assembly was partly constituted on 14 February 2007. The talks on the forming of a new parliamentary majority, however, continued until mid-May. The Assembly had no Speaker during that period, given that the future coalition partners refused to nominate their candidates for the post before the talks on the new government were completed. The activities of the topmost legislative body were stymied by the obstruction of its work and delays in electing its speaker in an atmosphere of overall mistrust and the non-transparent talks lasting nearly four months.

The National Assembly succeeded in passing only 60 or so laws until mid-December. Only about 10 of them were new ones and even they mostly formally fulfilled the obligations laid down by the Constitutional Act on the Implementation of the Constitution. The work of the parliament in 2007 was marked by delays caused above all by its failure to work for five months, from the January elections until the Government was formed in May. Moreover, nearly all the adopted laws had been submitted and adopted under an emergency procedure, wherefore there were hardly any opportunities for serious debates of the drafts and making any essential improvements of them through amendments. The 2007 Budget Act, the most important law the National Assembly adopts every year, was, for instance, submitted and adopted in an emergency procedure. The National Assembly discussed the Draft 2008 Budget Act in a similar manner, in contravention of the Budget System Act envisaging a 15-day period for a public debate and review of the proposed budget.

*2.1.3. Presidential, Local and Provincial Elections*. – The Constitutional Act on the Implementation of the Constitution of Serbia lays down the deadlines for calling presidential and local elections and elections for the Assembly of the Autonomous Province of Vojvodina. The Act specifies that these elections shall be called by 31 December 2007 or within a maximum of 60 days from the day of enforcement of the last of the elections-related laws the adoption of which it stipulates.

Major disputes arose over how these legal conditions and deadlines were to be interpreted, even within the ruling parliamentary majority. The last few months of 2007 were marked by uncertainty about whether the draft laws would be submitted to parliament on time and adopted by the set deadline. Some members of the ruling coalition (DSS/NS) linked the calling of presidential elections to the Kosovo status issue. It was in such an atmosphere that the Act on the President of the Republic, the Act on the Election of the President of the Republic, the Act on the Army, the Defence Act, the Foreign Affairs Act and the Act on Security Services were passed. Several days after the last four of these laws were adopted, the Assembly Speaker called the presidential elections for 20 January 2008 (the second round of elections will be held on 3 February if no candidate wins in the first round). PM Koštunica's party, the DSS, challenged the lawfulness of the Speaker's decision, claiming that one of the adopted laws had not come into force yet. The Speak-

er was also criticised for deciding to call the elections without consulting coalition partners.[515] However, after the subsequent political agreement among the DS and DSS, the political party of the Prime Minister gave up challenging the legitimacy and legality of the decision on calling presidential elections.

As a part of the same „package" of the agreement at the top of the ruling coalition, the majority in the National Assembly, in the end of December adopted the laws necessary for calling of the local and provincial elections so the speaker of the parliament called these elections for 11 May 2008.

*2.1.4. Non-functioning of the Local Self-governments and Impermissible Duration of Receiverships*. – The provisions of the laws on local self-government and local elections and the underdeveloped culture of political relations at the local level led to the introduction of receivership in about 20 Serbian municipalities. Early elections for local parliaments under receivership were not held until end 2007 although the law limits the duration of receivership by persons appointed by the Serbian Government. Delays in calling these elections were continuously justified by expectations that general local elections would be held by mid-2008. Nevertheless, the fact that the composition of the municipal receiverships is arbitrarily determined by the Government and that it usually reflects the make-up of the ruling coalition at the republican level, notwithstanding the parties' standings in the local communities, gives cause for concern.

*2.1.5. Funding of Political Parties*. – The non-transparent funding of political parties remained high on the public agenda in 2007, leading to even deeper mistrust of the manner in which they operate.[516] Transparency Serbia stated on 20 September that the parties had been allocated 62 million dinars (nearly 800,000 Euros) more than they should have been from the state budget because of the clashing provisions in the Act on the Financing of Political Parties and the 2006 Budget Act due to the inconsistent budget outlay adjustments during the adoption of the Act. The parties therefore received more funds than they had been entitled to under the Act on Financing of Political Parties. This problem had not been addressed by the time this report went into print.

*2.1.6. Political Scandals*. – A number of scandals erupted in 2007 but yet again remained unresolved.

LDP said in mid-April it would ask the Assembly deputies to set up an inquiry committee to "examine the business operations of the Delta Company owned by Miroslav Mišković and prevent him from influencing the media".[517] The company's concentration of ownership on the Serbian market (above all in retail) turned

515 *B92*, 12 December, www.b92.net.

516 The interest these issues commanded in the general public is best corroborated by the fact that articles on the funding of political parties appeared every day in at least one daily throughout June, July and August.

517 LDP news conference report; http://www.ldp.org.yu/; accessed on 30 November.

into one of the leading political issues after the Commission for the Protection of Competition published its decision assessing that Delta secured a "dominant position, i.e. over 50% of the market in Belgrade by taking over the chain of C Market grocery stores".[518] The Supreme Court of Serbia initially rescinded the Commission decision for formal reasons. In the meantime, many politicians, including some senior officials in the ruling coalition, publicly brought into question the powers of independent regulatory bodies and the advisory bodies of the Government (Commission for the Protection of Competition and the Anti-Corruption Council).

These events led to a serious public debate about the relationship between politics and big businesses. The resolution of the obvious problems and the lack of transparency in these relations are not even on the horizon. Meanwhile, the National Assembly in late November refused to include in its agenda the motion to establish an inquiry committee to look into Delta's work.[519]

*2.1.7. Conflict in the Islamic Community in Sandžak*. – The region of Sandžak, especially the town of Novi Pazar, was the scene of tensions several times in 2007. They were above all caused by the conflicts and recriminations between the two factions in the leaderships of the Islamic religious community in Sandžak and Serbia. The two groups of religious leaders, one rallying round Muamer Zukorlić, the Chief Mufti of the Islamic Community in Serbia, and the other led by Adem Zilkić, Reis ul Ulema (Grand Mufti) of the Islamic Community of Serbia, have been vying over who "officially represents" the Sandžak Moslems.

Adem Zilkić was appointed the new Reis ul Ulema of the Islamic Community of Serbia at an official ceremony in Belgrade in early October. Several hundred supporters of the two factions staged separate rallies upon his return to Novi Pazar. Zilkić's supporters were chanting "Victory!" while Zukorlić's replied with "Treason!", "Go to Belgrade!" The Novi Pazar streets were jammed with cars and people; police presence was enhanced.[520] Soon after the conflict in the Islamic community intensified, the two sides began clashing for control over some of the Islamic religious sites in Novi Pazar and other Sandžak towns. The Altun-Alem Mosque in Novi Pazar was temporarily shut down, ostensibly for renovation. Zilkić's supporters said several times that they would take over the mosques the imams of which "expressed no confidence in Zukorlić in early October" (*Politika,* 18 October, Internet edition).

What is especially concerning is that the two sides have been accusing each other of being exponents of political parties and "being armed". Mufti Zukorlić has insisted that Zilkić is representing the political interests of the "SDA and Sulejman

518 The law allows maximum 40% concentration of ownership. It, however, specifies that even 40% concentration of ownership requires the prior consent of the Commission for the Protection of Competition. Delta became the owner of C market via the company Primer C in December 2005.

519 *B92*, 3 December, www.b92.net.

520 *B92*, 11 October, www.b92.net.

Ugljanin". Zukorlić said that the incident in front of the Altun-Alem Mosque in early December showed "who is militant, who is armed and who wants violence" (*TANJUG*, 18 October). Some time before the incident, six students of the Novi Pazar Islamic lower seminary were temporarily sent home because the school could not guarantee their safety due to the clashes between the two factions. One of them is the son of Mufti Zilkić.

The state authorities had failed to clearly react to the developments in Sandžak by the time this report went into print. Although serious clashes were avoided at the last minute on several occasions, the smouldering conflict between the Moslem religious leaders may endanger the realisation of religious and other human rights in the otherwise sensitive Sandžak region.

*2.1.8. Rehabilitation*. – The courts in 2007 reviewed a number of cases initiated under the 2006 Rehabilitation Act[521] and reversed judgements against people deprived of their liberty and political and civil rights because of their political convictions.

The Požarevac District Court passed its first judgement under the Rehabilitation Act in January 2007. It rehabilitated Radomir Petrović from the village of Porodin at Požarevac, who had been convicted to ten years in jail for insisting that a religious procession pass through the village on St. George's Day. The court declared the initial judgement null and void and rescinded all its legal consequences retroactively. Petrović's family said it would sue the state.[522]

The Private Property and Human Rights Protection League launched proceedings for the rehabilitation of persons who had fallen victim during the legal vacuum that existed from the arrival of the Red Army until the constitution of the first military courts in the country. The Court has to date identified 17 persons on whose behalf the lawsuit was submitted on the basis of birth certificates and other documents in Serbia and abroad. However, no documents about them committing offences or any final judgements against them have been found. A number of witnesses testified that the orders to arrest their family members and relatives were issued orally after they were accused by informants of collaborating with the occupation forces.[523]

The Belgrade District Court rehabilitated Slobodan Jovanović in October 2007. The Military Chamber of the Supreme Court of the Federal People's Republic of Yugoslavia on 15 July 1946 convicted Jovanović to 20 years of imprisonment and forced labour, deprived him of his political and some civil rights for ten years and of citizenship and confiscated his property. Jovanović had been a law professor at the Law College for several decades and the Rector of Belgrade University; he had also been a historian, a writer and the President of the Serbian Academy of Arts

521 *Sl. glasnik RS*, 33/06.

522 *B92*, 13 January, www.b92.net.

523 *B92*, 9 June, www.b92.net.

and Sciences. He had been a member of the Royal Government since 1941. The District Court declared all the legal consequences of the 1946 judgement null and void whereby Jovanović was posthumously rehabilitated.[524]

Bujanovac Professor Sevdail Hyseni, who has a college degree in philosophy, is the first ethnic Albanian to have been rehabilitated under the Rehabilitation Act. He claimed he was the victim of persecution for political and ideological reasons and had been deprived of the right to employment and the right to freedom of expression. The Vranje District Court confirmed that his claims were fully grounded. It established that Hyseni did not get the job of teacher in the elementary school in the Bujanovac village of Zarbince in 1983 because the Municipal League of Communists Committee qualified him as morally and politically unfit for the job. Hyseni said that the Vranje Court also established that the Bujanovac state security department prohibited the dissemination of his satirical book "When Luck Comes Your Way" and destroyed all the confiscated books in 1994. Hyseni said that this book also prompted the Bujanovac Municipal Court to initiate proceedings against him for ridiculing the nations and nationalities of Yugoslavia, which it discontinued in 2001 after holding over 20 hearings.[525]

## *2.2. Freedom of Access to Information of Public Importance*

The 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) 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 of the Republic of Serbia.[526]

Under Article 1 (2) of the Act on Free Access to Information of Public Importance, the Access to Information Commissioner (hereinafter: Commissioner) is established as an independent and autonomous state authority in order to implement the right of access to information of public importance. The Constitution does not,

524 *B92*, 26 October, www.b92.net.

525 *B92*, 26 November, www.b92.net.

526 *Sl. glasnik RS*, 120/04.

however, include provisions regulating the status of Commissioner although it does include such provisions with respect to the Protector of Citizens (Art. 138),[527] the National Bank of Serbia (Art. 95) and the State Audit Institution (Art. 96). It remains unclear how the absence of constitutional provisions on the Commissioner can be justified given the fact that, just like the Act on the Protector of Citizens,[528] the Act on the National Bank of Serbia[529] and the Act on the State Audit Institution[530], the Act on Free Access to Information had come into force before the Constitution was endorsed at the 28–29 October 2006 referendum. The real cause may lie in what the Venice Commission voiced in its Opinion on the Serbian Constitution i.e. that the "finally adopted text was prepared very quickly" by a small group of party leaders and experts and "that there are some provisions that still fall well below those standards and others where the hasty drafting is evident in provisions that are unclear or contradictory" (or non-existent, *author's remark*).[531]

The Act on Access to Information of Public Importance of the Republic of Serbia was adopted on 5 November and came into force on 13 November 2004.[532] Amendments to the Act[533] were adopted in June 2007 in accordance with the provision in Article 5 (1) of the Constitutional Act on the Implementation of the Constitution of the Republic of Serbia[534] under which the new Assembly shall at its first session upon the election of the Government 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...". Both the experts and the Commissioner himself had presumed that the initial intention of the ruling politicians at the time was to dilute and weaken the institute of Commissioner.[535] However, a new parliamentary coalition was formed after the 21 January 2007 elections; its members differed in views as to whether the then Commissioner ought to stay on until the end of his term in office and whether the achieved degree of freedom of access to information of public information should be tampered with. These "disagreements" can probably be partly attributed to the new post-election party calculations, increased public interest in the issue and the unanimous support the civil society extended the Commissioner. Consequently, in the spirit of the all-pervasive atmosphere of cohabiting legalism (and, ultimately, for-

527 See I.2.3.1.

528 *Sl. glasnik RS*, 79/05, 54/07.

529 *Sl. glasnik RS*, 72/03, 55/04.

530 *Sl. glasnik RS*, 101/05, 54/07.

531 European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitution of Serbia*, Opinion No. 405/2006, CDL-AD(2007)004, p. 3. http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.pdf.

532 See *Report 2006*, III.3. for a more detailed analysis of the Act and the provisions that had been criticised.

533 *Sl. glasnik RS*, 54/07.

534 *Sl. glasnik RS*, 98/06.

535 See *Report 2006*, III.3.

mally legal logic), it was decided that the explicit norm in Article 5 (1) of the Act on the Implementation of the Constitution had to be abided by. It, however, transpired that the adopted amendments to the Access to Information Act were "cosmetic" both in character and purpose. The content of the amendments need not be analysed here – the Act Amending the Act on Access to Information of Public Importance contains six articles, half of which (Arts. 1–3) deal with the manner in which the Commissioner and his/her Deputy are elected, although Article 105 of the Constitution regulates the issue, albeit incompletely. One article (Art. 4) gives the Commissioner the authority to initiate proceedings for assessing the constitutionality and legality of laws and other general enactments, notwithstanding the fact that the Constitution already awards these powers to the Commissioner in Article 168 (1). Article 5 regulates the duration of the Commissioner's and Deputy Commissioner's terms in office if they are re-elected prior to the expiry of their terms in office (!) while the last Article is merely a run of the mill transitional or final provision.

The legislators have, thus, again ignored the need to make substantial amendments that would consolidate specific solutions in the Act. Given the authorities' inertia on the issue, a Model Act Amending the Act on Free Access to Information of Public Importance,[536] drafted by civil society representatives and the Commissioner himself, was presented to the expert public in October 2007. The proposed amendments have been deliberated by the expert public for quite some time now.[537]

The explicit provision in the Model Act (Art. 18) under which the provisions of the Act on Free Access to Information of Public Importance shall apply in the event of conflict between this law and the other laws warrants special attention. This provision reflects the recommendation in the Joint Declaration adopted 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 under which the law on access to information should, to the extent of any inconsistency, prevail over other legislation.[538]

The Model Act Amending the Act on Free Access to Information of Public Importance also obliges the government to regulate the enforcement of Commissioner decisions and, if necessary, ensure their enforcement (Art. 9 (3)). This provision is extremely important given the fact that public authorities have often ignored the Commissioner decisions in practice. The severity of the problem is highlighted in the Commissioner's 2006 Annual Report on the Implementation of the Free Access to Information Act[539]: "The passive attitude and absence of support of the

536 See "Model Act Amending the Act on Free Access to Information of Public Importance" at: http://www.cups.org.yu/download.

537 More in *Report 2006*, III.3.

538 See "Joint Declaration" at: http://www.cidh.org/Relatoria/showarticle.asp?artID=319&lID=1.

539 Although this Report focuses on 2007 in general, it quotes data from the Commissioner's 2006 Report on the Implementation of the Act on Free Access to Information of Public Importance as the Commissioner will publish his 2007 Report in 2008.

Government in the execution of the decisions of the Commissioner despite permanent attention being drawn to this problem by the Commissioner as well as the direct requests made to the Government by the citizens and media for obtaining information, could mean that the Government is supporting and encouraging the government agencies to violate this right guaranteed by the Constitution and law. In any case the number of non-executed decisions made by the Commissioner, which was very small at the beginning, has been growing more and more lately, which serves as evidence to support such an assumption."[540]

In 2007, a lot of public attention was drawn to the (non)publication of the Contract on the Concession for the Construction of the Horgoš – Požega Highway Route signed on 30 March by the then Capital Investments Minister Velimir Ilić and the Spanish-Austrian Consortium "FCC Construction" and "Alpine Mayreder Bau". Vojvodina Assembly Speaker Bojan Kostreš on 2 April 2007 submitted a request to the Serbian Government, the Ministry of Capital Investments and the Ministry of Finance, asking them to make public the disputed concession contract in accordance with the Act on Free Access to Information. These institutions, however, ignored the request and Kostreš complained to the Commissioner for Information of Public Importance.[541] The Serbian Infrastructure Ministry[542] responded by filing a complaint with the Supreme Court of Serbia to revoke the Commissioner decision, although the Supreme Court of Serbia had already dismissed 14 complaints by state authorities in similar cases.[543] After months of public pressure, the Infrastructure Minister Velimir Ilić finally decided to allow access to the contract; when journalists asked him why so much time had to pass before he allowed its publication, he replied that no-one had been persistent enough and that he just felt like it.[544] The Horgoš – Požega Highway Route Construction Concession Contract was finally made public on 20 August 2007. However, although the authorities said the journalists would be able to review the whole contract, they were only allowed to peruse the main document, while the 19 annexes with essential information on the concession terms and conditions remained hidden from the public. The journalists of over 20 papers, TV stations and agencies were given a chance to look at merely four copies and one original of the main document i.e. access to the incomplete document was even more difficult.[545] Public pressures on the Infrastructure Minister did not abate and

540 Report on the Implementation of the Act on Free Access to Information of Public Importance in 2006, Commissioner for Information of Public Importance of the Republic of Serbia, March 2007, p. 27, http://www.poverenik.org.yu/Dokumentacija/eng_42_ldok.pdf.

541 "Concession Mystery", *Politika*, 24 May, p. A13.

542 After the January 07 parliamentary elections, the parties that made up the ruling coalition agreed on splitting the former Capital Investments Ministry into the Infrastructure Ministry, which remained in the hands of Velimir Ilić, and the Telecommunications and Information Society Ministry.

543 "Even the Number of Registered Trabants Has to be Found out through the Commissioner", *Danas*, 16 August, p. 1.

544 "Contract on Government Website as of 23 August?" *Danas*, 18–19 August, p. 1.

545 "Annexes Still Unavailable to the Public", *Danas*, 21 August, p. 1.

the Government unanimously decided to publish the concession contract on its website. But, Annexes 3 and 5 remained unpublished.[546]

The power some politicians hold over institutions is illustrated also by the publication of a 580 million dollar contract between JAT Airways and Airbus, under which JAT is to purchase eight A-319 airplanes. The contract was concluded in 1998 and, although an advance of around 23.5 million USD was paid at the time, none of the planes have been delivered yet. After the Commissioner for Information of Public Importance issued a decision ordering the publication of the contract in response to a complaint by a *Glas javnosti* journalist, JAT Airways filed a complaint with the Supreme Court of Serbia, which dismissed it as inadmissible. JAT Management Board Chairman Miloš Aligrudić prevented the domestic airlines from enforcing the Supreme Court decision, explaining that the publication may prompt Airbus to file a compensation claim against JAT for publishing the contract. On the other hand, a *Glas javnosti* journalist got hold of an official memo from the Airbus Deputy Director General to the JAT Director in which the former said Airbus would allow the publication of the contract if its publication became inevitable.[547]

Serbia still needs to adopt legislation complementing the Act on Access to Information of Public Importance.[548] The Serbian Justice Ministry in July 2007 established a working group to draft a law on personal data protection. The working group produced a Draft Personal Data Protection Act[549] based on the 2004 Centre for Advanced Legal Studies (CUPS) Model Act on Personal Data Protection.[550] Under the draft, the Commissioner for Information of Public Importance shall be charged with the protection of personal data.[551] This model, which is, *inter alia*, applied in the Republic of Slovenia, has proven extremely efficient as it ensures uniform jurisprudence in two extremely closely related fields. In late October 2007, CUPS publicly presented both its Model Act Amending the Act on Free Access to Information of Public Importance and its Model Act on Confidentiality of Information.[552] The adoption of laws regulating access to data marked by different degrees of confidentiality will largely put the finishing touches to the legal regulation of the very important field of access to information held by public authorities.

The necessity of adopting complementary legislation as soon as possible is illustrated by the practice of the public authorities. The 2006 Report on the Implementation of the Act on Free Access to Information of Public Importance says that confidentiality of documents was the most frequent reason which the public au-

546 More at: http://www.srbija.sr.gov.yu/vesti/dokumenti_sekcija.php?id=72725.

547 "Aligrudić not Abiding by Supreme Court Decision", *Glas javnosti*, 29 September, p. 11.

548 More in *Report 2006*, III.3.

549 See "Draft Personal Data Protection Act" at: http://www.mpravde.sr.gov.yu.

550 See "Model Act on Personal Data Protection" at: http://www.cups.org.yu/download.

551 See "Information on the Personal Data Protection Draft Act" at: http://www.mpravde.sr.gov.yu.

552 See "Model Act on Confidentiality of Information" at: http://www.cups.org.yu/download.

thorities invoked to deny access to information but that they failed to provide evidence that access was denied to protect an overriding interest.[553] The Commissioner also noted that the authorities unjustifiably denied access to information invoking the legal provisions on the protection of privacy.

In his 2006 Annual Report, the Commissioner indicates that the number of applications for access to information has tripled over 2005; the high number of requests is a good illustration of the citizens' interest in accessing information held by the public authorities. The Commissioner also notes some headway in the authorities' responsiveness to such requests; he, however, also observes that he had received a large number of complaints, which indicates that the public authorities still lack adequate will to allow access to information that they are legally obliged to let the public have.[554] As per the public authorities' obligation to submit annual reports, the Commissioner had received such reports from 583 bodies by the deadline he had set, 20 January 2007, and another 51 after that date i.e. more than double than in 2005. But, it should be borne in mind that several thousand bodies are obliged to submit such reports (although a comprehensive register of all such bodies still has not been compiled). Of the state bodies, the Republican Public Prosecution Office was the only one amongst the six highest state bodies[555] that failed to submit its report; of the 19 Ministries that operated in 2006, only the then Ministry of Capital Investments ignored this legal obligation. The Commissioner's Annual Report, however, specifies that public companies were the ones that failed to fulfil this legal obligation the most.[556]

A similar trend was observed with respect to the obligation of public authorities to publish information directories on their work. Three and a half time as many authorities fulfilled this explicit legal obligation in 2006 over the previous reporting period.[557] The Commissioner assessed that an insufficient number of authorities fulfilled the obligation to train their staff in implementing the Act. The Commissioner had therefore on a number of occasions submitted an initiative to the State Administration and Local Self-Government Ministry to include the Act on Free Access to Information of Public Importance in the curriculum of the civil servant exam that employees of the state administration and public authorities must take.[558]

553 Report on the Implementation of the Act on Free Access to Information of Public Importance in 2006, Commissioner for Information of Public Importance of the Republic of Serbia, March 2007, pp. 28–29.

554 *Ibid.*, pp. 27–28.

555 Under Article 22 (2) of the Act on Free Access to Information of Public Importance, complaints cannot be lodged against decisions of the National Assembly, the President of the Republic, the Government of the Republic of Serbia, the Supreme Court of Serbia, the Constitutional Court and the Republican Public Prosecutor, whereby they are exempted from the regular procedure before the Commissioner for Information of Public Importance.

556 See n. 550, p. 37.

557 See n. 550, p. 40.

558 See n. 550, p. 20.

The Annual Report ranks the failure to monitor the implementation of the Act and absence of liability for violating amongst the main problems hampering the effective enjoyment of the right of free access to information of public importance. The Act (Art. 45) charges the Culture Ministry with monitoring the implementation of the Act; the Ministry was to have collated a register of entities that must act in accordance with the Act. However, out of hundreds of cases with elements of a misdemeanour that the Commissioner's Office submitted to the Ministry, misdemeanour proceedings were launched only in a score of cases and the misdemeanour judges reached decisions only in three cases: two bodies were fined and one was issued a reprimand and a warning. If one also takes into account another case in which the misdemeanour court pronounced a fine against a public authority in proceedings initiated by the damaged party, it can be concluded that not even 1% of all the registered cases where there were grounds for liability ended with the pronouncement of legal penalties.[559] Moreover, due to the lack of manpower and other organisational and technical prerequisites, the Culture Ministry was unable to put together a comprehensive register of entities, wherefore the Commissioner's Office on two occasions sought such data from the ministries and other public authorities in the attempt to compile the catalogue itself. A large number of public authorities, however, failed to respond to this initiative.[560]

It may be concluded that, notwithstanding some headway in the implementation of the Act on Free Access to Information of Public Importance, the enjoyment of the right to access of information still has not attained the satisfactory level in practice. To reach that level, the political culture needs to change radically and the full respect and implementation of the rule of law needs to govern everyday interaction between citizens and bodies exercising public powers on their behalf.

## *2.3. 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.

The International Court of Justice judgement in the dispute between Bosnia-Herzegovina (BiH) and Serbia was the most significant event in this area in 2007. In addition, some headway was made in the domain of war crimes trials in Serbia. Little was, however, done in other aspects of transitional justice, notably in the field of institutional reform (lustration and vetting) and in establishing the truth about the past. The Act on the Responsibility for Violations of Human Rights is not imple-

559 See n. 550, p. 25.

560 See n. 550, p. 26.

mented; initiatives for establishing the truth about the past are not institutionalised and state institutions have shown no interest in them

### *2.3.1. International Court of Justice Judgement*

The International Court of Justice (ICJ), the United Nations' highest judicial body, on 27 February 2007 returned its long-awaited judgement in the suit filed by Bosnia-Herzegovina against the Federal Republic of Yugoslavia (FRY) i.e. Serbia accusing it of genocide during the 1992–1995 armed conflict in Bosnia-Herzegovina.[561] Apart from the extremely complex meritorious issue of whether there had been genocide in BIH and the responsibility of Serbia as a state for that genocide, the case was accompanied by equally complex procedural problems, wherefore it took the ICJ 14 years to deliver its judgement.

Namely, given that ICJ has jurisdiction in a case if both contracting states involved in the dispute consent to it, Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which includes a clause under which disputes between the contracting parties shall be submitted to the International Court of Justice at the request of any of the parties to the dispute, was the only grounds on which BIH could file the suit against the then FRY. The ICJ in 1996 ruled it had jurisdiction solely under Article IX of the Convention.[562] Therefore, ICJ had jurisdiction only over alleged cases of genocide committed during the war in Bosnia, but no jurisdiction to establish Serbia's responsibility for war crimes, crimes against humanity or violations of rules prohibiting use of force established by international customary law and the UN Charter. Moreover, the Convention includes a very strict definition of genocide in Article II, under which genocide means any of the five listed acts committed with intent to destroy a national, ethnical, racial or religious group.

Although the ICJ ruled in 1996 that it had jurisdiction under Article IX of the Convention, the post-Milošević authorities in Serbia and the FRY resorted to another procedural strategy after they came to power in 2000 in the hope of avoiding the ICJ's meritorious judgement. Milošević's regime had insisted on continuity between the FRY and the former Socialist Federal Republic of Yugoslavia (SFRY) i.e. that they were one and the same state. The new democratic authorities dismissed this approach, asserting that FRY was a successor of the SFRY, like Croatia, BIH or Slovenia. They, thus, asked the ICJ to review its 1996 ruling on jurisdiction, claiming that the FRY was not a UN member nor a Contracting Party to the 1948 Convention at the relevant time. The FRY application was above all grounded on the UN bodies' inconsistent practice with respect to FRY's alleged continuity with the SFRY.

561 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 27 February 2007, available at www.icj-cij.org.

562 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, *ICJ Reports*, 1996, p. 595.

The ICJ dismissed the motion for review of jurisdiction in 2003 for formal reasons. The FRY was in the meantime transformed into the State Union of Serbia and Montenegro, which in 2006 split up into two states, Serbia and Montenegro. The ICJ allowed Serbia to again raise the issue of jurisdiction during its deliberation of the merits in 2006. In its final judgement delivered in February 2007, the ICJ definitely dismissed all claims that it lacked jurisdiction.

In its deliberation of the merits of the case, the ICJ established that the crime of genocide committed in BIH occurred "only" in Srebrenica in July 1995, when the Bosnian Serb Army (VRS) forces killed over 7,000 Bosniaks, as established in final ICTY judgements.[563] The ICJ had thus rejected the main thesis by the BIH counsels that all crimes committed in Bosnia on the whole constituted genocide. The ICJ also established that Serbia was not responsible for the genocide given that it had not had full control of the Bosnian Serb Republic or effective control over the military operation in Srebrenica.[564] The ICJ did not consider Serbia an accomplice to this crime, given that it had not been proven that its authorities had been aware of the VRS' intent to commit genocide.

The ICJ, however, established that Serbia had violated Article I of the Convention, which obliges states to undertake to prevent and punish the crime of genocide. It found that Serbia had been aware of the serious risk of the VRS committing genocide in Srebrenica but had done nothing to prevent the genocide. Moreover, Serbia has not punished the perpetrators of the genocide as it has failed to hand over the men indicted for the crime, notably Ratko Mladić, to the ICTY.[565]

The ICJ rejected the BIH claim for financial reparations and established that its declaration that genocide had been committed in Srebrenica constituted appropriate satisfaction. The ICJ also ordered Serbia to immediately establish full cooperation with the ICTY.[566]

The general public of Serbia and BIH wrongly perceived the ICJ judgement as judicial exoneration of Serbia for its involvement in the war in Bosnia-Herzegovina. This misperception can be attributed to the lack of understanding of the ICJ's jurisdiction, which was in this case limited to genocide alone and did not encompass aggression or other international crimes, and the lack of understanding of the very strict legal definition of genocide, a concept frequently liable to inflation and political manipulation.

Although the ICJ judgement fully confirmed the findings of the ICTY and the extent of crimes committed in BIH, the judgement itself is limited in scope for formal reasons. Serbia has unfortunately failed to act as instructed by the ICJ and has not handed Ratko Mladić over to the ICTY or established full cooperation with

563 ICJ judgment, paras. 291–297.

564 *Ibid.*, paras. 391–415.

565 *Ibid.*, paras. 425–450.

566 *Ibid.*, para. 463.

this international tribunal. The attempt by some political parties and NGOs to have a declaration condemning the Srebrenica genocide adopted by the Serbian Assembly has also failed. In any case, Serbia has a clear obligation under the UN Charter to enforce the ICJ judgement as soon as possible.

### *2.3.2. International Criminal Tribunal for the Former Yugoslavia*

2.3.2.1. Introduction

The International Criminal Tribunal for the Former Yugoslavia (ICTY)[567] 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 Statute). 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). Serbia's co-operation with the ICTY and its procedures are regulated by the Act on Co-operation with the ICTY.[568]

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

567 For basic data on the ICTY and chronology, see I. Bandović (ed.), *The Activity of ICTY and National War Crimes Judiciary*, Beogradski centar za ljudska prava, 2005.

568 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 and *Sl. list SCG*, 16/03). More on the Act in *Report 2005*, IV.2.5.1.

death. The Tribunal and the Office of the Prosecutor are actively helping in building the capacities of national courts to conduct war crime trials.

2.3.2.2. ICTY Judgements Delivered in 2007[569]

*Dragan Zelenović (IT-96-23/2)*. – The Trial Chamber convicted Dragan Zelenović to 15 years in jail for raping and torturing Bosnian Moslem women in the eastern Bosnian municipality of Foča. Zelenović was transferred to the Tribunal on 10 January 2006 and pleaded guilty on 17 November 2007. He pleaded guilty to seven counts in the indictment charging him with torturing and raping a number of Bosnian Moslem girls and women after the Serb forces captured Foča in April 1992. The women were tortured and raped during detention at several locations across Foča in the July-October 1992 period. Dragan Zelenović was found guilty of personally committing nine rapes, eight of which were qualified as both torture and rape. He was also found guilty of two instances of rape through co-perpetratorship, one of which was qualified as both torture and rape, and one instance of torture and rape through aiding and abetting. Four of the rapes he took part in were gang rapes, together with three or more other perpetrators.

*Blagojević and Jokić (IT-02-60)*. – The ICTY Appeals Chamber upheld the judgements finding former Bosnian Serb Army (VRS) officers Vidoje Blagojević and Dragan Jokić guilty of crimes against humanity and violations of the laws or customs of war against Bosniaks in the Srebrenica area in July 1995. The Chamber reversed Blagojević's conviction for complicity in genocide and reduced his sentence to 15 years' imprisonment. It affirmed Jokić's nine-year jail sentence.

*Milan Martić (IT-96-23/2)*. – Former Croatian Serb political leader Milan Martić was convicted to 35 years' imprisonment for crimes against humanity and war crimes committed against Croats and other non-Serbs in Croatia in the early 1990s. Martić was found guilty on sixteen counts which included persecution, murder, torture, deportation, attacks on civilians, wanton destruction of villages or devastation not justified by military necessity and other crimes against humanity and violations of the laws or customs of war. He was found not guilty of extermination. Martić had held the posts of Minister of Internal Affairs, Minister of Defence and President of the self-styled Serbian Autonomous District of Krajina later renamed into the Republic of Serbian Krajina.

*Limaj et al (IT-03-66)*. – The Appeals Chamber affirmed the acquittal of former KLA leader Fatmir Limaj who had been charged with crimes against Albanians and Serbs in the Lapušnik prison camp. The ICTY also affirmed the acquittal of Limaj's subordinate Isak Musliu and upheld the first-instance judgement sentencing the third defendant, Haradin Bala to 13 years' imprisonment. The Trials Chamber acquitted Limaj and Musliu on all counts in the indictment in its first-instance

569 Judgements of the ICTY can be found at http://www.un.org/icty/bhs/frames/cases.htm.

judgement delivered on 30 November 2005, finding that the prosecutors had not proven the two had played any role in the Lapušnik camp. Bala was convicted to 13 years in jail for executing nine Albanians detained in a camp on Mt. Beriša on 26 July 1998. Bala was also found guilty of torture and cruel treatment of prisoners.

*Mrkšić et al (IT-95-13/1)*. – The Trial Chamber convicted former JNA officers Mile Mrkšić and Veselin Šljivančanin to 20 and 5 years' imprisonment respectively for assisting the murder and torture of Croatian prisoners in Vukovar in 1991. The third co-defendant, Miroslav Radić, was found innocent. Mrkšić was found guilty of assisting the torture, cruel treatment and murder of 194 Croatian prisoners taken from the Vukovar hospital to the Ovčara farm on 20 November 1991. Šljivančanin was found guilty of assisting the torture of prisoners but acquitted with respect to the murder charges. Both Mrkšić and Šljivančanin were convicted of violating the laws and customs of war, Radić was acquitted on all counts and released. The Trial Chamber concluded that the indictees had not taken part in the joint criminal enterprise the aim of which was to kill the persons taken from the hospital as the prosecutors claimed or that any of them had ordered the execution of the Croatian prisoners that was committed by the members of the local territorial defence and paramilitary forces.

*Halilović (IT-01-48)*. – The Appeals Chamber affirmed the acquittal of former Deputy Commander of the Supreme Command Staff of the Army of Bosnia and Herzegovina (ABiH) and chief of the Supreme Command Staff of the ABiH Sefer Halilović, who had been charged with crimes against Bosnian Croats in the 1992-1995 war. Halilović was acquitted on all counts in November 2005. He had been charged with command responsibility for murders committed by ABiH troops in the villages of Grabovica and Uzdol, in the Jablanica and Prozor areas in Herzegovina, in September 1993.

*Dragomir Milošević (IT-98-23)*. – The ICTY convicted retired VRS general Dragomir Milošević to 33 years' imprisonment for the siege of Sarajevo. He was found guilty of crimes against civilians in Sarajevo, which had been under siege from 1992 to 1995. He was *inter alia* charged with shelling the Markale market on 28 August 1995 which killed 34 and wounded 78 civilians. The Trial Chamber found Milošević guilty of shelling Sarajevo and sniper attacks on its citizens in the August-November 1995 period from the positions of the VRS Sarajevo Romanija Corps under his command. Four counts in the indictment charged Milošević with crimes against humanity, murders and inhumane acts and the other three with violations of laws and customs of war, terror and attacks on civilians in the August 1994-November 1995 period.

*Contempt of Court Judgements*. – The Trial Chamber found Croatian journalist Domagoj Margetić guilty of contempt of court because he published a list of names of protected witnesses and convicted him to three months in jail and a 10,000

Euro fine. The ICTY has to date launched proceedings for contempt of court against 19 people, including indictees, their counsels, witnesses and journalists and others. They were charged with intimidating the witnesses, refusing to answer questions in court, disclosing confidential court documents and breaching protective measures.

### *2.3.3. Serbia's Cooperation with the ICTY*

Serbia's cooperation with the ICTY intensified in 2007, notably, two indictees were apprehended and handed over to The Hague. The first, Vlastimir Đorđević, former Serbian senior police official charged with crimes against humanity and war crimes against Kosovo Albanians in 1999, was arrested in Montenegro on 17 June after hiding for three years. His arrest was the result of cooperation between the ICTY prosecutors and the Montenegrin and Serbian authorities. Senior Bosnian Serb army officer Zdravko Tolimir, charged with genocide and other crimes in Srebrenica in 1995, had been at large over two years. He was arrested on 31 May and transferred to The Hague on 1 June.

Serbia still has not fulfilled its main obligation to arrest and extradite the former Bosnian Serb Commander in Chief General Ratko Mladić, as both the ICTY President and Chief Prosecutor emphasised in their reports to the UN Security Council on 10 December. Four indictees, the most important of whom were Ratko Mladić and Radovan Karadžić, remained at large at the end of the reporting period. The ICTY shall not stop working until they are brought to justice.

### *2.3.4. Serbian Press Reports on the ICTY*

The ICTY was the second most frequent topic of articles monitored by BCHR associates for the purposes of this report. Nearly one-fifth (or precisely, 18.45%) of these reports were devoted to the Tribunal. A large proportion of them focussed on the now former Chief Prosecutor Carla Del Ponte, mostly in a negative context ("Foul Carla", *Press*, 19 March, p. 3). The press also devoted a lot of attention to accusations voiced against Del Ponte by her former deputy Nice, who alleged she had been protecting Belgrade ("Carla Scheming with Belgrade", *Kurir*, 16 April, p. 3, "Carla Del Ponte: I was not Protecting Belgrade", *Politika*, 21 April, p. 4). The press also wrote about the alleged agreement between former Bosnian leader Radovan Karadžić and US official Richard Holbrooke, by which the latter reportedly guaranteed Karadžić immunity from the courts ("US Deal with Radovan", *Kurir*, 22 March, p. 5, "Artmann: West Hindered Karadžić's Arrest", *Politika*, 8 September, p. 4). These reports were published with the aim of releasing Serbia from the responsibility to extradite Karadžić and additionally discredit the USA, which is considered the greatest state and national enemy because of its views on Kosovo. All year round, but especially in the latter half of 2007, the media were full of statements by Serbian officials claiming that no official institution was hiding Ratko Mladić or the other indictees and that the fugitives would soon be arrested ("Army not Guarding Hague Fugitives", *Večernje novosti*, 8 June, p. 2, "We're Closing Down on One Fugitive", *Blic*, 18 November, p. 2).

The Serbian state authorities' decision to offer one million Euro awards for information on Karadžić's and Mladić's whereabouts and 250,000 Euro awards for information on the other two indictees at large, Goran Hadžić and Stojan Župljanin, also attracted much media attention ("Million Euros for Ratko", *Kurir*, 13 October, p. 2).

Of the ICTY trials reported on by the Serbian media in 2007, the acquittal of Miroslav Radić of the so-called Vukovar Troika and the fierce reactions in Croatia got the greatest coverage ("First Serb to Beat The Hague", *Večernje novosti*, 29 September, p. 16, "Radić Acquitted, Mrkšić Gets 20 and Šljivančanin 5 Years in Jail", *Politika*, 28 September, p. 5, "Croatia Disappointed", *Večernje novosti*, 29 September, p. 18).

The trial of the president of the ultra-right Serbian Radical Party (SRS) Vojislav Šešelj was reported on throughout 2007, mostly thanks to his SRS, the strongest party in the Serbian Assembly, which held many press conferences devoted to the trial and quasi-scientific gatherings serving to negate and deny the actual events in which Šešelj and his party played a negative role. The SRS and "patriotic" media used the Šešelj trial also to attack the Tribunal (*Press*, 22 March, p. 5) and all those having anything to do with it, from the President of Serbia to the Serbian War Crimes Prosecution Office. The Šešelj trial opened on 7 November, after five years of preparation. SRS had insisted that the state broadcaster RTS carry the trial live. The RTS initially rejected the request because it "undermines its role and function" ("RTS Cannot Broadcast Assembly Session and Šešelj Trial", *Politika*, 2 November, p. 8) but then agreed to provide coverage of the trial, by combining live coverage with recordings of the trial and regular reports from The Hague in special shows ("Šešelj Trial to be on RTS", *Kurir*, 6 November, p. 8, "RTS to Carry Šešelj Trial", *Politika*, 6 November, p. 8 and "Tijanić: Cekić, What about Šešelj", *Press*, 6 November, p. 2). The broadcast of the recording of the opening of the Šešelj trial on RTS 2 was watched by 2.5 million people, i.e. one-third of Serbia's residents. "Citizens will have the opportunity to see Voja crush The Hague Tribunal, watch the propaganda lies about Serbs in the wars in Bosnia and Croatia fall like a house of cards," senior SRS official Dragan Todorović said at the time (*Press*, 10 November, p. 2).

Serbian media reports on the ICTY in 2007 did not differ from their coverage of this tribunal's work in the preceding years. They remained negative, constantly reiterating that the ICTY did not apply the same criteria to Serbs and members of other nations. Criticism of the ICTY's work by the media, even when founded (e.g. the long periods indictees have to wait before their trials begin), served above all to reconfirm the *a priori* negative view of this UN body, not to analyse its work or recall the events in the former Yugoslavia in the 1990s.

### *2.3.5. 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 repa-

ration 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.

Serbia made no major headway in awarding financial and symbolic reparations in 2007. Even the ICJ judgement failed to provoke a serious public debate. The general public in Serbia wrongly interpreted the judgement, above all because the media had superficially and incompletely reported on the judgement and its consequences. Serbian President Boris Tadić was the only official to publicly react to the judgement and call on the National Assembly to adopt a declaration condemning the crime in Srebrenica "in no uncertain terms".[570] His initiative was not backed by the ruling political parties in Serbia. The Democratic Party of Serbia insisted that the declaration condemn all crimes committed in the former Yugoslavia, which would have relativised the crime committed in Srebrenica. The drafting of the declaration was halted and Serbia missed the chance to apologise to the victims and condemn the genocide in Srebrenica for the first time through its topmost legislative body.

The Belgrade-based NGO Humanitarian Law Centre contributed the most to the awarding of financial reparations for damages incurred by human rights violations in the past by continuing to initiate proceedings for compensation of damages in 2007. According to HLC data, this organisation has launched 11 court proceedings over the violations of the rights of Bosniaks in Sandžak by the police and army since 1 September 2006.[571]

## *2.4. War Crimes Trials in Serbia*[572]

The work of state bodies related to the prosecution of war crimes intensified somewhat in 2007. The War Crimes Chamber of the Belgrade District Court and the

570 Tadić's address to the nation on the ICJ judgement available at http://www.predsednik.yu/mwc/default.asp?c=303000&g=20070302095150&lng=eng&hs1=0

571 More data on the proceedings available at the HLC website http://www.hlc-rdc.org/storage/docs/f09a42d0b43e5af6ddad75bcb3b1c5e6.pdf.

572 This text is the result of BCHR associates' one-year work within the project entitled "Monitoring and Reporting the Activities of Judical Institutions in Serbia in the Field of Organised Crime, War Crimes, Discrimination and Domestic Violence". The project enabled the BCHR associates to more directly monitor the work of judicial and other state authorities and the developments in this area in general, by systematically collecting information in the media and NGO reports and especially by personally attending the trials, round tables and panel discussions on the topic, and discussing them with representatives of the state bodies and experts. Apart from this comprehensive overview of war crimes trials in Serbia in 2007, the project activities are also presented in three quarterly bulletins entitled *Osmatračnica* (Watch Tower),

War Crimes Prosecution Office were extremely active. Moreover, the National Assembly adopted the draft acts submitted by the Ministry of Justice and aiming at improving the efficiency and effectiveness of war crimes prosecutions.

The investigation procedure, which had accounted for significant problems in war crimes prosecution, has been changed. Under the new Criminal Procedure Code,[573] the prosecutor is now in charge of the investigation.

Investigation has heretofore been conducted by the police, more precisely the MIA War Crimes Investigation Service (an extremely small service of modest capacity) and the Organised Crime Directorate (UBPOK) together with the War Crimes Prosecution Office. The greatest burden of the investigation has thus befallen the prosecution office, which has lacked the appropriate means. The new CPC allows the prosecution office to establish its own investigation team, which will provide for better and more thorough investigations.

The powers of the Prosecution Office have been expanded also by the Act Amending the Act on the Organisation and Competence of State Bodies in War Crimes Proceedings.[574] The Prosecution Office is now also charged with prosecuting persons helping war crimes indictees remain at large. The prosecution of war crimes and crimes related to them (abetting and hiding indictees) will be facilitated once the same Chamber is charged with prosecuting all these acts. Abettors were until now tried by the Municipal Court and their trials were inefficient.

The new legal provisions will not, however, eliminate all the problems unless cooperation with the MIA improves. Cooperation has gotten better after the War Crimes Investigation Service was set up within the MIA. But more support is needed given that this Service is small and its capacities are modest. Few policemen agree to transfer to the Service and are offered neither higher salaries nor any benefits; moreover, their colleagues are reluctant to cooperate with them, *inter alia* because many of the crimes the Service is to investigate were perpetrated by policemen.

The capacities of the Belgrade District Court War Crimes Chamber pose an additional problem.

Only a limited number of trials can be held as the District Court can usually spare the War Crimes Chamber only one courtroom. Moreover, the Chamber lacks judges. The Chamber can thus simultaneously conduct 5 or 6 proceedings. In view of the fact that most trials take around two years, the Chamber is clearly unable to pronounce more than 2 or 3 verdicts *per annum*. It should be borne in mind that

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where the topic is elaborated in greater detail. The data and assessments in the text are based on information in the bulletins, monthly reports and collected media documentation available at BCHR's website (www.bgcentar.org.yu). This is why the text departs from the manner in which sources are ordinarily quoted in the Report (see other texts in this Section of the Report).

573 The enforcement of the CPC adopted in 2006 has been put off until 31 December 2008.

574 *Sl. glasnik RS*, 101/07.

over 10 cases were being investigated at the time this report went into print and that ICTY was expected to cede several more cases to the Chamber in accordance with its completion strategy.

The 2006 CPC holds an important provision limiting the possibility of ordering retrials and obliging the Supreme Court of Serbia to itself eliminate the irregularities in the first-instance proceedings and rule on the case. Given the Court's practice of overturning the war crimes verdicts and ordering retrials (cases of "Sjeverin", "Podujevo", "Ovčara"), this provision will give the Supreme Court of Serbia the opportunity to clearly demonstrate its will (or lack of it) to take a constructive attitude in war crime trials.[575] Its actions to date have not only undermined the effectiveness of the proceedings but also the trust of both the families of the victims and the international institutions, notably the ICTY, which is expected to cede some cases to the domestic judiciary in accordance with its completion strategy. The Supreme Court decisions are all the more odd given that all observers agree that the trials to date have been professional and that none of the parties to the proceedings have seriously questioned the expertise and impartiality of the judges.

Public resistance and the executive authorities' insufficient support to war crimes trials has contributed to a climate deterring injured parties and witnesses from testifying, which additionally hinders the war crime proceedings. The War Crimes Prosecution Office has recently invested efforts in addressing the issue. The NGO Humanitarian Law Centre (HLC) has been tackling this problem for a number of years now.

The HLC has been representing the victims of war crimes and encouraging their participation in such trials. It has built a model for supporting victims and witnesses to ensure that their voice is heard at the trials, that the relevant documents and testimonies vital to establishing the truth are obtained, that information on crimes and perpetrators not covered by the indictments is revealed so that these crimes are investigated as well, and that the context of events in which the war crimes occurred is shed light on.[576]

Cooperation between the prosecution offices in the region was intensive in 2007. Apart from the cooperation agreements signed with Croatia[577] and Bosnia-Herzegovina[578] earlier, the Serbian War Crimes Prosecution Office on 31 October

575 When ruling on appeals of war crimes sentences, the Supreme Court of Serbia has to date never used the opportunity provided to it by law to call a hearing and deliver a judgement if it has established irregularities in first-instance proceedings.

576 HLC Report, Counselling witnesses/victims and their representation in court: model of support – Project Implementation Report, 21 February 2007, www.hlc-rdc.org.

577 The Memorandum of agreement in order to establish and promote cooperation in combating all forms of serious crimes was concluded on 5 February 2005 and the Agreement on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide with concluded on 13 October 2006.

578 The Memorandum of agreement in order to establish and promote cooperation in combating all forms of serious crimes was concluded between the Serbian Republican Public Prosecution

2007 signed the Agreement on Cooperation in the Criminal Prosecution of Perpetrators of Crimes against Humanity and Other Goods Protected by International Law with Montenegro.

The Serbian war crimes authorities have also cooperated with Kosovo courts under UNMIK's jurisdiction but to a much lesser extent than with the Croatian and Bosnian judicial authorities.

The War Crimes Prosecution Office has been subjected to political pressures since it was founded. These pressures have mostly been exerted by the SRS and they intensified before the trial of SRS leader Vojislav Šešelj began. Some media have taken part in the campaign by publishing the false accusations voiced by SRS members without checking the facts first. Statements by authorised Prosecution Office officials denying the false allegations are, as a rule, not published.

The War Crimes Prosecutor, his deputies and spokesperson were frequently the targets of verbal attacks and threats in 2007. Even the deputies hurled insults against the Prosecution Office staff in the Assembly. Not only does such conduct ruin the already feeble dignity and authority of the Assembly; it is dangerous as well, given that it creates a climate in which threats against and physical assaults on the representatives of the judiciary go unnoticed and unpunished.

The War Crimes Prosecutor and his deputies were subjected to a number of attacks. They were threatened both by phone and at public venues. Both the private and official cars of the prosecutor in the Ovčara case, Dušan Knežević, were damaged. Just before the Suva Reka trial opened, the windows of the car owned by leading prosecutor in the case Dragoljub Stanković were smashed. The tires of Prosecution Office Spokesman Bruno Vekarić's car had been punctured a number of times; he was also assaulted and threatened by an unidentified man.[579]

Lieutenant-Colonel Lakić Đorđević has also been subjected to pressures and threats ever since 2000, when he started talking in public about the crimes during the armed conflicts in Kosovo which he learned of while he worked as a military prosecutor in Priština. He has been exposed to maltreatment, humiliation and threats against his life and the safety of his family. He filed an official request for protection to Serbian President Boris Tadić on 10 October 2000 via the army command in Kragujevac, which forwarded the request to the then Defence Minister Zoran Stanković, not President Tadić. The Minister's associates sent him a message to the effect that he himself was to blame as he had decided to testify before the ICTY. The Humanitarian Law Centre called on President Tadić in 2007 to protect Lieut.-Col. Đorović twice. According to HLC's statement, Đorović has been been tranferred to the Kragujevac garrison, subjected to several disciplinary proceedings and open threats and neither he nor his family were safe because he has had contacts

Office, the Republic of Serbia War Crimes Prosecution Office and the Prosecution Office of Bosnia-Herzegovina on 1 July 2005.

579 BCHR's interview with War Crimes Prosecution Office spokesperson Bruno Vekarić, 4 December, BCHR Archives.

with ICTY investigators, agreed to testify before the ICTY (wherefore he was granted a confidentiality waiver) and because of the critical texts he had published.

The state authorities failed to react as one would have expected them to or to investigate the numerous incidents in this case although they had been notified of them on time. It should be emphasised that protection of former or future witnesses at the ICTY is an important element of Serbia's legal obligation to cooperate with the ICTY.[580]

The state authorities' lack of appropriate reaction clearly indicates that the official strategy and policy of cooperation with the ICTY and support to war crimes trials is not implemented in practice.

### *2.4.1. War Crimes Judgements*

The War Crimes Chamber passed four judgments ("Ovčara 2", "Anton Lekaj", "Scorpions" and "Sinan Morina") in 2007. A number of war crimes trials were under way at the end of the reporting period.

*2.4.1.1. "Ovčara 2" Case*. – The Supreme Court of Serbia upheld the guilty verdict pronounced by the Belgrade District Court War Crimes Chamber against Milan Bulić on 1 March. Milan Bulić had been a member of the Vukovar Territorial Defence and was found guilty of cruelly treating POWs at the Ovčara farm at Vukovar, whom he beat up and ill-treated. He was tried separately from the other Ovčara indictees because of his health and convicted to eight years in jail. Bulić's grave illness prompted the Supreme Court of Serbia to reduce the first-instance eight-year prison sentence to two-year imprisonment.

*2.4.1.2. "Anton Lekaj" Case*. – On 5 April, the Supreme Court of Serbia dismissed the appeals filed by both the defence and the prosecution in the case of Anton Lekaj and upheld the first-instance verdict pronounced by the Belgrade District Court War Crimes Chamber. The Chamber sentenced Lekaj to 13 years in jail on 18 September 2006 for war crimes against the civilian population[581]. Lekaj was found guilty of killing one and torturing 13 non-Albanian civilians in Đakovica in 1999.

*2.4.1.3. "Scorpions" Case*. – The Belgrade District Court War Crimes Chamber on 10 April pronounced its judgement in the case of the Scorpions paramilitary unit members accused of war crimes against the civilian population. They executed Azmir Alispahić, Safet Fejzić, Sidik Salkić, Smail Ibrahimović, Jusa Delić and Dino Salihović in Godinjske bare near Trnovo in July 1995.

580 Serbia's President should protect Serbian Army Lieut. Col. Lakić Đorović, HLC statements of 19 January and 5 June, www.hlc-rdc.org.

581 Article 142 (1) CC of Yugoslavia *in juncto* Article 22 of CC of Yugoslavia.

The trial opened in November 2005, after the video tape of the execution was shown at the ICTY trial of Slobodan Milošević. The authenticity of the recording of the execution, made by the members of the Scorpions, was proven during the trial.

The Chamber found Slobodan Medić, Pera Petrašević, Branislav Medić and Aleksandar Medić guilty. It acquitted Aleksandar Vukov.

Slobodan Medić, the commander of the Scorpions, who had ordered the execution of the captured men, was convicted to 20 years in jail. Branislav Medić, who shot the prisoners together with Pera Petrašević, Milorad Momić and Slobodan Davidović, was also sentenced to 20 years in jail. Pera Petrašević, who admitted the crime and cooperated with the Prosecution Office during the proceedings, was sentenced to 13 years in jail. Milorad Momić is at large. Slobodan Davidović has been convicted to 15 years in jail for this crime in Croatia.

This trial will be remembered by the explanation of the verdicts provided by presiding judge Gordana Božilović-Petrović. She had listed a number of inappropriate reasons for the lenient sentences handed down to some of the accused. She said they were "young people who had found themselves in the vortex of war", "family men" with clean records. She obviously believed their statements rather than those of the victims' families when she was assessing the evidence. She believed the sincerity of the condolences Aleksandar Medić expressed to the victims' families during the trial and assessed his commiseration sufficed to sentence him to merely five years in jail. She also accepted Aleksandar Vukov's allegation that he had not known the prisoners would be killed notwithstanding evidence to the contrary. Although the victims' families claimed that they had been taken prisoner in Srebrenica, the Chamber concluded that there was no evidence that the executed men were brought from Srebrenica, although it is clear that the Scorpions were merely finishing off the crime the forces under the command of Ratko Mladić committed in Srebrenica and its vicinity. Some other statements voiced by the judge in her explanation of the judgement ("all sides committed crimes") can only be interpreted as her wish to relativise the crime and diminish the responsibility of the defendants.

The sentences pronounced against Aleksandar Medić and Aleksandar Vukov are the most questionable part of the verdict. Medić was convicted to merely five years in jail and Vukov acquitted. The prosecutor, who had initially charged the two with complicity, amended the indictment for unclear reasons and accused them of accessorship. The main reason the prosecutor gave for amending the charges against Medić was that he was only standing guard during the execution. Whether a person standing guard during the commission of a crime should be accused of accessoryship or complicity has not been fully resolved in legal theory but it is most often treated as complicity in judicial practice. The only difference between complicity and accessoryship lies in the intention of the person committing the act i.e. whether

the person was aware of the group's aim. The video tape clearly corroborates Medić's intention.[582]

The video of the execution recorded by the Scorpion members shows Medić standing with his automatic rifle in his hands next to the prisoners who were lying on the ground, with their hands tied behind their backs, visibly scared and helpless. He is heard denigrating them and clearly indicating that they would be killed, which rules out the possibility that he had not known what would happen to them.

Medić claimed that he had had no idea that the prisoners would be executed, that he had not shot at them and that he had in no way helped the commission of the crimes by his actions.

Given that Medić's cruelty and his humiliation and maltreatment of the victims together with the other defendants are explicit in the video recording, only the judicial panel knows which alleviating circumstances prompted it to pass such a lenient sentence against Medić.

Aleksandar Vukov was not present during the execution, but appeared on the recording when he came to show the executioners where to commit the crime since he knew the area well and was the only one who knew the location of the building in which the killed people were later incinerated. He claimed he had no idea what would happen to the prisoners. Evidence to the contrary was presented at the trial. Moreover, judging by the video footage, it is difficult to believe that he did not know what the group leading the prisoners was tasked with at the moment he joined them.

The Court is bound by the qualification of the crime in the indictment but the question arises whether it was appropriate to alleviate the sentences to such an extent. Aleksandar Medić was sentenced to the minimum sentence for his crime – five years in jail.

Both the Prosecution Office and the defendants have appealed the sentence. The appeal was being reviewed at the end of the reporting period.

*2.4.1.4. "Sinan Morina" Case*. – The Belgrade District Court War Crimes Chamber acquitted Sinan Morina on 20 December. Morina was accused of complicity in the armed attacks on and the unlawful imprisonment, torture and violations of physical integrity of Serb civilians in the Orahovac villages on 17–21 July 1998 together with 34 other KLA Opteruša unit members under the command of Halit Dulaku, who had ordered the crime. Morina was accused of incurring large-scale

582 In their jurisprudence, other *ad hoc* tribunals (Nuremberg, Tokyo, ICTY, ICTR) have interpreted complicity more broadly than accessoryship. A good illustration is the case *Alphons Klein et al* where all of the accused (including the book-keeper who kept records of the killed and forged the causes of their deaths) were charged with complicity. The prosecutor in that case said that a line of distinction could not be drawn between the man who had initially come up with the idea to kill them and those who took part in the commission of the crimes.

destruction to civilian property and religious facilities and driving out the civilian population from the Orahovac municipality.

It took the Chamber a short time (the trial began on 17 October 2007) to establish that there was no evidence that Morina had committed the crimes he was accused of.

The Chamber heard around 20 witnesses, residents of Opteruša and other villages, none of whom recognised Morina as a perpetrator of the July 1998 crime. The whole indictment was based on the account of one witness, Slavica Banzić, whose testimony was contradictory and disputable in the opinion of the court. In addition, she described Morina, who is short and dark-haired, as tall and blond.

The presiding judge, Olivera Anđelković, said that it was "Sad, pitiful and shameful ... to use an event like this and raise an indictment without any evidence. A man has spent a year in custody, while the witnesses were approaching us asking where they loved ones were. Establishing their whereabouts is not the job of the court." [583] Her closing statement corroborates that the court was convinced that there was no evidence to support the indictment.

Although the judgement may be appealed before the Supreme Court of Serbia, the court demonstrated objectivity, impartiality and fairness in the first-instance proceedings. It fully abided by Articles 5 and 6 of the ECHR. Taking into consideration all the available evidence, the court proceeded with exceptional urgency in this case, whereby it respected the right to a trial within a reasonable time and the right of persons deprived of liberty to speedy proceedings.

### *2.4.2. Trials under Way*

*2.4.2.1. "Ovčara 1" Case*. – The War Crimes Chamber opened the retrial of this case after its first-instance verdict was overturned by the Supreme Court in March 2007. Given the reasons for annulling the verdict, no major turnabouts or changes are expected at the retrial. The Supreme Court decision to overturn the judgement has undermined the trust in the judiciary and the state institutions, which is evident in the statement by the Croatian Alliance of Associations of Families of Victims, the Imprisoned and the Missing. They said none of their members would attend the retrial because they "do not want to be props in the performance staged to serve Serbian political purposes". They had expected the filing of new indictments and not the annulment of the judgement and believe that politics had interfered and stood in the way of punishing the criminals.

*2.4.2.2. "Vladimir Kovačević Rambo" Case*. – In July 2007, the Serbian War Crimes Prosecution Office charged retired JNA office Vladimir Kovačević *aka* "Rambo" with war crimes against the civilian population in Dubrovnik in December 1991.

583 *B92*, 20 December, www.b92.net.

According to the indictment, the units under Kovačević's command and he personally randomly fired hundreds of shells at the heart of Dubrovnik; two civilians lost their lives and three were wounded in the shelling.

Six historic and architectural monuments under UNESCO protection were completely destroyed and burnt down and another 46 buildings were damaged in the attack.

Kovačević, diagnosed with paranoid psychosis, was unable to present his defence and plea during the proceedings before the ICTY.

The ICTY ceded this case to the Serbian War Crimes Prosecution Office in May 2007. This is the first case the ICTY ceded to the Serbian judiciary after having filed the indictment.

The Begrade District Court War Crimes Chamber on 5 December dismissed the indictment given the findings and opinion of the Military Medical Academy Institute of Psychiatry medical team that found that Kovačević was unable to understand the indictment, defend himself or in any way actively participate in the proceedings.

*2.4.2.3. "Zvornik" Case*. – The ICTY Chief Prosecutor ceded this case in the investigation stage to the Serbian War Crimes Prosecution Office in 2004. The trial opened in November 2005 and is to end soon. The defendants are accused of crimes against the civilian population, notably: the expulsion of 1822 Bosniaks from the villages of Kozluk and Skočić, the crimes in the Čelopek Culture Hall and venues known under the names of "Ekonomija" and "Ciglana", where the Bosniak civilians were held prisoner and where at least 22 of them were killed and many more cruelly tortured. Two of the defendants, Branko Grujić (former head of the Crisis Headquarters, Mayor, head of the Interim Government and War Headquarters of Zvornik) and Branko Popović (former commander of the Territorial Defence Headquarters and member of the War Headquarters in Zvornik) are charged with ordering and carryng the expulsion of the Kozluk and Skočić villagers and with knowing of but not preventing the crimes in Čelopek, Ekonomija and Ciglana, of which the other four are accused (former members of the "Igor Marković" unit better known as Yellow Wasps), wherefore they consented to the commission of the crimes. The other four accused are charged with murder of several people and ill-treatment.

The cooperation between the prosecutions of Serbia and Bosnia-Herzegovina has greatly contributed to the collection of evidence in this case as it has facilitated access to witnesses in Bosnia. Protection measures have been afforded the numerous witnesses: they have been allowed to testify under pseudonyms or behind closed doors, or via video links with Sarajevo. Some witnesses in Bosnia have, however, refused to testify, thus demonstrating their lack of trust in Serbia's institutions.

At the beginning of the main hearing on 25 June, the judicial panel presided by judge Tatjana Vuković said it had decided against hearing several witnesses because two of the summoned witnesses refused to testify fearing for their own lives

and those of their families, while two other witnesses decided against testifying due to their ill health (which was confirmed by the competent Bosnia-Herzegovina authorities). Four witnesses, who are also injured parties in the proceedings (former prisoners at Čelopek), also refused to testify. In cooperation with colleagues in Bosnia, the War Crimes Chamber on two occasions tried but failed to ensure the presence of these witnesses at the trial.

This again illustrates the victims' evident mistrust of the institutions of the Republic of Serbia, which is understandable given the irrational overturning of the Ovčara conviction, the despicable judgement in the Scorpions case, the defective witness protection programme (which made possible the brutal killing of a protected witness in the trial of PM Đinđić's assassins[584]) and the fact that two main ICTY indictees (Ratko Mladić and Radovan Karadžić) are still at large. All this brings into question the state's resolve to confront the crimes committed in the 1990s.

Many of the witnesses, who are unaware of what the defendants are precisely indicted for, have given first-hand accounts of other crimes in Zvornik and its vicinity in 1992 (some of them have actually implicated themselves). These testimonies will help the Prosecution investigate crimes not covered by the indictment (case dubbed "Zvornik 2" during the investigation). Many people had fallen victim to these crimes.

Media have paid the least attention to this case, although it deals with the gravest forms of torture and extremely cruel killings, more so than the other cases. Moreover, it is interesting that some of the accused served as SRS leader Vojislav Šešelj's bodyguards at his rallies across Serbia after the war.

*2.4.2.4. "Bytyqi Brothers" Case*. – The trial opened in November 2006. Although the investigation covered a number of suspects, only Sreten Popović and Miloš Stojanović, members of the Operational Search Group operating within the special police units in 1999, have been indicted. They are charged with the unlawful deprivation of liberty of Ylli, Argon and Mehmet Bytyqi as they were leaving the Prokuplje jail after having served sentences for illegally crossing the border. Popović and Stojanović then transferred the brothers to a police camp in Petrovo selo (where they were later taken over by unidentified Special Anti-terrorist Unit (SAJ) members, who killed them by shooting them in the back of the neck. The brothers found with their hands tied by wire). The two men have been charged with war crimes against war prisoners. The accused stated that they were following the orders of their superiors and named General Vlastimir Đorđević. The authorities opened an investigation of Đorđević, a Hague indictee, who refused to give a statement to the investigators about this case. In addition, the authorities also launched an investigation of Goran Radosavljević Guri (who was in charge of the Petrovo selo camp at the time and is currently at large) and another four persons suspected of complicity in the unlawful deprivation of liberty of the Bytyqi brothers. The FBI is also taking

584 See II.2.5.2.8.

part in the investigation as the victims were US citizens and has conducted the ballistic analysis.

Vlastimir Đorđević, investigated on suspicion of ordering the crime, was arrested in mid-2007 and extradited to The Hague. Sreten Popović stated in his defence that he had organised the arrest and imprisonment of the Bytyqi brothers on Đorđević's orders and that he had handed them over to as yet unidentified policemen because Đorđević had ordered and threatened him to do so.

The bodies of the Bytyqi brothers were found in a mass grave in Petrovo selo in 2001.

This case is a textbook example of the problems war crimes investigation bodies have in obtaining evidence. Apart from the considerable time that has elapsed since the events, the witnesses in the case have proven to be extremely unreliable. The policemen have mostly demonstrated "solidarity" with their colleagues and are apparently afraid to tell the truth and they have avoided disclosing facts that may implicate their colleagues. For instance, none of the people in the Petrovo selo camp at the time the Bytyqi brothers were held there were able to say anything about the July 1999 events. They state they had not known anything about the brothers being held in the camp or about the mass graves found in the camp and have come up with implausible explanations.

*2.4.2.5. "Suva Reka" Case*. – The trial of eight men, five of whom were policemen at the time of the crime, who have been charged with war crimes against the civilian population, began in October 2006. They are accused of ordering an attack on the civilian population, killings, large-scale destruction of property and of driving the civilian population out of Suva Reka on 26 March 1999. Forty-six members of the Berisha family (including the elderly, women and children) and two other Albanian men were killed during the attack.

This is the first case in which the domestic judiciary has made headway in accepting international humanitarian law and ICTY practice and qualified the conflict in Kosovo as an armed conflict. The trial has been marked by the witnesses' evident solidarity with the accused. The witnesses, most of whom are policemen, also lacked motivation to provide a comprehensive account of what they know. All witnesses demonstrated profound lack of interest in what had happened in Suva Reka, justifying their actions by tensions and conflicts with the Albanians and by their alleged belief that the killed persons they had seen had been KLA troops.

### *2.4.3. Indictments Filed in 2007*

*2.4.3.1. "Tuzla Column" Case*. – The Serbian War Crimes Prosecution Office in November filed an indictment against Tuzla resident Ilija Jurišić, charging him with using unlawful means of combat during the attack on the JNA column in Tuzla on 15 May 1992. According to the indictment, Jurišić had ordered the

snipers to first kill the drivers of the military vehicles departing Tuzla in order to stop the vehicles, wherefore further passage via the agreed-on withdrawal route would be blocked; they then shot and killed the troops in the vehicles, who had not been prepared for combat or resistance. They opened fire at the JNA soldiers who were fleeing the vehicles under fire. The snipers launched such attacks also on visibly marked military ambulances. The JNA column had fully abided by the Bosnia-Herzegovina (BiH) Presidency decision on the JNA's peaceful departure from BiH and the BiH-FRY agreement on their peaceful withdrawal, as well as the guarantees agreed on by the Tuzla military and civilian authorities and the JNA representatives.

This case was taken over from the Belgrade Military Prosecution Office in 2004 and has been processed in cooperation with the Bosnia-Herzegovina Prosecution Office.

*2.4.3.2. "Slunj Crime" Case*. – The War Crimes Prosecution Office in November also filed an indictment against Zdravko Pašić (44) who is reasonably suspected of war crimes against the civilian population in the Croatian town of Slunj in 1991. Pašić was a member of the local police in the then Republic of Serb Krajina. The evidence in the case was ceded to the War Crimes Prosecution Office by the Croatian State Prosecution Office in accordance with the Agreement on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide. The Karlovac County Court in 2001 convicted Zdravko Pašić and his accomplice Milan Grubješić to twelve years in jail each. Pašić was sentenced *in absentia* and is at large, while Grubješić is serving his sentence.

*2.4.3.3. "Lovas" Case*. – The War Crimes Prosecution Office in November filed an indictment against 14 persons, who are accused of committing a war crime in Lovas, Croatia, as members of the JNA, the local territorial authorities and the paramilitary unit Dušan Silni. They are charged with killing 70 Croatian civilians. Twenty-two civilians were killed in their homes or yards during the attack on the village of Lovas on 10 October 1991 and another 23 people in makeshift prisons on 18 October. Twenty-two civilians were killed when they were forced to walk through a minefield and another three perished in sporadic incidents. This is the first time JNA troops have been accused of war crimes by the domestic judiciary.

The trial of 18 persons charged with the crime of genocide and crimes against the civilian population at Lovas opened before the Vukovar County Court War Crimes Chamber back in 2003. Given that some of the accused were in Serbia and that their extradition to Croatia is not allowed under the law, the Serbian War Crimes Prosecution Office took over jurisdiction for their prosecution. It began the investigation into the Lovas case in 2005 and has since been cooperating with its Croatian counterpart on the case. Over 100 witnesses, 50 of them from Croatia, have been heard to date.

## 2.5. Organised Crime Trials in Serbia[585]

Trials before the Special Organised Crime Chamber of the Belgrade District Court are conducted in accordance with the provisions of the Criminal Procedure Code,[586] which, like legislation in other countries, envisages special institutes for combating organised crime: the institute of undercover agent (Art. 504 (nj)), the institute of witness collaborator (Art. 504 (d–i)) and the controlled delivery measure (Art. 504 (o)).

A first-instance judgement was delivered in 2007 in the trial of assassins of Prime Minister Zoran Đinđić on 12 March 2003, the most important trial in the history of the Serbian judiciary. The judgement includes an analysis of the assassination, the description of the events preceding and following it, an analysis of the roles of the perpetrators of the crime, the statements of the witnesses, et al. The court established that a conspiracy had been forged with the intention of undermining the constitutional order and security of the state with the aim of gaining influence over the leading state officials by creating insecurity and unrest by assassinating the PM and several other senior officials and by other acts of violence. The evidence and facts corroborating the guilt of the accused Zemun Clan members are numerous and incontestable. The proceedings, however, failed to provide answers to a number of questions related to the PM's assassination and the events that ensued. The link between the armed rebellion of the Special Operations Unit (JSO) and the assassination was not established; nor was the role of MIA Dragan Jočić and former Justice Minister Zoran Stojković in the surrender of the main defendant Milorad Ulemek Legija. No light was shed on the role of Serbian Prime Minister Vojislav Koštunica either. The reasons for the absence of political will and support to institutions combating organised crime are clear when one takes into account the above and the fact that the latter have been part of Serbia's executive for a number of years now. Although the judicial panel's explanation of the judgement and some statements made by the special prosecutors indicate that they recognise the importance of shedding light on the political background of Đinđić's assassination for establishing rule of law in Serbia, the lack of courage of the prosecutors and the court to shed light on these events cannot be justified by the lack of political will and support of other state institutions.

The executive indirectly exerted pressure on bodies charged with combating organised crime in 2007. The absence of any efficient investigations of the assassination attempts on and threats against judges of the Belgrade District Court Special Organised Crime Chamber (hereinafter: Special Chamber) constitutes one form of such pressure. MIA Dragan Jočić's dismissal of police officials who had taken part

585 This text is the result of one-year work by BCHR associates on the project entitled "Monitoring and Reporting the Activities of Judical Institutions in Serbia in the Field of Organised Crime, War Crimes, Discrimination and Domestic Violence". See n. 569.

586 *Sl. glasnik RS,* 58/04.

in filing a criminal report against former Electric Company of Serbia (EPS) officials for signing harmful contracts with Vuk Hamović's company Energy Financing Team (EFT) and Vojin Lazarević's company Interface are another illustration of such pressures. Jočić's move brought pressure to bear on the prosecutors with respect to the prosecution of the crimes listed in the criminal report; it will no doubt impact on any trial of the persons charged with organised crime in the report.

Some of the trials under way before the Special Chamber constitute a form of confrontation with the past. The Supreme Court of Serbia's jurisprudence, however, is an incessant reminder of how difficult such confrontation is and how direly in need of reform the Serbian judiciary is if it is to effectively fight organised crime. This is corroborated by an unusual precedent regarding the voting of Supreme Court judge Milena Drecun, who refused the sign the records on the court deliberations and voting, whereby she violated the decision-making procedure in third-instance criminal proceedings of the men who had killed Ivan Stambolić and attempted to assassinate SPO leader Vuk Drašković in Budva and regarding the payment of 4 million dinars (around 50.000 Euro) in compensation for sustained mental anguish, damaged reputation and honour, freedom and rights of person during the *Sabre* campaign.

### *2.5.1. Assassination of Prime Minister Zoran Đinđić*

*2.5.1.1. Judgement*. – The Special Chamber on 23 May 2007 delivered its first instance judgement against the assassins of Serbia's Prime Minister Zoran Đinđić. The assassination organisers and assassins were convicted to maximum sentences on the basis of numerous and incontestable pieces of evidence presented during the trial. The main defendant, Milorad Ulemek *aka* Legija, who had organised the assassination, was convicted to 40-year imprisonment, as was Zvezdan Jovanović, the man who had pulled the trigger. Zemun criminal clan members Aleksandar Simović, Ninoslav Konstantinović, Vladimir Milisavljević and Sretko Kalinić were each sentenced to 35 years in jail, while Miloš Simović, Milan Jurišić, Dušan Krsmanović, Branislav Bezarević and Željko Tojaga were each convicted to a total of 30 years in jail for multiple offences. Saša Pejaković, who remained at liberty during the trial, was sentenced to eight years in jail. Ulemek, Jovanović, Aleksandar Simović, Krsmanović, Bezarević and Tojaga will remain in custody until the judgement becomes final, while Miloš Simović, Konstantinović, Milisavljević, Kalinić and Jurišić are still at large. Saša Pejaković is still prohibited from leaving Belgrade and is obliged to report to the police regularly.

Presiding judge Nata Mesarović signed the written judgement on 9 November. Under the law, the parties to the proceedings had 15 days to file their appeals from the day they received the judgement. After the expiry of the deadline, the whole case file was submitted to the Supreme Court of Serbia, which has the jurisdiction to hear appeals of Special Chamber judgements. Belgrade press reported in the latter half of November that the defence counsels appealed the judgements.

Continual pressures had been exerted on the judicial panel throughout the trial. Presiding judge Nata Mesarović received a number of threatening text messages on her cell phone. There was an attempt to assassinate the President of the Belgrade District Court Special Department when unidentified perpetrators unscrewed the wheels of his car. Judge Mesarović was also exposed to pressure when the former lawyer of witness collaborator Milenković, Biljana Kajganić, filed charges against her alleging unlawful judicial conduct.

Just as the presentation of evidence was drawing to a close, the defence counsels tried to extend the proceedings by filing motions for the repeated presentation of some evidence and by putting on the witness stand numerous witnesses for the defence who tried to provide alibis for some of the defendants. The latter move was undoubtedly aimed at overturning the indictment. Members of the disbanded Special Operations Unit (JSO) tried to give Zvezdan Jovanović and Milorad Ulemek alibis. The question arises why these witnesses had waited three years and why they had not given their statements earlier. There may be two answers to this question: either the investigation had not been thorough or the defence counsels applied the formula that had apparently been used in the trials of men who had attempted to assassinate Vuk Drašković in Budva, when witnesses providing alibis for the defendants were called to the witness stand at the very end of the trial. Given that the court established that these alibis were false, the prosecutors ought to initiate criminal proceedings against the witnesses who committed perjury in court. Moreover, the witnesses providing the alibis were mostly former members of the disbanded JSO and now hold various positions in the police throughout Serbia.[587]

The judicial panel rejected the defence lawyers' motions for presentation of evidence, including the motions to again call opposition LDP leader Čedomir Jovanović and other public figures to the witness stand. It explained that "all the rejected motions are either superfluous as evidence or have been sufficiently examined during the investigation or may constitute the object of other proceedings".

Counsel acting on behalf of Ružica Đinđić, the widow of the late Prime Minister and an injured party in the proceedings, lawyer Srđa Popović suggested the question of witnesses who may be able to shed light on the motives of the JSO protest in November 2001[588] and the circumstances in which the main defendant Ulemek surrendered to the Serbian police. The judicial panel rejected his motions to hear Serbian PM Vojislav Koštunica, MIA Dragan Jočić, Director of the Security Intelligence Agency (BIA) Rade Bulatović, former Koštunica adviser Gradimir Nalić, Radio Television Serbia (RTS) Director Aleksandar Tijanić and former MIA Inspector General Vladimir Božović.

The panel approved lawyer Popović's motion to put former head of the Yugoslav Army intelligence service general Aco Tomić on the witness stand; no new

587 A former member of Ulemek's security staff is actually now holding a job in the MIA witness protection department!

588 More in *Report 2001*, II.2.5.

facts were, however, revealed during his testimony. Judge Mesarović prohibited the question lawyer Popović posed about Tomić's links and meetings with Ulemek and the other defendants, explaining that the question was based on the information not included, that is, exempted from the records i.e. part of the statement Zemun Clan member Dušan Krsmanović gave during the investigation of the "*Zemun Clan"* case.

The panel also rejected lawyer Popović's motion to include in the evidence the transcripts of the telephone conversation witness collaborator Milenković had with his then lawyer Biljana Kajganić due to a formality – the investigating judge's order to wiretap Milenković had not been dated. Moreover, the court qualified as contestable the fact that the phone transcript had been delivered to the then presiding judge Marko Kljajević.

Deputy Organised Crime Special Prosecutor Jovan Prijić amended the indictment and abandoned the criminal prosecution of Dejan Milenković aka Bagzi, Miladin Suvajdžić and the late Zoran Vukojević aka Vuk,[589] who had earlier been granted the status of witness collaborator. Saša Pejaković, initially charged with complicity, was finally accused of being an accessory after the fact so that his custody was annulled *ex officio* because this crime carries a maximum eight-year imprisonment penalty.

The closing arguments were made by the deputy prosecutor, the lawyers of the injured parties, Đinđić's bodyguard wounded in the assassination Milan Veruović in the capacity of injured party, the defence attorneys, the principal defendant Milorad Ulemek and the legal representatives of the Đinđić family. RTS carried live most of the closing arguments. Đinđić family counsels Danilović and Popović underlined in their closing arguments that the motive for and political background of the assassination had been insufficiently investigated.

In the oral explanation of the judgement, judge Nata Mesarović spoke about the evidence on the basis of which the truth about the assassination of the PM was established, of the events that preceded it and the earlier unsuccessful assassination attempts by which a link between the disbanded JSO, the State Security and the Zemun Criminal Clan members had been clearly established. In her explanation, judge Mesarović spoke about the constructions the defence used during the proceedings and the numerous expert witness findings and testimonies on the basis of which it was proven that the defence of the accused was fabricated and untrue.

In its assessment of the political motive behind Đinđić's assassination, the judicial panel adhered to its view that the political background of the assassination had been sufficiently clarified, that no politician had inspired the crime and that it was neither necessary nor important to establish who was responsible for creating the political climate conducive to the assassination. It also gave its view on the JSO rebellion by pinning on the Special Organised Crime Prosecutor the responsibility for failing to investigate the facts related to the rebellion and to initiate proceedings.

589 See below details of the investigation into the murder of Zoran Vukojević Vuk.

After reading out the explanation, judge Nata Mesarović expressed her opinion on the unclarified lapses in the work of the state services on the day of the assassination and the possibility of a criminal association following, persecuting and planning the assassination of the country's prime minister. She qualified the state's actions aimed at protecting the Đinđić as incomprehensible and ludicrous.

The delivery of the verdict was itself marked by unusual conduct of the persons sitting in the part of the courtroom designated for the families of the defendants and of the court guards who disobeyed judge Mesarović's explicit order to prevent anyone from leaving the courtroom during the reading of the judgement.

*2.5.1.2. The Political Background of the Assassination*. – Acting Special Organised Crime Prosecutor Slobodan Radovanović said in June 2007 that he had opened a case on the "background of the assassination of Prime Minister Zoran Đinđić". The Office spokesman Tomo Zorić issued an inappropriate statement on the occasion in which he in advance qualified the crime committed by the JSO in 2001 as a protest. Both the organised crime prosecutors and judicial panel refused to go into the political background of the assassination during the nearly four-year long proceedings against Đinđić's assassins; the prosecutors kept on reassuring the public that they would open a separate investigation into the issue.

Four months after the delivery of the judgement and the prosecution's announcement that it opened an investigation into the political background of the assassination, Radovanović appeared in public, but not to present the results of the investigation undertaken so far, an issue of primary importance to Serbia's citizens. He instead expressed "surprise that many called for an investigation into the issue and then went quiet". Radovanović has begun preparing the public for the failure of the investigation by saying that "it is a devilishly difficult job and the question is whether we're ever going to reveal it". He then went on to say that "the case will be closed if it transpires that there was no political background to the murder of PM Đinđić". BCHR maintains that the prosecution should begin by requiring the questioning of all current senior state officials who had during the Đinđić trial failed to clarify their roles in a series of events, such as the surrender of the main defendant Milorad Ulemek or the support to the JSO armed rebellion.

*2.5.1.3. Interview of Defendant Milorad Ulemek Legija.* – While judge Mesarović was writing the judgement, the dailies *Kurir* and *Glas javnosti* published an allegedly authentic interview with Milorad Ulemek Legija, convicted for organising the assassination of PM Zoran Đinđić, Ivan Stambolić and the attempt to assassinate Vuk Drašković.

Presiding judge Nata Mesarović had not approved the interview. The head of the Penal Sanctions Directorate department charged with treatment of prisoners claims Ulemek had had no contact with journalists and that the latter is deprived of all means of communications in his cell. The Directorate report states that Ulemek had been visited only by persons authorised to visit him and that there are no indica-

tions that the Belgrade District Prison staff "participated" in the publication of the interview in any way.

Acting Special Organised Crime Prosecutor Slobodan Radovanović issued an order to investigate whether the law has been violated. The Ministry of Culture, which is charged with the media as well, unfortunately does not have legal powers to launch proceedings against *Glas javnosti* and *Kurir*.

The publication of the interview with Ulemek is yet another in a series of campaigns some media have been conducting with the aim of deluding the public about the facts related to the assassination and the political background of the assassination. Ulemek's interview is directly aimed at destabilising the institutions combating organised crime and undermining public support to their work. It simultaneously constitutes a form of pressure on the Supreme Court of Serbia which is to review the appeals filed by the defence.

### *2.5.2. Other Trials before the Belgrade District Court Special Department*

*2.5.2.1. "Zemun Clan" Case*. – Members of the so-called Zemun Clan are tried by the Special Chamber for criminal association, 15 murders, 3 abductions and terrorist attacks on the company Defence Road and DSS main office in Belgrade. Court experts concluded after the psychiatric evaluation of the defendants that all of them were sane.

The use of the institute of witness collaborator has been of major significance in this case. Ljubiša Buha Čume and Miladin Suvajdžić *aka* Dumb Đura testified behind closed doors. Dejan Milenković Bagzi gave his account of the events later. This witness collaborator linked the main defendant Ulemek with the blowing up of the machines owned by the company Defence Road which, as court experts confirmed, was the work of professionals. Milenković said that the murders of Todor Gardašević and Branislav Lainović were agreed in the Kotobanja shopping centre, owned by Ljubiša Buha; he said they were executed at the order of Dušan Spasojević and that defendant Aleksandar Simović was one of the men who had followed them. Aleksandar Matić testified about Aleksandar Ristić's murder, for which defendants Jurišić and Konstantinović have been charged; Matić was himself wounded during the commission of this crime. Witness Suad Musić did not join in the prosecution and asked the court to exempt him from appearing before it due to the traumas he had sustained during the abduction and torture he had been subjected to.

Darko Milićević, accused of killing Goran Trajković, first pleaded innocence, but then opted for defending himself by remaining silent. Nikola Skerlić's testimony was to have confirmed the charges in the indictment according to which Vladimir Milisavljević and Miloš Simović shot Srđan Ljujić dead. Skerlić was in the car with the late Ljujić during the shoot-out and had sustained light bodily injuries. However, he said at the main hearing that he had not seen the assailants and would not join in the criminal prosecution. The defence attorneys insisted on confrontations of wit-

ness collaborators Dejan Milenković and Ljubiša Buha, maintaining that there were many inconsistencies in their testimonies. Two Belgrade police inspectors said in their testimonies that Zemun Clan leader Dušan Spasojević was not a registered police informant, but an informal contact of police inspector Slobodan Pažin; the latter is accused of helping Dušan Spasojević and the Zemun Clan conceal the murders they had committed and passing on to them the details the police discovered in their investigations. Several friends of the accused testified in September providing them with alibis for 12 June 2002, the day Slobodan Radosavljević Bulka was killed. This approach – of people close to the defendants providing them with alibis – is identical to the one applied in the Ibar Road trial and in the trial of Đinđić's assassin Zvezdan Jovanović. Serbian police experts testified that the traces of two of the accused, Darko Milićević and Milan Jurišić, were found at the scene of Goran Trajković's murder.

Defendant Aleksandar Simović presented his defence at the end of the evidentiary proceedings first because he considered the indictment unclear and then because of ill health. Simović told the court he had been hiding in Argentina since August 2006 after criminal charges were raised against him. He denied he had committed the crimes he was charged with and voiced accusations against Čedomir Jovanović, Dušan Mihajlović, Goran Vesić, Vladimir Beba Popović, Milorad Dodik and former prosecutor Milan Sarajlić. Simović stated that witness collaborator Zoran Vukojević Vuk was killed because of Dušan Spasojević's money; given that his DNA was found at the scene of the crime, Simović is suspected of complicity in the murder and torture of Vukojević. Simović's accounts coincide to an extent with the allegations Milorad Ulemek made in his interview and can be interpreted as part of a broader campaign aimed at undermining the authority of the judiciary and refuting the political background of the assassination about which Vukojević had testified.

The accused and the witness collaborators were confronted at the main hearings in October. Although the trial was closed to the public at the request of witness collaborator Ljubiša Buha, a lot of information was leaked to the media. Aleksandar Simović accused Buha of killing Željko Mihajlović aka Crnogorac. This murder is not covered by the indictment and the prosecutors proceeded to check Simović's allegations. Milenković and Ulemek traded a large number of recriminations during the confrontation. Milenković, for instance, accused Ulemek of trying to kill Ljubiša Buha, which Ulemek denied. The presiding judge adjourned the confrontation a number of times because of the insults the two hurled at each other. During the confrontation, Simović accused Milenković of numerous crimes, *inter alia* the murder of Momir Gavrilović, the bomb attack on the DSS Belgrade headquarters, a large number of abductions and rapes.

The judicial panel decided to try Nikola Bajić separately as he has been unable to attend the trial due to ill health. The judicial panel quoted the effectiveness and efficiency of the ongoing proceedings as the reason for its decision. A separate case file on Bajić will be opened.

Apart from the trial before the Special Chamber, Zemun Clan members are *inter alia* charged with abducting businessman Miroslav Mišković before the Fourth Municipal Court in Belgrade. Aleksandar Simović, Dušan Krsmanović, Nikola Bajić and Nenad Opačić have been accused of being the principal perpetrators of the crime. The opening of the main hearing was marked by the failure to bring the defendants to court after it was assessed that the courthouse was not safe enough. These reasons prompted the authorities to announce that the trial would in the future be held in the Special Court. Miladin Suvajdžić testified at the main hearing and again claimed that the Zemun Clan members were responsible for a number of murders and the abductions of wealthy people, notably Milija Babović, Vuk Bajrušević and Suad Musić. He emphasised that Miloš and Aleksandar Simović split between them the one million DM of ransom they got for setting businessman Milija Babović free.

The presentation of evidence ended in mid-November. The judgement in this case is expected in early January 2008.

*2.5.2.2. "Bankruptcy Mafia" Case*. – The trial of the so-called Bankruptcy Mafia began in mid-January 2007. Under one of the probably longest indictments in the history of Serbian judiciary (181 pages) the members of this group are charged with accepting and giving bribes, abusing their official positions and unlawful judicial conduct. Thirty-five people have been indicted for committing a total of 105 crimes by engaging in malversations and illegal bankruptcy procedures whereby they incurred over 50 million Euro of damages to the state. The indictment charges former Belgrade Trade Court President Goran Kljajević as the main defendant, and lawyer Nemanja Jović, businessmen Sekula Pijevčević and Slobodan Radulović, former Director General of the supermarket chain "C market" as the leaders of this criminal group. Belgrade Trade Court judge Delinka Đurđević and former Postal Savings Bank Director Jelica Živković have also been indicted in this case.

Evidence was being presented at the trial of this criminal group before the Special Chamber at the end of the reporting period. The trial has so far revealed some of the mechanisms of corruption in the state structures, the ways in which companies like Rad, C Market and Postal Savings Bank nearly went under due to harmful bankruptcy and privatisation procedures and credit arrangements. With the help of the Belgrade Trade Court judges, this group appointed bankruptcy managers and CEOs and then ensured the companies operated with losses for the purpose of obtaining illicit personal gain. The prosecution will call over 200 witnesses and present over 1000 pieces of material evidence at the trial.

*2.5.2.3. "Pay Toll Mafia" Case*. – The Belgrade District Prosecutor filed an indictment in 2006 against the members of the so-called Pay Toll Mafia accused of criminal association and complicity involving abuse of post. This criminal group had incurred the state over 6.5 million Euro of damages by issuing false toll tickets and collecting the tolls.

The accused are charged with committing the crime by using special machines for issuing road toll tickets that were not registered at the toll ramps and a special computer programme that tampered with the official registration of cargo vehicles with foreign licence plates, whereby they appropriated the collected road tolls that were not registered by the toll computers.

Fifty-three people have been indicted; Milan Jovetić, the main defendant, denied committing the crime. The evidence presented revealed that the organisers of the group took 40% of the illegal proceeds, while 25% of the money went to the toll ramp shift leaders. The testimonies of the accused and their admissions provided proof about how the new toll-booth workers were trained and the hierarchy within the criminal group.

*2.5.2.4. "Belgrade City Transport Mafia" Case*. – Members of the so-called Belgrade City Transport Mafia had been charged with issuing and selling nearly five million forged public transport tickets and monthly passes used in Belgrade and Batajnica in the October 2005-end January 2006 period, whereby they incurred 128 million dinars (around 1.6 million Euro) of damages to the Belgrade City Transport Company. The indictment against the members of this criminal group came into force in September 2006 and the court delivered its judgement on 22 June 2007. Gojko Samardžić, who had organised the group, was sentenced to six years and three months in jail, while the others were convicted to between 2 and 4 years in prison.

*2.5.2.5. "Kertes" Case*. – The trial of Milošević-era chief of Federal Customs Mihalj Kertes for abuse of post began in early September 2007. According to the indictment, Kertes enabled and organised the transfer of millions of DM from the state budget to bank accounts in Cyprus during the rule of Slobodan Milošević. Kertes has also stood trial for other crimes committed during Milošević's reign. He was found guilty as accessory after the fact in the Ibar Road trial (an attempt to assassinate opposition leader Vuk Drašković that left four men dead) and convicted to two years and five months in jail (the judgement is not final yet). Kertes has also been accused in the so-called Tobacco Mafia case.

According to the indictment, the then President of Serbia Slobodan Milošević in 1994 organised a criminal group which apart from Kertes included deputy Federal Deputy PMs Nikola Šainović and Jovan Zebić. He instructed them to illegally cede part of the money collected by customs to natural and legal entities, political parties and the State Security Service. The Beogradska banka, Zastava weapons plant, Krušik Valjevo, Prvi partizan Užice, Gemaks, Jumko Vranje, Prvi maj Pirot are the just some of the 1182 companies funded in this manner. Šainović and Zebić had been tasked with preventing the Federal Budget Inspection from controlling the work of the Federal Customs.

Kertes allocated the tax payers' money in accordance with the orders he got from Slobodan Milošević – he gave 900,000 DM to SPS officials Nikola Šainović and Dušan Matković and 3 million DM to Živadin Jovanović to fund the SPS.

Kertes gave a total of 12 million DM to SPS official Uroš Šuvaković to fund the SPS election campaign; on the eve of 5 October 2000, Kertes gave around one million DM to head of the State Security Rade Marković.

In response to the charges in the indictment, Kertes explained the mechanisms which Milošević's regime used to pay social benefits, keep the retail prices of staples low and pay the various state dues. He said that all foreign payments were made via the account of Beogradska banka. Speaking about the transfer the money of Serbia's tax-payers to private accounts in Cyprus banks, Kertes emphasised that there was an accurate logbook of flights to Cyprus and amounts of money transferred there.

The investigation conducted by ICTY Financial Investigator Morten Torkildsen also sheds light on the financial malversations by the state structures in the Milošević era. Torkildsen composed a detailed report on the financial transactions and bank accounts in Cyprus (and other locations) of senior state officials of the then FRY, businessmen and Milošević family members. After Torkildsen ceded his report to Serbia's state authorities, the competent bodies conducted various pre-investigation activities and froze the funds deposited in foreign bank accounts. No court proceedings have, however, been initiated nor has any state representative provided a plausible explanation for non-action. Rade Terzić, the Belgrade District Attorney until 2003, believed there was not enough evidence in the criminal reports to initiate criminal proceedings; consequently, the money deposited in the private foreign bank accounts was unfrozen and it is highly unlikely it will ever be retrieved.

*2.5.2.6. "Car Insurance Mafia" Case*. – The members of the so-called Car Insurance Mafia are charged with a number of crimes related to collecting car insurance. Zoran Stojanović and Slobodan Knežić, former customs officer, have been indicted for organising a group that bribed policemen between 500 and 1000 Euro for each bogus traffic accident report on the basis of which the former claimed car insurance, whereby the car insurance companies sustained damages amounting to hundreds of thousands of Euro. The accused policemen admitted that they knew Slobodan Knežić and Zoran Stojanović but denied taking the bribes. At the proposal of the defence counsel, the judicial panel allowed seven of the accused to await trial at liberty and prohibited them from leaving their towns of residence. Svetlana Glišić, partner of the main defendant Slobodan Knežić, Branko Škarić, a *Wiener Städtische* damage assessor, and policemen Dušan Đurković, Slobodan Đošović, Branko Kostadinović, Miroslav Starčević and Dobrosav Laćarak were released from custody while Slobodan Knežić, Zoran Stanojević, Petar Tomašević, *Wiener Städtische* damage assessor Arsen Žuža and traffic policeman Darko Mrkić remained in detention.

*2.5.2.7. "Tobacco Mafia" Case*. – The Belgrade Organised Crime Prosecution Office launched an investigation of three organised criminal groups charged with the illegal trafficking and sales of cigarettes in the 1990s. The tobacco mafia

comprised several organised groups. The prosecutors have begun prosecuting the groups led by Stanko Subotić Cane, Slobodan Milošević's son Marko and so-called Badža's group headed by Siniša Stojčić, the brother of Radovan Stojčić Badža, who had held the post of Deputy MIA before he was assassinated in the Milošević era.

Police investigation revealed that there were three methods of cigarette trafficking. The first involved transportation of cigarettes by trucks from Macedonia to Serbia; at the border crossing, these trucks were allowed to continue to a bogus final destination and then their bogus departure from the country would be registered at the Bogojevo border crossing with Hungary where they were "taken over" by a bogus buyer. Upon arrival at Bogojevo border crossing, the trucks with the uncleared cigarettes would leave the country only for a moment but would immediately return under police escort into Serbia and unload the cargo in warehouses in Futog, Novi Sad and Rumenka.

The second mechanism involved the legal purchase of cigarettes by an unnamed businessman abroad. These cigarettes would be shipped in truck convoys from Western Europe to the border crossing with Hungary Kelebija. Federal Customs chief Mihalj Kertes would then sent Extraordinary Control Measures teams to the border crossing to take over the control of the border from the ordinary customs officers; these teams would keep the borders open for hours, allowing the free passage of the trucks with the cigarettes into Serbia. The trucks were escorted by cars with police licence plates.

The third mechanism entailed the use of forged invoices for cigarettes legally imported from Macedonia. Eight of the 15 accused members of Subotić's group have been arrested while seven, including principal Subotić, are at large. Former heads of the Novi Sad police and state security Miodrag Zavišić and Milovan Popivoda, and founder of the para-military unit Scorpions Milan Milanović Mrgud have also been charged with the crime. Under the indictment, Stanko Subotić Cane succeeded in building cigarette smuggling channels across the Balkans, thanks to the support of political and police authorities in nearly all former SFRY countries. Cigarette trafficking in Serbia was facilitated by the state bodies, notably the customs authorities headed by Mihalj Kertes at the time.

Marko Milošević also enjoyed the state's logistic support in his cigarette trafficking endeavours. His group trafficked cigarettes into Serbia via the border crossing with Bulgaria at Gradina. The truckloads of cigarettes were legally shipped on behalf of the company Tref to the border crossing and all the accompanying documents were in order. However, as the trucks entered no man's land between Bulgaria and Serbia, the drivers were given new documents according to which the cigarettes were merely transiting Serbia. The drivers were given new bills of lading containing false data on suppliers, buyers and types of goods. The trucks would then stop at the shipping agents where customs documents with the false data would be prepared. There are indications that Milošević's wife Mirjana Marković, too, was involved in the trafficking of cigarettes that ended up on the black market in Bel-

grade and throughout Serbia. Part of the profit from their sale was used to keep her husband's regime in place in the nineties.

*2.5.2.8. Other Criminal Reports, Investigations, Arrests and Indictments Related to Organised Crime*. – State authorities have also investigated the members of the so-called Petroleum Mafia, which illegally imported and sold petroleum products. The Special Organised Crime Prosecution Office filed an indictment against the members of this group, naming owner and Director General of the company Protekta Miša Stojanović as it chief and Dejan Ketić, Slobodan Obradović, Dragan Milak, Aleksandar Vojinović and Mitar Odalović as its members. They are charged with acting under Stojanović's orders and importing D2 diesel fuel declaring they were importing fuel used in production.

Belgrade District Court Special Department investigating judge Dragan Lazarević completed the investigation of the assassination of journalist Slavko Ćuruvija in late June 2007 and submitted the case to the prosecution, wherefore one may expect a court epilogue of this case after eight years. Lazarević heard over one hundred witnesses while he was investigating the assassination. He, however, failed to question Mirjana Marković, former state security chief Radomir Marković, the then chief of the Belgrade secret service Milan Radonjić and several other secret service agents the media had linked to the Ćuruvija assassination. The public and media have been speculating that no other than these people have been suspected of killing Ćuruvija; had they been questioned as witnesses, their statements could not later be used in court. The only eyewitness of the assassination identified a Luka Pejović as one of the two assassins from the police photographs in late 2003. Luka Pejović, who had a criminal record with the Montenegrin police for dealing drugs, was killed by unidentified perpetrators soon after 5 October 2000. Police had in their previous investigations linked Pejović to the JSO. Slavko Ćuruvija was killed on 11 April 1999, following a frightening media campaign against him by the outlets in the hands of the Milošević-Marković couple.

The murder of the witness collaborator in the trial of assassins of PM Đinđić, Zoran Vukojević, the former chief of security of Dušan Spasojević, is another example of hindering the successful prosecution of Zemun Clan members. Witness collaborator Vukojević had left the state witness protection programme after two years. In his statement before the Special Chamber, he gave indication of potential links between general Aco Tomić, Rade Bulatović and Vojislav Šešelj and the assassination of the PM, directly pointing to the political motives for the assassination. Investigating judge Vučko Mirčić has completed the investigation of his murder and found DNA traces of Zemun Clan member Aleksandar Simović at the scene of the crime. Although Vukojević's testimony about the political background of the assassination would appear to be sufficient motive for his murder, the police revealed during their investigation that the murderers were after a large amount of money that Vukojević had taken after Spasojević's death and buried in his backyard. The failure of the state bodies to safeguard Vukojević given his testimony merits the utmost condemnation.

The First Belgrade Police Department on 25 July 2007 filed a criminal report against four former senior officials of the Electric Company of Serbia for signing harmful contracts with the companies Energy Financing Team (EFT) and Interface owned by Vuk Hamović and Vojin Lazarević respectively. According to data in the criminal report registered in the District Prosecution Office under the number KU 1398/07, the state has suffered damages amounting to 978,236,591 dinars (nearly 12.23 million Euro). After the criminal report was filed, MIA Jočić intervened and had the three police inspectors working on the case dismissed. It is no secret that Hamović and Lazarević are close to PM Koštunica and his DSS. Minister Jočić is also a member of the DSS. In light of these circumstances, Minister Jočić's intervention can only be interpreted as abuse of ministerial powers to protect party interests.

Anton Stanaj, qualified by the Serbian police as "leader and financier of an international cigarette trafficking criminal group" was arrested in the police campaign dubbed Memfis in September. Stanaj was the chairman of the Management Board of the Podgorica company Rokšped with branch offices in Serbia, Croatia and Cyprus which has been involved in importing petroleum and petroleum products, car and tobacco sales. The Special Organised Crime Prosecution Office filed a motion for the investigation of Anton Stanaj, who allegedly heads the criminal group and other 14 persons suspected of being members of the group. They are suspected of bypassing customs and shipping, selling, distributing and hiding uncleared cigarettes.

An indictment has also been filed against a criminal group organised by Darko Erceg. Erceg is charged with purchasing heroin and cocaine; the indictment states that the other group members diluted the drugs, repacked them into 500-gram packages to facilitate their transportation and sale in Western Europe. The following people have also been indicted for the crime: Bojan Milković, Hikmet Hajrović, Zehnira Hajrović, Milica Grubić, Dejan Erceg, Nurko Nurković and Boban Tasić.

Belgrade police arrested Luka Bojović and Veljko Banović, suspected of helping hide Zemun Clan members and of a number of grave crimes committed in Serbia and abroad. The two are said to have led one of the most dangerous criminal groups in Serbia.

Nearly all former senior managers of the state-owned company Generalexport (Genex) were arrested in early October and charged with abusing their positions. The following were arrested: former Genex Director Milorad Savićević, former Directors General of Genex Petar Novaković and Ivica Lukić, former Director of the Kopaonik Tourist Centre, which is part of the company Internacional CG, Nebojša Premović, former Director General of Internacional CG Vladimir Gajić, and Director of the Privatisation Agency Legal Affairs Centre Ljiljana Mlađan. In 2004, Geneks ceded 1.2 hectares of land in New Belgrade to the consortium Neimar V, Kemoimpex and Irva Investments to build the Savograd centre in exchange for merely 1000 square meters of business premises in the building that would be built on the land. According to the police, these business premises were then resold to the consortium for 1,726,000 Euro, although they are worth around 2.5 million Euro on

the market. The consortium thus reaped profit at the expense of Geneks and the budget of the Republic of Serbia. The above are also charged with other illegal activities, such as granting free of charge board at the Kopaonik hotels Grand and Sunčani vrhovi whereby they incurred 4.5 million dinars (around 56.250 Euro) of damage to Internacional CG. The prosecutors asked the judge to order up to one-month custody of all six arrested. After hearing the accused, the investigating judge allowed them to await trial at liberty.

The Special Organised Crime Prosecution Office in September indicted a group of Wahhabis from Novi Pazar. The 15 men are accused of association to commit crimes against the constitutional order and in relation to the crimes of terrorism and unlawful possession of weapons and explosive material. One of them, Senad Ramović, is accused also of attempted murder in the first degree. Some of the indictees were arrested in March, while the others were apprehended in the police action in April 2007, when the leader of the group was killed, while one member of the group and one police officer were wounded.[590] In mid-April, the Special Organised Crime Prosecution Office stated that this case has been declared a state secret.[591]

## *2.6. Human Rights Situation in Kosovo and Metohija under UN Administration*

### *2.6.1. Introduction*

Most political analysts, scholars and journalists predicted that 2007 would be the decisive year for determining the future status of the Serbian province under UN administration. However, the United Nations Mission in Kosovo, which has been governing all aspects of life in Kosovo since the 1999 air strikes on the former Yugoslavia, is still in place. Just as it had been expected, the negotiations between the Serbian government and Kosovo Albanians, mediated by the "Troika" (USA/EU/Russia) did not reach any results.

The United Nations Interim Administration Mission in Kosovo (UNMIK) was established in accordance with UN Security Council Resolution 1244 (1999).[592] The Resolution 1244 entrusted UNMIK with the duty of performing all functions that a state normally performs and, at the same time, with the task of creating a basis for functional self-governance in the province. The Special Representative of the UN Secretary General (SRSG) bears the ultimate legislative and executive authority.[593]

590 *B92*, 14 September, www.b92.net.

591 *B92*, 16 April, www.b92.net.

592 UN doc. S/RES/1244, 10 June 1999.

593 Section 1 of UNMIK Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo of 25 July 1999.

Pending a final settlement over the Kosovo status and with the aim of creating conditions for the province's self-government, UNMIK transferred extensive powers to the Provisional Institutions of Self-Government (PISG). The transfer started already in 2001 but was particularly accelerated in autumn 2005 when the political process of determining the future status of Kosovo started. However, the large presence of the NATO-led military force in the province (KFOR) and the institutions operating in the areas predominantly settled by the Serbian community and directly financed by the Republic of Serbia have significantly decreased the extent of PISG's control over the territory.

SRSG Joachim Rücker on 1 June 2007 announced that the Mission had begun preparations for leaving Kosovo.[594] The UN mission will probably be replaced by an EU mission in 2008. Although the Ahtisaari plan[595] was not formally endorsed, it is used as guidelines for planning international engagement in the province in the absence of an agreed blueprint.[596]

### *2.6.2 Negotiations*

Martti Ahtisaari, former Finnish president, was appointed Special Envoy to the UN Secretary General in 2005 and tasked with elaborating a plan for the future status of Kosovo. In March 2007, after months of negotiations between the Serbian Government and the Kosovo Albanian "Unity Team", Ahtisaari presented his Comprehensive Proposal for the Kosovo Status Settlement to the UN Secretary General. The Secretary General subsequently presented the proposal to the Security Council.[597] Ahtisaari's plan proposed a sort of supervised independence for the province, including the possibility to seek membership in international organisations and become party to international agreements. A broad range of protection measures in favour of minorities was also included in Ahtisaari's "package", ranging from considerable autonomy of the areas predominantly inhabited by Serbs (decentralisation) to financial support to these areas from the Republic of Serbia.

Belgrade and Priština did not come any closer to an agreement on the future status of Kosovo during the negotiations. Belgrade proposed a broad autonomy of Kosovo within Serbia under which Kosovo could not become a member of any international organisation or have an army, whereas Priština did not agree to any other solution save full independence. The Kosovo Albanian parliament on 14 March 2007 fully supported the solutions in the Ahtisaari plan,[598] but Belgrade rejected it.

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594 *Express, Kosova Sot, Epoka e Re*, 1 June 2007.

595 Comprehensive Proposal for the Kosovo Status Settlement, Addendum to the Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council.

596 Interview with the representatives of the ICO Planning Team, 18 September 2007, Priština.

597 *Ibid.*

598 European Commission, *Kosovo (Under UNSCR 1244) 2007 Progress Report*, Brussels, 2007, p. 5.

Belgrade and Priština held direct talks after the Ahtisaari plan was not upheld by all parties. These talks, too, ended in failure. The "Troika" was expected to present its final report to the UN on 19 December. The delay of any decision on the status until the announcement of the results of the Serbian presidential elections scheduled for 20 January 2007 will, however, be the most probable outcome after the failure of the talks between the delegations from Serbia and Kosovo.

Whilst mostly focusing on status negotiations, both international and local authorities at central and municipal levels often paid little attention to the everyday problems of Kosovo's residents. Negotiations about its final status overshadowed many of the pressing human rights issues in 2007.

### *2.6.3. Human Rights in Kosovo Legislation in 2007*

The legal system in Kosovo remains an overtly confusing and complicated amalgam of different sources of law. Besides the legal texts enacted by the UNMIK administration, the laws applicable in Kosovo also include the Kosovo Assembly laws promulgated by the SRSG and laws that were in force in Kosovo *on* 22 March 1989. If a subject matter is not covered by the above sources, laws adopted in Kosovo *after* 22 March 1989 also apply under the condition that they are not discriminatory and are in accordance with international human rights instruments.[599] In addition, although Kosovo does not have the international legal subjectivity necessary to become a party to an international treaty, the major human rights instruments are directly applicable in the territory of the province by virtue of UNMIK Regulation 1999/24 and the Constitutional Framework for Provisional Self-Governance.[600]

A legal system composed of such a great number of disconnected sources of law is inevitably characterised by lack of legal certainty and transparency. Not only is it hard to grasp which law to apply in a specific situation; the applicable laws are hard to access as well. While old Yugoslav laws still applicable in Kosovo are almost impossible to find, other laws – including the directly applicable international human rights instruments – are often not translated into the official languages or can be accessed only via the Internet.

Another hindrance lies in the fact that hardly any of the Kosovo Assembly laws or UNMIK regulations specify which laws or provisions they have replaced and contain only a general provision about superseding any other inconsistent legal acts. It is even less clear which laws from the Yugoslav times are still applicable i.e. which of them are not discriminatory, as there is still no higher judicial body competent to address such matters. The Special Chamber of the Supreme Court for Constitutional Matters, as foreseen in Chapter 9.4.11 of the Constitutional Frame-

599 Art. 1 of UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo of 12 December 1999 as amended by UNMIK Regulation No. 2000/59 of 27 October 2000.

600 Art. 1 of UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo, Chapter 3 of UNMIK Regulation No. 2001/9 on the Constitutional Framework for Provisional Self-Government in Kosovo of 15 May 2001.

work, has not been constituted yet. The UNMIK Department of Legal Affairs has rarely exercised its powers to give authoritative interpretations of the UNMIK regulations and has thus left many human rights related norms ineffective in practice.

Almost without exception, laws and regulations enacted in Kosovo enter into force immediately after being promulgated by the SRSG without any *vacatio legis* i.e. the time of delay between the promulgation of a law and its entry into force.[601] This increases the periods necessary for the implementation of laws and, when it comes to human rights legislation, creates an unfortunate picture in which the legal texts are being passed only for the sake of demonstrating that human rights standards are being fulfilled rather than because there is an adequate institutional set-up and readiness to implement them.

Despite the Kosovo Assembly's intensive legislative activities, none of the laws passed in 2007 were of direct relevance to the state of human rights in the province. Only two regulations enacted by UNMIK at the beginning of the year and several Administrative Instructions issued by the PISG directly address human rights protection.

*2.6.3.1. Establishment of the Human Rights Advisory Panel*. – The SRSG issued UNMIK Regulation No. 2007/3 amending UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel[602] in January 2007 with the aim of enabling its final establishment. The Panel, which only has advisory powers, is supposed to deal only with the "complaints relating to alleged violations of human rights that had occurred not earlier than 23 April 2005 or arising from facts which occurred prior to this date where these facts give rise to a continuing violation of human rights".[603]

*2.6.3.2. Appointment of the Ombudsperson in Kosovo*. – Another legal act endorsed in 2007 and relevant to human rights protection is UNMIK Regulation No. 2007/15 amending UNMIK Regulation No. 2006/06 on the Ombudsperson Institution.[604] Its primary goal is to simplify the procedure for appointing a new Om-

601 The main purpose of this institute is to give the public and those institutions applying the law a chance to adjust and prepare for the new legal situation. As such, *vacatio legis* is a necessary feature of an accessible and transparent legal system. See the case law of the European Court of Human Rights (for instance, *the Sunday Times v United Kingdom* ([1979–80] 2 EHRR 245, 26 April 1979) or the cases including the quality of domestic remedies such as *Akdivar and Others v. Turkey* (judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, p. 1210, para. 67)*, Andronicou and Constantinou v. Cyprus* (judgment of 9 October 1997, Reports 1997-VI, pp. 2094–95, para. 159)*, Assanidze v. Georgia,* (71503/01 [2004] ECHR 140 (8 April 2004), para. 127, etc.).

602 UNMIK Regulation No. 2007/3 amending UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel of 12 January 2007.

603 Section 2 of UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel of 23 March 2006.

604 UNMIK Regulation No. 2007/15 amending UNMIK Regulation No. 2006/06 on the Ombudsperson Institution of 19 March 2007.

budsperson. UNMIK Regulation No. 2006/06 as amended sets up an institution with the local ombudsperson and four deputies where two shall represent the local Serbian community and other local non-majority communities entitled to be represented in the Assembly, while one deputy shall be female.[605]

*2.6.3.3 Implementation of the Law on the Use of Languages*. – Subsequent to the promulgation of the long awaited Law on the Official Languages,[606] the Kosovo Government adopted Administrative Instruction No. 3/2007 on the Composition and Competences of the Language Commission in February 2007.[607] This body is to discharge the important task of receiving complaints and carrying out investigations aimed at "protect[ing] the official languages and their equal status in Kosovo, as well as ensur[ing] protection of the languages of communities whose mother tongue is not an official language".[608] Just two months later, the Ministry of Public Services issued Administrative Instruction No. 2007/01-MPS On Determining Administrative Sanctions for Violation of the Law on Language Use[609] with the goal of determining administrative sanctions "[to] be pronounced to the entity which violates the provisions of the Law on Language Use".[610]

*2.6.3.4. Establishment of Human Rights Units*. – In March 2007, the Prime Minister of Kosovo issued an administrative instruction on human rights units in the Kosovo Government Ministries.[611] The purpose of the instruction was to determine the structure of the human rights units that were supposed to be created within each ministry, by specifying their size, structure, and the range of their tasks. The instruction also envisioned regular reporting duties of the units and information exchange within the ministries and other governmental structures as well as regular cooperation with the Ombudsperson Institution. This legal text can be seen as a significant step forward in securing respect for human rights within the governmental structures in Kosovo. However, as in the case of Administrative Instruction No. 8/2005

605 Article 6.6 and 6.7 of the UNMIK Regulation No. 2006/06 on the Ombudsperson Institution as amended of 16 February 2006.

606 Law No. 02/L-37 on the Use of Languages as promulgated by UNMIK Regulation No. 2006/51 on the Promulgation of the Law on the Use of Languages Adopted by the Assembly of Kosovo of 20 October 2006.

607 See: Annex 1, Technical assessment of progress in implementation of the standards for Kosovo, United Nations Security Council (UN SC), 9 March 2007, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2007/134, paras. 10 and 23, at: http://www.un.org/Docs/sc/sgrep07.htm.

608 Article 32 of Law No. 02/L-37 on the Use of Languages of 20 October 2006.

609 Administrative Instruction No. 2007/01-MPS on Determining Administrative Sanctions for Violation of the Law on Language Use of 11 April 2007.

610 Article 1 of Administrative Instruction No. 2007/01-MPS on Determining Administrative Sanctions for Violation of the Law on Language.

611 Administrative Instruction No. 4/2007 on Securing the Structure and Integration of the Human Rights Units within the Kosovo Ministries of 19 March 2007, at: http://md-ks.org/?cid=2,407.

On Terms of Reference for Human Rights Units[612] that gave the initial impetus for the establishment of these bodies, its value is undermined by the fact that it is not accessible and that there are serious discrepancies between the versions in the two official languages.

*2.6.3.5 Implementation of the Anti-Discrimination Law*. – Similar problems have been observed *vis-à-vis* Administrative Instruction No. 04/2006 on Implementation of the Anti-Discrimination Law.[613] Although Kosovo became a society with one of the most advanced anti-discrimination laws in Europe back in 2004,[614] a long awaited legal instrument for its implementation saw the light of the day only in the spring of 2007.[615] Administrative Instruction No. 04/2006 is comprised of nine articles that are supposed to regulate several important issues, such as the nature, composition and responsibilities of the bodies responsible for the promotion of equal treatment,[616] bodies responsible for the implementation of the instruction[617] and time-frames for their establishment. The central provision of the Instruction is Article 3 identifying the Office for Good Governance and the Units for Human Rights in the ministries as the key bodies for the promotion of equal treatment.

As the Anti-Discrimination Law is designed to protect an individual against the very sophisticated forms of discrimination, one of the main objectives of the Instruction was to set the "practical and accurate definition[s] of the rights and obligations of [complainants] who claim to be victims of discrimination".[618] However, the Instruction accomplishes this aim just partially.

Be it due to the lack of resources or gross negligence with respect to the provisions of the very law it is supposed to implement, the spelling mistakes in both the English and Serbian versions of the Instruction[619] are so numerous that they

612 Administrative Instruction No. 8/2005 on Human Rights Units in the Kosovo Government of September 2005.

613 Administrative Instruction No. 04/2006 on Implementation of the Anti-Discrimination Law of 5 May 2006. Although the given instruction has been issued in 2006, the fact that it has become public just at the beginning of 2007 is the reason why it is dealt with in this year's Report.

614 Anti-Discrimination Law No. 2004/32 promulgated by UNMIK Regulation No. 2004/32 on the Promulgation of the Anti-Discrimination Law, of 20 August 2004.

615 More M. Matijević, "An outline on the Implementation of the Kosovo Anti-Discrimination Law – The Serbian Perspective", in: OSCE Mission in Kosovo, *Study on the Implementation of the Kosovo Anti-Discrimination Law*, Priština, 2007; Youth Initiative for Human Rights: *Report on the Implementation of the Kosovo Anti-Discrimination Law*, Priština, 2007.

616 Article 3, 4, 5, 6 of Administrative Instruction No. 04/2006 on Implementation of the Anti-Discrimination Law of 5 May 2006.

617 Article 7 and 8 of Administrative Instruction No. 04/2006 on Implementation of the Anti-Discrimination Law of 5 May 2006.

618 Article 1 of Administrative Instruction No. 04/2006 on Implementation of the Anti-Discrimination Law of 5 May 2006.

619 Since the English language version had the same legal validity as the Albanian and Serbian versions at the time of the endorsement of the Instruction, the analysis is based on all three language versions of the Instruction.

render the meaning of certain provisions dubious, questionable, or, at the very least, imprecise. This is particularly the case with the Serbian version of the text, which is literary 'flooded' with typing errors.[620]

Examples are numerous and often bordering on absurdity. The Instruction, which tasks the Office for Good Governance with conducting public awareness campaigns, prescribes in Article 7 (in both the English and Serbian versions) the duty of the Office to provide information on "places also relevant institutions where every person can address to, submit a request or assume an answer if they *pretend that they are victims of discrimination* (italics added)."[621]

The interpretation of the by-law becomes even more challenging once the reader realises that each of the three texts of the Instruction contains a different number of provisions. For instance, Article 6 has a different number of paragraphs and different content in each language version.[622] Moreover, the Instruction seriously departs from the text of the Anti-Discrimination Law as it contains an incomplete and partly distorted list of the prohibited grounds of discrimination compared to the one in Article 2 (a) of the Anti-Discrimination Law.[623]

These serious shortcomings of the Administrative Instruction No. 04/2006 show that the implementation of the Anti-Discrimination Law is still almost at the beginning despite complex and time-consuming preparations and although nearly three years have passed since its enactment. Ironically enough, the core provision of the Anti-Discrimination Law – prohibition of direct discrimination on the grounds of language (Art. 2 (a)) – has been violated in the very by-law that is supposed to give it operational value.

*2.6.3.6. Rights of Minority Communities*

*2.6.3.6.1. Continued Problem Related to the Licensing of the University of Kosovska Mitrovica*. – UNMIK re-accredited the University of Kosovska Mitrovica, allowing it to participate in the Bologna process in March 2007.[624] The University

620 The Serbian version of the Instruction suffers from the same weakness as the last Draft of the Anti-Discrimination Law. For instance, the Anti-Discrimination Law would have been adopted much earlier if, prior to its adoption in February 2004, it had not been rejected by the Serbian MPs in the Kosovo Assembly due to its distorted translation into Serbian. See in: S. Šabović, U. Steinle, *'Lost in Translation' or How to Make Three Languages Speak One Legislative Voice*, OSCE Assembly Support Initiative Newsletter, Special edition, No. 15, Priština, 2005.

621 The spelling mistake found in Article 2 (i) also smacks of surreal humour: "Practical rule – means the practical and accurate definition of the rights and obligations of *complainers* who claim to be victims of discrimination" (italic added).

622 For instance, only the Serbian version Article 6 refers to the Anti-Discrimination Units of the Ombudsperson Institute in Kosovo.

623 Anti-Discrimination Law No. 2004/32 promulgated by UNMIK Regulation No. 2004/32 On the Promulgation of the Anti-Discrimination Law, of 20 August 2004.

624 European Commission, *Kosovo (Under UNSCR 1244) 2007 Progress Report*, Brussels, 2007, p. 21.

of Kosovska Mitrovica is one of the two main university centres in Kosovo, the other being the University of Priština. The two university institutions can be clearly distinguished by their student bodies. The University of Priština is attended by Albanian-speaking students as it does not offer any programmes in the Serbian language,[625] while the lectures at the University of Kosovska Mitrovica are conducted only in the Serbian language.[626]

These two university centres differ in their legal status in the Kosovo educational system. While the University of Priština has been accredited by virtue of the Law on Higher Education enacted in 2003,[627] the University of Kosovska Mitrovica has been granted a temporary licence by an SRSG decree every year since 2003. For this reason and given the fact that the Government of Serbia finances it, this university practically belongs to the so-called "parallel institutions".[628]

This practice is very much a consequence of the unfortunate events related to the enactment of the Law on Higher Education.[629] The Assembly of Kosovo passed the Law on Higher Education in 2003. The legislator granted an unlimited licence to the University of Priština while omitting to grant such a licence to the University of Kosovska Mitrovica. In accordance with the procedures for adopting laws laid down in Section 9 of the Constitutional Framework, the representatives of the Serbian community in the Assembly then submitted a motion to the Presidency of the Assembly claiming that the Law on Higher Education "violates vital interests of the Community to which they belong [i.e.] adversely affects the rights of the Community or its members under Chapter 4".[630] As the Presidency of the Assembly failed to submit an agreed-on proposal within the prescribed period, the Special Panel was established to seize the matter.[631] Within five days, the Special Panel issued its decisions recommending that the Assembly adopt the Law on Higher Education with amendments aimed at licensing the University of Kosovska Mitrovica and thus enabling the Serbian speaking communities to exercise the right to receive higher edu-

625 Although the system of quotas for minority communities has now been in place since 2004, lectures at this university are delivered only in Albanian although the students are entitled to take their exams in Serbian.

626 In addition, the Business School in Pejë/Peć and the Faculty of Pedagogy of the University of Prizren, provide tuition also in the Bosnian language.

627 UNMIK Regulation No. 2003/14 on the Promulgation of a Law adopted by the Assembly of Kosovo on Higher Education in Kosovo of 12 May 2003.

628 Parallel structures in Kosovo can be qualified as institutions that have continued to be financed and administered by the Government of Serbia after 1999. They are not formally recognised but are informally endorsed by UNMIK in the territory of Kosovo.

629 Law No. 2002/3 on Higher Education in Kosovo as promulgated by UNMIK Regulation No. 2003/14 on the Promulgation of a Law adopted by the Assembly of Kosovo on Higher Education in Kosovo of 12 May 2003.

630 Section 9.1.39 of UNMIK Regulation No. 2001/9.

631 Section 9.1.40 and Section 91.41 of UNMIK Regulation No. 2001/9.

cation in their own language.[632] However, the Assembly of Kosovo rejected the recommendations of the Panel and the Law remained as initially approved by the Assembly.[633]

By virtue of Section 9.1.45 of the Constitutional Framework, a law becomes effective "on the day of [its] promulgation by the SRSG". However, promulgation of the Law on Higher Education in Kosovo without the amendments recommended by the Special Panel would have been in breach of the responsibilities of the SRSG in the sphere of protection of the rights and interests of Communities.[634] In result, the Law on Higher Education in Kosovo was promulgated with new provisions inserted by SRSG in Section 10, granting a temporary license to the University of Kosovska Mitrovica almost a year after its adoption by the Assembly.

The functioning of the University of Kosovska Mitrovica has been legalised for a while by the described legislative developments, but this has not improved its legal standing. Furthermore, the legal framework came no closer to the existing human rights standards. The Kosovo legal framework still does not contain any provision that explicitly recognises the right to higher education for the members of the communities speaking Serbian. Although it is the basic law regulating higher education, the Law on Higher Education nowhere reiterates the fact that both Albanian and Serbian are the official languages in Kosovo[635] and that the system of higher education shall be based on the principle of equality of those two languages.[636] The Law contains just a general prohibition of discrimination with respect to access to higher education (Section 3.1) and a prohibition of discrimination against students (Section 29.4, para (c)).[637]

This situation just adds to the group of factors that increase the level of uncertainty as one of the main impediments to the return process. As noted by many

632 According to James C. O'Brien, presiding member of the Panel, this decision was brought because the consequence of the Assembly's refusal to authorise the operation of the University of Kosovska Mitrovica was that this University "had no practical way of applying for certification in the near term, even if it chose to do so, because the procedures for certifying universities will not be in place." In: James C. O'Brien, "Working Towards a Unified System", *Focus Kosovo*, Priština, August 2002.

633 Section 9.1.42 of UNMIK Regulation No. 2001/9.

634 As prescribed *inter alia* in Chapter 8 of UNMIK Regulation No. 2001/9.

635 Law No. 02/L-37 on the Use of Languages promulgated by UNMIK Regulation No. 2006/51 of 20 October 2006.

636 It also does not include other types of guarantees necessary for the effective functioning of a bilingual higher education system such as, for instance, affirmative action in the sphere of employment by public providers of higher education or the use of official languages in the documents issued by a higher education institution, etc.

637 The only provision that indirectly invokes the right of the Serbian speaking communities to higher education in their native language, is contained in the Section 4.2 regulating the responsibilities of the Ministry of Education: "In exercising powers and duties under this Law, the Ministry shall respect and promote the rights of Communities and their members established in Chapter 4 of the Constitutional Framework for Provisional Self-Government."

IDPs/returnees, the fact that the existing educational system in the Serbian language in Kosovo is inadequate and that its legal foundations are constantly brought into question, has negatively affected their decision on whether to return or not.[638]

*2.6.3.6.2. Continued Problem of Discriminatory Norms Regulating the Process of Privatisation in Kosovo*. – Due to the special status of employees in socially-owned enterprises (SOE)[639] and the impact privatisation has had on them, the laws in Kosovo entitle SOE employees to shares of the proceeds from privatisation on a priority basis.[640] However, the former SOE employees belonging to non-majority communities continued to contend in 2007 that they were unable to profit from the on-going privatisation process due to the discriminatory character of the regulatory framework.[641] The deficiencies of the legal framework regulating the privatisation process were noted back in 2005 but nothing has been done yet to rectify its discriminatory effects.[642]

The process of privatisation in Kosovo started in 2003, long after the large-scale displacement of non-Albanian communities from Kosovo. Most of the non-Albanian employees of SOEs in Kosovo were indeed forced to stop working as they were directly threatened or exposed to the inter-ethnic violence that had reigned in the province. This process was additionally aggravated by the March 2004 events.

These considerations were not taken into account during the drafting of UNMIK Regulation No. 2003/13.[643] Its main setback lies in Section 10.4 providing that an "[e]mployee is eligible if such employee is: "a) registered as an employee with the Socially-Owned Enterprise *at the time of privatization*" (emphasis added).[644] As noted above, most IDPs do not meet this criterion since they had already fled Kosovo by 2003 and were no longer employed in the SOEs.

638 Interviews conducted across Kosovo and in the area of Smederevo in August 2006 and June 2007 respectively.

639 Socially owned enterprises are enterprises constituted under a unique form of organisation permitted by the laws of the former Yugoslavia. The assets of these companies were notionally owned by the workforce. In theory, the workforce also appointed its managers, although in practice state party managers were in control.

640 This share is determined as 20 per cent of the proceeds from the sale of shares of a privatised Socially-Owned Enterprise and the Kosovo Trust Agency has been tasked with distributing the given amount to the benefit of eligible employees.

641 European Commission, *Kosovo (under UNSCR 1244) 2007 Progress Report*, Brussels, 2007, p. 26.

642 See for instance: Letter of the Ombudsperson in Kosovo to the Special Representative of the UN Secretary-General of 21 December 2005.

643 UNMIK Regulation No. 2003/13 On the Transformation of the Right of Use to Socially-Owned Immovable Property of 9 May 2003.

644 The Section 10.4 reads as follows: "10.4 For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Socially-Owned Enterprise at the time of privatisation and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim

These workers who, in some cases, had worked in the SOEs 25 years or longer, have thus been denied benefits from the privatisation process. The existing legal framework envisages a right to submit a complaint to the Special Chamber of the Supreme Court on Kosovo-Trust Agency-Related Matters where former employees who were not placed on the list of eligible workers can challenge the KTA decision, claiming discrimination. This right is, however, hampered by several practical obstacles reflecting the specific position of the communities affected by displacement.

Firstly, the complaints before the Special Chamber are to be lodged "*within 20 days after the final publication in the media* [...] of the list of eligible employees by the Agency". However, this time-frame is impossible to meet by a large number of the ex-employees due to their displacement and the obstacles arising from it. Many of the displaced ex-workers, mostly residing in Serbia proper, are poor and often do not have access to the print media or the necessary means to travel long distances in order to submit their complaints to the Supreme Court in Priština.[645] Moreover, the procedure requires a considerable level of legal skills but *no legal aid is available* to potential claimants intending to initiate the procedure before the Special Chamber.[646]

*Lack of Safeguards Ensuring Non-discriminatory Employment Policies*. – It has been observed that the privatisation process has further increased the unemployment rate among the non-Albanian communities in Kosovo as the existing privatisation policies do not provide any safeguards for the adequate application of non-discrimination employment policies in the privatised companies.

The provisions on the reorganisation or liquidation of SOEs in UNMIK Regulation 2005/48 determine the role of non-price criteria such as investment, employment and other types of commitments aimed at safeguarding the employees' rights during the selection of the winners amongst the bidders for the reorganisation of SOEs.[647] One of the criteria applied in selecting the bids, according to Section 27.3 (d), is "the extent to which a plan will achieve the preservation of employment for the *current employees* of the Enterprise (emphasis added)".

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that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6."

645 It is important to point out in this context, that under UNMIK Regulation 2003/13 employees are not entitled to have access to the "employee lists" before publication in the media and therefore have no opportunity to object to them except before the Special Chamber. IDPs are thus forced to undergo a judicial procedure to challenge such lists and have very little impact on the role of the KTA in the process of verifying the list.

646 With the exception of the Civil Rights Project (Kosovo), a Priština-based NGO, which has recently started providing legal assistance in this process.

647 UNMIK Regulation 2005/48 on the Reorganisation and Liquidation of Enterprises and their Assets under the Administrative Authority of the Kosovo Trust Agency of 21 November 2005.

The international legislator in Kosovo has obviously enacted legislation that contains standard privatisation procedures without adjusting it to the post-conflict reality of Kosovo's society. In other words, provisions attach importance to the preservation of employment for the *current* employees of a SOE undergoing privatisation without taking into account that the ethnic composition of SOE at the time of privatisation had already been changed by the forced migrations in the aftermath of the conflict.[648] In the situation where the ethnic composition of workers of SOE in Kosovo has radically changed due to the displacement of a large part of population, "ethnically-blind provisions" of this kind serve to preserve the existing forms of ethnic division rather than eradicate it. By equally treating SOE workers from different ethnic groups, the legislator places persons belonging to a minority community affected by displacement at a particular disadvantage *vis-à-vis* those belonging to the majority group. It can, thus, be concluded that the given provisions are in breach of Articles 2 and 3 of the Kosovo Anti-Discrimination Law and of international standards prohibiting discrimination.[649]

### *2.6.4. Human Rights in Practice in 2007*

*2.6.4.1. Cases before the European Court of Human Rights*. – As the status of Kosovo has not been defined yet, the Serbian province under UN administration cannot ratify any human rights treaties. However, under the Constitutional Framework for Provisional Self-Government, the major human rights instruments are directly applicable in Kosovo. The first two applications related to Kosovo – *Behrami v. France*[650] and *Saramati v. France, Norway and Germany*[651] – were filed with the European Court of Human Rights (ECtHR) in 2006 but the ECtHR declared both inadmissible in May 2007. The ECtHR also dismissed the case *Gajić v. Germany*, in which an IDP from Kosovo initiated proceedings claiming that the German KFOR had violated his right to private and family life (Art. 8 (1) Convention) and his right to peaceful enjoyment of property (Art. 1 Protocol No. 1).[652] The applicant claimed

648 The same concerns have been voiced by Mr. Kai Aide, the Special Envoy of the UN Secretary-General to Kosovo: "This process could have a direct and positive impact on the economy in Kosovo, as many of the socially owned enterprises have been idle. Most of the privatized enterprises are taken over by Kosovo Albanians in Kosovo or residing abroad. [...] It is important to take into account the effects of this process on the different ethnic groups. The privatization process could lead to discrimination in employment along ethnic lines and affect the economic sustainability of minority communities. This process must move forward, but in a way which safeguards the interests of the minority population during and after privatization." In: Annex to the Letter dated 7 October 2005 from the Secretary-General addressed to the President of the Security Council – A comprehensive review of the situation in Kosovo (so called 'Kai Aide Report'), p. 3

649 Anti-Discrimination Law No. 2004/32 promulgated by UNMIK Regulation No. 2004/32 on the Promulgation of the Anti-Discrimination Law, of 20 August 2004.

650 ECHR, App. No. 71412/01.

651 ECHR, App. No. 78166/01.

652 *Gajić v. Germany*, App. No. 31446/02, ECHR 2007, para. 1.

that: a) KFOR is a separate entity that cannot be subsumed within the UN chain of decision-making, b) the acts of violation are to be attributed to Germany due to the level of control that it had been exercising over its troops acting within the KFOR (principle of extraterritorial jurisdiction applied *rationae personae*).[653] As in the first two cases, the Court found "that the actions or inactions of KFOR are, in principle, attributable to the UN and that the Court is incompetent *ratione personae* to review the acts of the respondent State carried out on behalf of the UN.[654]

*2.6.4.2. Human Rights Advisory Panel*. – Although the necessary provisions for the establishment of this body have been in place since 2006, the inaugural session of the Panel was held just in November 2007.[655] The fact that a year and a half passed before the establishment of the Human Rights Advisory Panel was an additional blow to the rule of law principle in Kosovo as the mandate of the Ombudsperson Institution over acts of UNMIK was revoked back in February 2006.[656] The Panel is supposed to deal only with the "complaints related to violations of human rights that occurred since 23 April 2005 or arising from facts give rise to a continuing violation of human rights" and it has only advisory powers since UNMIK is not bound to act on its findings. This was the reason for the UN Human Rights Committee to conclude that the Panel "lacks the necessary authority and independence" from UNMIK to carry out its mandate.[657] However, these shortcomings can be partly mitigated by the prominence and personal determination of the members of the Panel who have been nominated by the President of the European Court of Human Rights.[658]

*2.6.4.3. Ombudsperson Institution in Kosovo*. – Following the first unsuccessful and highly controversial round of voting in the Kosovo Assembly,[659] the Assembly on 22 June 2007 endorsed the amendments to its Rules of Procedure for the Appointment of the Ombudsperson and Deputy Ombudspersons and a week

653 The same has been stated in the third party interventions submitted by the Republic of Serbia and the NGO "Praxis".

654 *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* (dec.), Nos. 7412/01 and 78166/01, paras. 144–152, ECHR 2007, *Gajić v. Germany*, cited above, para. 1.

655 UNMIK press release of Wednesday, 21 November 2007.

656 The SRSG promulgated UNMIK Regulation No. 2006/06 on the Ombudsperson Institution replacing UNMIK Regulation No. 2000/38 in February 2006. Following this new Regulation, the Ombudsperson Institution is no longer empowered to investigate complaints against UNMIK.

657 Human Rights Watch, *World Report 2007*, p. 419.

658 On 12 January 2007 the SRSG appointed the following members of the Panel: Mr. Paul Lemmens (Belgium), Judge in the Belgian Supreme Administrative Court and Professor of Human Rights Law at the University of Leuven; Mr. Marek Nowicki (Poland), President of the Helsinki Foundation for Human Rights, Warsaw, and former Ombudsman in Kosovo; Ms. Michèle Picard (France), Vice-President of the Paris First Instance Court and former President of the Human Rights Chamber for Bosnia and Herzegovina.

659 The Assembly first voted on the amendments in December 2006.

later issued a new vacancy announcement for the position of Ombudsperson. The new Ombudsperson was expected to be appointed by the end of 2007.[660]

*2.6.4.4. Legal Aid.* – Although just several NGOs have been delivering legal assistance until recently and were unable to meet the real needs in Kosovo,[661] the situation is slightly improving. In September 2007, a Legal Aid Commission was established in Kosovo[662] pursuant to UNMIK Regulation 2006/36 on Legal Aid, which creates an "integrated legal aid system for criminal, civil and administrative matters".[663] The system is supposed to have legal offices established across Kosovo and to provide services to socially vulnerable groups. However, this model will not cover the needs of IDPs who are located in Serbia. For that reason, a legal aid program with a cross-boundary dimension is to become operational in March 2008. It is financed by the European Agency for Reconstruction under the 2006 CARDS Assistance to Serbia.[664]

*2.6.4.5. Rule of Law and Security*. – Although no major incidents against members of non-majority communities were recorded during 2007, the series of low-scale interethnic incidents continued throughout the year. It is worth mentioning that most of the people living in the Serbian enclaves scattered across Kosovo[665] are elderly and suffer the most even from 'minor' incidents, such as stoning of windows, hate graffiti, thefts of their mobile property. As stated in the September 2007 Report of the Secretary General on UNMIK, "While the number and gravity of ethnically motivated incidents remained relatively low, incidents of violence and vandalism targeting cultural and religious sites continued, especially in ethnically mixed areas [...]."[666]

Minorities in Kosovo, in particular Serbs, Roma, Gorani, Croats, as well as Albanians in those areas of Kosovo where they are in the minority,[667] are still at risk, notwithstanding the constantly decreasing number of attacks in 2006 and 2007. Small-scale incidents such as stoning of windows and buses, hate graffiti, harassment and destruction of cultural, religious and other sites create a climate of insecu-

660 Ombudsperson Institution in Kosovo, *Annual Report for 2006–2007*, Priština, p. 7.

661 OSCE Mission in Kosovo, *Legal Representation in Civil Cases,* Priština*,* June 2007.

662 UNMIK Press Release 26 September 2007.

663 Preamble of UNMIK Regulation 2006/36 On Legal Aid of 7 June 2006.

664 There is a commitment by the Ministry for Kosovo and Metohija to support this programme, which could in turn give additional impetus to the final settlement of the property-related disputes of the individual claimants in Kosovo.

665 There are around 50,000 Serbs living in the enclaves.

666 UN, Report of the Secretary General on the United Nations Mission in Kosovo, S/2007/582, September 2007.

667 Ethnic Albanians are a minority in the northern part of Mitrovicë/Mitrovica, in the Municipalities of Zvečan/Zveçan, Zubin Potok, and Leposavicì/Leposaviq in the north of Kosovo, the Štrpce/Shtërpce Municipality in the south and the Municipality of Novo Brdo/Novobërde.

rity and negatively affect the decisions of minority communities to stay or return to the province.

Two Serbs driving their car near Fushë Kosovë/Kosovo Polje on 20 February were attacked and robbed by unidentified assailants.[668] In April 2007, two other Serbs heading towards Pejë/Peć to collect their personal documents from the factory where they used to work were beaten up at a gasoline station. Both described the assailants as youngsters whom they had not seen before.[669] In the summer of 2007, Dušan Perić (55), a returnee to the village of Gojbulë/Gojbulja in the municipality of Vushtrri/Vučitrn, sustained minor bodily injuries when he was attacked by several Albanian teenagers. [670]

In June 2007, the local Albanian newspaper "Infopress" published a list of Serbs living in the area of Lipjan/Lipljan.[671] The list, which contained approximately 100 names, increased the feelings of threat among the Serbs of Lipjan/Lipljan, whose local elementary school "Braća Aksić" had already been stoned in February 2007.[672]

Although not more than 100 Serbs still live in Priština – the majority of them are elderly women – one of them was the target of an attack in June 2007. Vukosava Ivanović (74) was beaten up in her flat in Priština. She sustained head injuries and her nose was fractured. According to the KPS deputy spokesperson, one suspect was taken into custody several days later.[673]

The most serious attack in 2007 occurred in Gračanica/Graçanicë in August, when unidentified persons raped a girl. Her boyfriend was beaten up and shut in the car trunk.[674]

The bus between Dragash/Dragaš and Belgrade, attacked already several times in the few past years, was again targeted in November when an explosive device was thrown at the bus near Podujevë/Podujevo. None of the forty-three passengers were injured in the incident.[675]

*2.6.4.6. Attacks on Cultural Heritage and Religious Sites*. – Protests of the Serbian Orthodox Church against the illegal construction close to the Visoki Dečani monastery continued in 2007. The monastery, which is on the UNESCO world heritage list, is protected by the Italian KFOR contingent round the clock.[676] The monastery was shelled in April 2007.

668 *RTS*, 20 February.
669 *RTS/TANJUG*, 27 April.
670 *Glas javnosti*, 5 July.
671 *TANJUG*, June 2.
672 *RTS*, February 3.
673 UNMIK Media Report, 14 June.
674 *B92, TANJUG, BETA*, 22 August.
675 *Koha Ditore*, 26 November.
676 *RTS*, 5 January.

An Orthodox church was desecrated in Pejë/Peć in March. Unidentified perpetrators broke into the church, wrote insulting words on the walls, broke its windows and threw rubbish all over it. The church, which was damaged in the violent attacks of March 2004, was renovated within the CoE programme of reconstructing the damaged churches in Kosovo.

Notwithstanding the promulgation of the new law on freedom of religion in 2006,[677] the relationship between different religious communities is in need of improvement, as is the dialogue, particularly between the Muslim community and the Serbian Orthodox Church. According to the European Commission, "Acts of vandalism and attacks on religious monuments, including with mortars, remain a problem. Investigations have not been carried out professionally in all cases (...) only limited progress was achieved in this field, apart from the legislative development. Religious freedom is not fully respected".[678]

*2.6.4.7. Access to Economic and Social Rights*. – The overall economic situation in Kosovo reflects the troubles in the status talks. The unemployment rate, lack of serious economical investments and the failure of the privatisation process have jeopardised the economical sustainability of the province. According to the United Nations, "Despite the growth in exports recorded in 2006, Kosovo still has the lowest proportion of exports to imports in Europe. Economic development is still constrained by interruptions in the electricity supply, a lack of capacity of public institutions and a lack of adequate skills in the labour market."[679]

The economic situation of the ethnic minorities is even worse. Many communities, especially those living in enclaves, do not have any access to the job market and the unemployment rate in the enclaves ranges from 70% to 100%.[680] Most of the minorities derive their income from agriculture, but there still has not been any progress in protecting their right to work and access the land, as in many cases the land is occupied or the owners do not feel safe to go and cultivate it.

The Roma, Ashkali and Egyptian (RAE) communities remain the most vulnerable and marginalised groups in Kosovo. They suffer from the highest rates of unemployment, educational exclusion, and infant mortality, and the greatest difficulties in accessing social services.

*2.6.4.8. Repossession of Property*. – In June 2007, the closing ceremony of the Housing and Property Directorate and Claims Commission (HPD/CC) was at the same time the inaugural session of the Kosovo Property Claims Commission

677 UNMIK Regulation No. 2006/48, 24 August 2006.

678 European Commission, *Kosovo (under UNSCR 1244) 2007 Progress Report*, Brussels, 2007, p. 17.

679 UN, Report of the Secretary General on the United Nations Mission in Kosovo, S/2007/582, September 2007, p. 4.

680 Ombudsperson Institution in Kosovo, *Annual Report for 2006–2007*, Priština, p. 35.

(KPCC).[681] The Kosovo Property Claims Commission is part of a newly established mass claim mechanism, established by UNMIK Regulation 2006/10 in 2006.[682] The Kosovo Property Agency (KPA), part of which is the KPCC, is charged with resolving property disputes over *agricultural, commercial and residential property*. The KPA is the direct successor of the Housing and Property Directorate (HPD) – the first mass claim mechanism established in Kosovo that had the mandate to resolve disputes only over residential property.[683]

KPA and KPCC are characterised by strong international involvement and such involvement is expected to continue even after UNMIK leaves the province.[684] Difficulties that mark the process of property restitution in Kosovo indicate that the process is still untenable and that international participation remains essential.

Developments in the municipality of Klinë/Klina in August 2007 merely reinforce this conclusion. The authorities of the Klinë/Klina municipality have persistently refused to abide by HPCC decisions since the beginning of the year. The HPCC decision in the "Radosavljević case", entitling a Serbian IDP to repossess his property – a residence situated next to the city hall that was used by the Municipality for various purposes since 1999 – was among the last HPCC decisions awaiting implementation.

All the efforts of the IDP to repossess his property proved futile. In reaction, the SRSG issued an Executive Decision temporarily suspending the applicable legal framework in early August 2007. The implementation of all remaining HPCC decisions, including the decision in the "Radosavljević case" was suspended as the "unity [of] all the stakeholders, including the government of Kosovo" was no longer present.[685]

The suspension of the implementation of the HPCC decisions caused very strong protests and concern in Serbia where such acts were perceived as lack of support for the return process. UNMIK gave no official explanation or reason for such a decision for a few days.

This situation was seemingly resolved at the press conference held a few days later that was attended by the highest representatives of all main international and provisional institutions and foreign offices in Kosovo as well as by the representatives of the Municipality of Klinë/Klina. Officials of the Klinë/Klina munici-

681 UNMIK press release, 6 June.

682 UNMIK Regulation 2006/10 on the Resolution of Claims Relating to Private Immovable Property, including Agricultural and Commercial Property of 4 March 2006.

683 The body was composed of two distinct bodies, the Housing and Property Claims Commission (HPCC), a quasi-judicial authority, and the Housing and Property Directorate (HPD), an administrative authority. Final Report of the Housing and Property Claims Commission, Priština, 2007, p. 17. Available at: www.kpaonline.org/PDFs/HPCC-Final_Report.pdf.

684 Interviews with the representatives of the ICO Planning Team and International Advisors in KPA, 18 September 2007, Priština.

685 UNMIK, Executive Decision 2007/41 of 8 August 2007.

pality publicly pledged that they would abide by the decisions of the HPD/CC under diplomatic pressure. The suspended regulation finally became applicable again as the participants in the conference announced that the unity of the stakeholders was restored.[686]

The fact that UNMIK chose to suspend the law in face of a municipality's resistance to implement it gave rise to widespread criticism of the whole property restitution process in Kosovo and seriously undermined the confidence of the owners of the occupied properties in the new mass claim mechanism.

Moreover, despite the promises given at the conference, the UNMIK strategy did not help in the "Radosavljević case". Radosavljević's troubles were not over. As soon as Radosavljević collected the keys from the KPA and started preparing for return, the authorities of Klinë/Klina notified him that it was not advisable for him and his family to return as his house would soon be demolished.[687] Just a couple of days after publicly promising to vacate the successful claimant's house, the Municipality issued a demolition order.[688] The demolition order was subsequently suspended (but not cancelled) by a local court decision on provisional measures and the Radosavljević family finally repossessed the house.[689]

*2.6.4.8.1. Deadline for Submission of Claims*. – The deadline for the submission of claims was another issue that arose in 2007 in relation to the KPA. The deadline was set in a by-law regulating the procedure before the KPA issued in June 2007.[690] This administrative directive introduced a 6-month deadline for the submission of claims, which expired on 3 December 2007. However, this very important deadline had not been made public until September this year. For instance, the July 2007 issue of the KPA Gazette[691] did not contain any information about the deadline while the KPA website FAQ section clearly stated until mid-September that "[n]o final deadline for the filing claims has been set yet."[692] The Ministry for Kosovo and Metohija officially requested the extension of deadline in November and a month later an appeal with the same request was lodged by "Praxis", an eminent legal NGO active in the field of property restitution.

686 UNMIK, Press Briefing, 8 August 2007.

687 Information obtained from the representative of the Danish Refugee Council in Belgrade (DRC), an international NGO that has been assisting the Radosavljević family during the return process.

688 Interview with Luis Perez-Segnini, UNMIK Municipal Representative, 18 September 2007.

689 The court procedure was initiated with the assistance of MPDL, a Spanish NGO providing legal aid in the province.

690 Section 8 of UNMIK Administrative Direction No. 2007/5 implementing UNMIK Regulation No. 2006/50 on the resolution of claims relating to private immovable property, including agricultural and commercial property of 1 June 2007.

691 http://www.kpaonline.org/PDFs/KPA%20Gazette%20no4.pdf.

692 http://www.kpaonline.org/faq.asp#8. It is important to remember that IDPs, in general, have very limited access to Internet services.

There are concerns that a large number of potential claimants have not been able to submit claims within the given deadline due to lack of timely and accessible information. This may particularly hold true with regard to the displaced population accommodated in the collective centres and remote settlements, including the extremely vulnerable categories such as the poor, the elderly and the ill, members of ethnic minorities and persons who do not possess documents.

### *2.6.5. Kosovo and the Media in Serbia in 2007*

Reports on Kosovo accounted for the greatest number articles perused for the Report by BCHR associates. One out of four or, more precisely, 27% of all press clippings were devoted to this topic.

Optimistic albeit unrealistic tones voiced by the Serbian leadership prevailed in the first eight months of the year. They expounded the view that the Kosovo issue, the Serbs' topmost priority in their eyes, would be addressed in accordance with their proposal: that it would remain within Serbia and enjoy substantial autonomy dubbed "more than autonomy, less than independence". The press headlines from that period illustrate the mantra well – "They will not Take Kosovo away from Us" (*Večernje novosti*, 7 8 April, p. 2), "Kosovo Must Stay Ours", (*Press*, 6 August, p. 29), **"**Serbia Must Have a Say" *(Večernje novosti,* 20 April, p. 2), "We're Holding on to What is Ours" (*Večernje novosti*, 25 July, p. 2) and "Majority Support to Resolution on Kosovo" (*Politika*, 25 July, p. 6).

Attempts to persuade the public that Kosovo was the issue of all issues was accompanied by the publication of a public opinion survey in October showing that Kosovo ranked third, behind unemployment and low living standards on the list of everyman's problems (*Večernje novosti*, 5 November, p. 3).

Media published calls to defend Kosovo with weapons voiced both by the Prime Minister's Democratic Party of Serbia and the Serbian Radical Party – "We'll Go to War over Kosovo" (*Kurir*, 23 March. p. 3), "War for Kosovo?" (*Kurir*, 17 June, p. 3) and "It's Time for the Army and Police to Step in" (*Kurir*, 18 August, p. 2).

Calls to defend Kosovo with weapons were again heard in December. PM Koštunica's adviser Aleksandar Simić said on state TV that war, too, was a legal tool. His statement provoked an angry reaction of EU Representative in the Contact Group Troika Wolfgang Ischinger who said he expected the Serbian side "to make sure that it does honour and remain committed to the statements it has made to the troika" and called on Simić to retract his statement (*Politika*, 6 and 7 December, pp. 6 and 1). The leaders of the Socialist Party of Serbia issued a similar call, justifying it by the Kosovo Albanians' announcements that they would stage an uprising (*Politika*, 7 December, p. 8).

The media devoted a lot of attention to the paramilitary organisation Holy Prince Lazar Guard, whom the police did not prevent from handing out to Assembly

deputies calls to war (*Večernje novosti*, 22 November, p. 6). The Guard leader was quoted as saying "Everyone from Canada via Peking to Trieste will be crossing themselves with three fingers" (Agency *FoNet* TV Archives, 28 November). Police Minister Dragan Jočić said the police had no information on this organisation constituting any threat (*Politika*, 22 November, p. 6).

The media, especially the tabloids, also campaigned against those who did not share the authorities' views on Kosovo and accused them of treason. They claimed international mediator Martti Ahtisaari was on the Albanians' payroll ("Millions in Exchange for a State", *Večernje novosti*, 12 July, p. 7 and "Ahtisaari – Albanian Mercenary", *Kurir*, 23 June, p. 2) and accused the US of undermining Serbia's territorial integrity ("Why Doesn't Bush Give away his own, not Serbia's", *Kurir*, 12 June, p. 6) and of conniving to create a NATO state in Kosovo's territory ("NATO State to Serve Mafia Interests", *Press*, 16 August, p. 2).

Extensive media reports accompanied every round of talks. Reports on the conduct of the Priština delegation were usually selective or negative ("Furious Albanians", *Press*, 5 March, p. 3), while the Belgrade negotiators did their best to present themselves in the best light to score political points ahead of the upcoming elections.

Indications of a more flexible stand, such as the statement by the Minister of Foreign Affairs that he saw no problem in Albanians holding senior positions in the state administration or the request by Deputy PM Božidar Đelić that Serbia be repaid the money it has spent meeting Kosovo's debts, did not meet with unanimous applause.

The optimism that the Kosovo issue would be resolved to Serbia's benefit began dwindling in July, when talk of partitioning the province reappeared (*Kurir*, 18 July, p. 2). Warnings of the danger of Serbia plunging into self-isolation were extremely rare (*Blic*, 11 November, p. 2).

Belgrade's leadership got the chance to score additional points thanks to the 17 November elections in Kosovo, held amidst the talks on its status. PM Koštunica called on the already apprehensive Kosovo Serbs to boycott the elections, saying that their government would always be in Belgrade. All Belgrade officials followed suit.

The local hard-liners were for their part threatening Kosovo Serbs that they would employ physical violence against them and halt their salaries paid out from the Serbian budget if they dared vote. Peć Municipality Coordinator Rajko Dunić (DSS) on 19 November sent the Ministry for Kosovo and Metohija a list of names of 18 Goraždevac residents, mostly DS members, and demanded that they be punished because they had voted. "Given that the state of Serbia and the Serbian Orthodox Church were of the view that Serbs should not vote at these elections, we maintain that they acted against their own state by turning out at the Kosovo elections and that the state ought to penalise them", Dunić assessed, adding that the village had asked him to submit such a request (*Blic*, 13 December, p. 2). Goraždevac

residents said he had been putting up the lists of the "traitors" all over the village and had denied them their welfare benefits. Several of Dunić's men in December assaulted UNMIK chief Rucker's security. The UN Security Council was notified of the incident (*Blic*, 14 December, p. 2).

It therefore came as no surprise that only 0.1% of the Serbian voters (800 of them) turned out at the Kosovo elections (*Politika*, 18 November, p. 1 and *Večernje novosti*, 24 November, p. 4) and that Kosovo Serbs lost power in the five municipalities they had run since the previous elections (*Blic*, 20 November, p. 2).

All this leads to the conclusion that the conduct of most Serbian politicians and reports of nearly all media on Kosovo in 2007 were dictated by political wishful thinking rather than by political reality. The Kosovo issue was also used to incur damage to political opponents and gain populist points ahead of the upcoming election races. Last, but not the least, such conduct additionally confused the public instead of objectively informing it of what was actually going on, whereby it violated the fundamental assumptions of a democratic society and the standards of serious and impartial journalism.

## *2.7. Prohibition of Discrimination and Status of Minorities*[693]

Both the Serbian Constitution and a number of laws include provisions prohibiting discriminatory conduct. However, the calls by numerous international organisations on Serbia to enact a general anti-discrimination law went unheeded and the Serbian Assembly failed to pass a systemic law penalising discrimination by the end of the reporting period. The year 2007, however, saw an upsurge of discrimination in practice.

### *2.7.1. National Minorities*

*2.7.1.1. Assaults on Roma.* – Discrimination of Roma is still extremely widespread in Serbia. It is often accompanied by physical violence, most often inspired by the victim's ethnic affiliation.

Unidentified perpetrators wrote insulting and threatening messages and drew Nazi symbols on the Roma houses in the village of Međa at Leskovac in January (*Blic*, 21 January, p. 5 and *Kurir*, 21 January, p. 3).

The Coalition against Discrimination rallying several NGOs presented its report on discrimination in Serbia in February. It highlighted that discrimination should be combated systemically, by the adoption of a general law against dis-

693 Part of the text related to the prohibition of discrimination is the result of one-year work by BCHR associates within the project entitled "Monitoring and Reporting the Activities of Judical Institutions in Serbia in the Field of Organised Crime, War Crimes, Discrimination and Domestic Violence". See n. 569.

crimination. The Coalition emphasised that Roma were the most frequent targets of such assaults (*Politika*, 8 February, p. A8 and *Večernje novosti*, 8 February, p. 32).

Attacks on the Roma settlement at the New Belgrade "flea market" intensified in August. The residents of the settlement have often been targeted by unidentified perpetrators. In the summer, when the attacks gained in frequency, the BCHR representative stated that the police usually failed to react to reports of the assaults and investigate them.[694]

All these incidents corroborate that there is widespread discrimination against Roma, much of which takes the form of physical violence. The problem lies also in the inefficient investigations of the assaults. The police are unusually unable to identify the perpetrators; when they do and when they apprehend them, the courts fail to fulfil their role. Courts are prone to convicting the assailants on Roma to lenient sentences. This is why there has been no adequate response to the frequent ethnically motivated incidents. A memorial plaque was officially unveiled on 18 October 2007 in Belgrade to commemorate the 10th anniversary since the death of Dušan Jovanović, a Roma youth who was beaten to death in 1997. The perpetrators had been arrested and convicted to maximum ten-year sentences. The fact that they were released early because of their exemplary conduct highlights the inadequacy of the penal policy, even with respect to the gravest crimes. (*Politika*, 17 October, p. A12).

In early December, Topola Mayor and Deputy President of New Serbia Dragan Jovanović stated in response to questions from the public on the official municipal website that the future Roma settlement in the town would be sealed off by wire. The residents of the street in which the Roma settlement is built voiced apprehension about their future neighbours and the Mayor reassured them that they had nothing to worry about, that Roma would not walk down that street because a wall would be erected around their settlement.[695] Such statements voiced by a local official openly advocating racism are sending a dangerous message which can only exacerbate the plight of the Roma minority. Such conduct can be criminally prosecuted in Serbia on the following counts: violation of the equality of citizens (Art. 128 CC), incitement of national, racial and religious hatred and intolerance (Art. 317 CC) and racial and other discrimination (Art. 387 CC). The prosecutors failed to undertake steps within their jurisdiction in reaction to the event by the time this Report went into print.

*2.7.1.2. Participation of Minorities in Politics*. – The election of minority party MPs was facilitated by the adoption of amendments to the Act on the Election of Assembly Deputies in 2004.[696] Under the amendments, the general 5% threshold of all voters who had turned out at the elections does not apply to minority parties,

694 *B92*, 22 August, www.b92.net.

695 *B92*, 7 December, www.b92.net.

696 *Sl. glasnik RS*, 18/04.

who need to cross the much lower natural threshold standing at 0.4% to get into parliament. These amended regulations were applied at the 21 January 07 parliamentary elections and the following national minority parties made it into parliament: three MPs of the Alliance of Vojvodina Hungarians, two MPs of the List for Sandžak, one MP of the Coalition of Albanians for the Preševo Valley, one MP of the Union of Roma of Serbia and one MP of the Roma Party.[697] Esad Džudžević, an MP representing the Bosniak minority, was appointed Deputy Speaker at the constituent session of the National Assembly.

The election of minority representatives to parliament after 3 years of their absence marks a major headway. Their active participation in the work of the National Assembly, however, remains disputable. One of the main obstacles still lies in the use of minority languages in the Serbian Assembly, which, although allowed by law, has not been effected in practice.

An incident occurred in the Serbian National Assembly in September when DSS MP Marko Jakšić insulted members of the Roma community by saying an opposition deputy had a "gypsy mindset" (*Blic*, 27 September, p. 2 and *Politika*, 27 September, p. A1). The issue of using minority languages in parliament arose on the occasion: Roma Party MP Srđan Šajn reacted to Jakšić's words and addressed the Assembly in his native tongue. Šajn's address was not interpreted. It should also be noted that, although the current MPs have been meeting in parliament for nearly a year now, none of the draft laws they have debated have been translated into minority languages wherefore the very function of the deputies is rendered senseless.[698]

### *2.7.2. Hate Speech*

The widespread problem of hate speech cannot be viewed separately from the increasingly frequent discriminatory outbursts in Serbia. Like in the previous years, Serbia's media and publishers have continued publishing more and more content inciting or disseminating hatred. Most have gone unpunished.

According to eminent Belgrade writer Filip David, over 150 anti-Semitic books are currently sold in Belgrade bookstores. Publishers specialising in such literature even sold them at stalls they rented at the Belgrade book fair in October.[699]

The Niš District Court in early February found Dušan Đorđević guilty of inciting national, racial and religious hatred and intolerance and sentenced him to one-year imprisonment. The court established that Đorđević had on a number of

697 Republican Election Commission statement, 25 January, www.rik.parlament.sr.gov.yu.

698 With respect to the use of minority languages in parliament, National Assembly Assistant Secretary Jasminka Jakovljević in February said the Assembly staff included four translators for the major world languages but none skilled in minority languages. She qualified the issue as a technical one that would soon be resolved. Minority MPs will be unable to effectively exercise their public duties until this issue is addressed.

699 *B92*, 27 October, www.b92.net.

occasions in 2003 and 2004 written insulting grafitti on the walls of Niš buildings ("Die Shiptars!" "Serbia to Serbs", "This school will burn like the mosque", "Let's start with the youngest...") and had physically assaulted citizens of Roma nationality three times.[700]

The Belgrade NGO Labris, which advocates the human rights of lesbians, said in mid-September that its studies show that most media write about lesbians "in a very denigrating manner, using hate speech". Labris submitted three complaints against hate speech to the Republican Broadcasting Agency (RBA) in 2007. Two of the applications concerned shows on RTV Pink and one a show aired on the public service broadcaster RTS. The RBA, however, failed to react.[701]

The Novi Sad District Court found Predrag Popović and Petar Pilipović guilty of spreading hate and convicted each to six months in jail or suspended two-year sentences for writing two "anti-Hungarian" grafitti after a fight with their ethnic Hungarian co-evals. The court stated in its explanation that it had considered pronouncing an additional protection measure against them, ordering them to "attend Hungarian language lessons and events organised by ethnic communities in Vojvodina" but that the list of organisations and events which they could attend had not been composed yet.[702]

### *2.7.3. Neo-Nazism in Serbia*

The number of neo-Nazi movements in Serbia has grown, as has the number of incidents they provoked in 2007. One such organisation, National Formation, which has assumed responsibility for numerous attacks on citizens of Serbia belonging to minority groups, has received much media attention.

The website of the neo-Nazi organisation Stormfront published threats against *BETA* Novi Sad correspondent Dinko Gruhonjić in April 2007. He was called a "balija (derogatory name for Moslems), traitor and beast"; his home address was put on the website, as was an open call to lynch him. National Formation leader Goran Davidović was taken into custody but he denied in court that he had anything to do with the threats. He was released and the investigation continued. This Internet page is on an international domain and cannot be forbidden under domestic law. The fact that it carries hate messages and calls to lynch of non-Serb citizens gives rise to serious concern (*Blic*, 9 April, p. 12 and *Politika*, 10 April, p. A12).

National Formation assumed responsibility for attacking domestic and foreign activists taking part in the March of Diversity during the Exit Festival in Novi Sad in July. The perpetrators were taken into custody and sentenced to 40 days in jail (*Večernje novosti*, 17 July, p. 20)

700 *B92*, 8 February, www.b92.net.

701 *B92*, 18 September, www.b92.net.

702 *B92*, 24 October, www.b92.net.

Novi Sad was the venue of another incident, the so-called "March for Serbia's Unity" staged by National Formation members, who wished to mark the birthday of Nazi ideologue Heinrich Himmler on 7 October. The prohibition of such rallies should not be problematic under national law given that glorification of Nazi ideologues falls under spreading of ideas inciting racial, religious and other forms of intolerance; the MIA accordingly prohibited the rally. A large number of NGOs, parties and individuals also expressed their revolt. On the day the neo-Nazi rally was to have held, another group of citizens, NGO and political party activists scheduled a rally under the name "Stop Fascism" to demonstrate their disgust with neo-Nazism. Notwithstanding the MIA ban, a group of neo-Nazis rallied at a spot by which the anti-Fascist procession was planning to pass. An incident broke out, the police were forced to intervene and 56 people were taken into custody (*Blic*, 27 September, p. 21(A) and *Polítika*, 8 November, p. 1(A) 6).

National Formation members had caused a number of incidents in the previous years as well.[703] This organisation is not officially registered and is on the MIA list of organisations the activities of which are monitored.

### *2.7.4. Discrimination against Persons with Disabilities*

The Act on Prevention of Discrimination against Persons with Disabilities was adopted in 2006. The law for the most part focuses on the state authorities' obligation to render public services and establishments used by the public accessible to persons with disabilities. Apart from prohibiting discriminatory conduct, the Act also envisages a whole set of specific measures the state and local self-government bodies must undertake to facilitate the social integration of persons with disabilities. As these authorities have by and large failed to fulfil their obligations, it may be concluded that this law has not been adequately applied although more than a year has passed since its adoption.

A case of discrimination against a person with disabilities was recorded in October. Zoran Jovanović, a resident of Kraljevo, alleges he was forced to leave a café because he uses a wheelchair. Although the Act devotes a separate provision in which it qualifies refusal to provide services to persons with disabilities as discrimination, such incidents obviously still occur in Serbia, as the Coalition against Discrimination noted in its statement. The Coalition added that state and local self-government bodies often ignore their obligations stipulated by the Act.[704]

Centre for the Development of an Inclusive Society (CRID) data indicate that 79% of persons with disabilities are jobless. One of the main reasons for their unemployment lies in the lack of readiness amongst employers to adapt their offices to accommodate the needs of persons with disabilities. Another problem lies in the

703 The organisation caused an incident when it barged in on an anti-Fascist panel discussion in 2005 and its leader Goran Davidović was convicted to one-year imprisonment.

704 http://www.cups.org.yu/kpd/index.php?str=arhivas&a=jv&id=95, accessed on 3 December.

fear of persons with disabilities that they will lose their welfare benefits if they find a job, says the CRID.[705]

BCHR representatives held talks with representatives of associations of persons with disabilities in June. The associations said that lack of information was the main problem in combating discrimination against persons with disabilities. The victims of such discrimination are not aware of the rights guaranteed them by law and thus fail to address the courts for help. Those who are aware of their rights as a rule lack money to initiate court proceedings and fear they will be exposed to even greater discrimination during the proceedings, the associations said.

Some headway has been made notwithstanding the numerous problems faced by persons with disabilities. G17+ member, Gordana Rajkov, is the first person with disabilities in Serbia to have been elected to the National Assembly (in January 07). Miroslav Kovačević is the first blind law college graduate to have gotten a job in a court in Western Serbia, in the town of Gornji Milanovac.[706]

Serbia signed the UN Convention on the Rights of Persons with Disabilities in December 2007. The Convention strives to establish a universal system of protection of persons with disabilities within the UN system. It promotes the concept of non-discrimination and underlines the need to provide persons with disabilities with access to the physical environment, to transportation and to information. The Convention also provides for a mechanism that will monitor the implementation of its provisions. The Convention was adopted unanimously by the UN General Assembly in December 2006. It has to date been signed by 119 and ratified by 12 states and will come into force once twenty states have ratified it.[707]

### *2.7.5. Implementation of the Act on Churches and Religious Communities*

The adoption of the Act on Churches and Religious Communities has to an extent regulated religious freedoms and the legal status of registered religious organisations. Many of its provisions, however, remain problematic from the viewpoint of the freedom of religious expression and the constitutional principle guaranteeing the equality of all religious communities.

The Council of Europe and Venice Commission both recommended that Articles 18 and 19 of the Act be eliminated as soon as possible, given that they differentiate between "traditional" and all other religious communities, contrary to international standards.[708] Discriminatory treatment is reflected already in Article 18

705 http://www.b92.net/info/vesti/u_fokusu.php?id=26&start=0&nav_id=274451, accessed on 3 December.

706 http://www.b92.net/info/vesti/u_fokusu.php?id=26&start=15&nav_id=272213, accessed on 3 December.

707 *B92*, 19 December, www.b92.net.

708 See Articles 18 and 19 of the Act on Churches and Religious Communities.

regarding the registration of churches and religious communities. Under the law, traditional religious communities need not register, while all other must do so. To be registered, a large number of conditions must be fulfilled; these prerequisites place new religious communities in an unequal position. The law does not allow the registration of religious communities the name of which includes the name or part of the name of a registered religious community. The wording of the provision is extremely problematic and allows administration bodies to act in an arbitrary fashion when deciding which religious community ought to be registered. In addition, the Act does not provide an answer the question about the fate of religious communities that fail to register. The law is also discriminatory in the sphere of religious instruction in schools, the provision of which is envisaged only for the traditional religious communities. Moreover, only these traditional communities are entitled to tax exemptions under the Act.

The many shortcomings in the Act have led to systemic discrimination accompanied by discrimination in practice. The US Government annual International Religious Freedom Report 2007 covering 198 countries says that "Government respect for religious freedom continued to deteriorate because of the problematic law on religion and the Ministry of Religion's arbitrary execution of the law".[709]

A religious community faces several problems if it is unregistered. First, it cannot have the status of a legal entity. It thus cannot act as a legal entity, does not have an official seal and registration number, wherefore it cannot be involved in legal relations and, indirectly, perform religious rituals. Also, the general public is led to believe that communities that have failed to register surely must pose a danger to the security of the state and citizens; this, in turn, leads to a large number of religiously motivated incidents. Some of these attacks have been recurring for years but the police have failed to apprehend the perpetrators. The attacks on the Adventist Church, for instance, intensified in 2007; a number of Adventist temples across Serbia were targeted in a relatively short time (*Blic*, 9 January, p. 14 and 11 July, p. 15).[710] Other, mostly minority religious communities, were also attacked in 2007. Hare Krishna member Života Milanović was assaulted by unidentified perpetrators in July 2007 and sustained multiple knife slashes. Života Milanović has been attacked a number of times since 2001; no light has been shed on most of the assaults nor have their perpetrators been arrested (*Blic*, 5 July, p. 16).

All these assaults are indirectly the consequence of the undefined status of the minority religious communities and reaffirm the need to eliminate the discriminatory provisions from the law and amend it to ensure systemic protection of non-traditional religious communities.

709 See report at http://www.state.gov/g/drl/rls/irf/2007/90198.htm.

710 The temples of this religious community were stoned on a number of occasions: some of them have been set fire to. The following Adventist churches were attacked in 2007: Belgrade (31 March), Novi Sad (28 March), Bačka Palanka (17 January), Sombor (8 July) and in other towns where this religious community practices its religion.

### 2.7.6. Discrimination of Women at Work

There is widespread discrimination of women at work in Serbia, notably by private employers, notwithstanding the prohibition of such conduct by the Labour Act. Women are discriminated against both when they apply for jobs and at work. Employers frequently avoid hiring pregnant women. At job interviews, they often ask the female applicants whether they are planning on having a family and children. Such conduct grossly violates the women's right to privacy and is in contravention of both international and domestic relevant legal standards. Women, unfortunately, often accept the employers' conditions, mostly because they fear they will not get the job or lose it. This is the reason why it is extremely difficult to obtain data and ascertain the genuine proportions of such discrimination in Serbia. Several incidents attracted public attention in 2007.

The dismissal of Knić municipal assembly chairwoman was the most flagrant example of discrimination of women holding public office. The municipal councilmen initiated the dismissal of Snežana Banković under the explanation that she had paralysed the work of the local administration by going on maternity leave. Both the civil sector and state authorities reacted to the request. The Assembly Gender Equality Committee condemned the councilmen's explanation and qualified it as sexual discrimination.[711] The Protector of Citizens assessed the initiative as inadmissible and stated that requests reasoned in this manner amounted to discrimination of women and a violation of their rights. The State Administration and Local Self-Government Ministry ordered the Knić Municipal Assembly to rescind the illegal decision as soon as possible (*Vreme*, 25 October, p. 6).

The discrimination of women working in the Sevojno plant Impol illustrates the widespread practice of undervaluing the work of women. In accordance with its Social Programme, the plant Management Board in 2003 took a decision that all employees who would willingly let go of their jobs would be given one-off severance pays, but that women employees would get less than their male colleagues. The female plant workers asked the Užice NGO Women's Centre to help them protect their rights. The Labour Ministry was asked to provide an official interpretation of Article 18 of the Labour Act. The Ministry replied that the Management Board had in the instant case violated the provisions on the prohibition of discrimination at work. The Management Board then decided to grant equal one-off severance packages to men and women, which were calculated on the basis of their length of service. The female workers, who were discriminated against on this basis in 2003 and retired but received smaller severance pay than their male colleagues, went to court. The Užice Municipal Court ruled in their favour. The Management Board representatives appealed this decision but the District Court in 2007 upheld the

711 The Gender Equality Committee asked the State Administration and Local Self-Government Ministry to review the motion to dismiss the Knić local parliament chairwoman and called on the Serbian Government to submit a draft law on gender equality to the Assembly for adoption as soon as possible.

first-instance judgement and clearly underlined in its explanation that discrimination at work was at issue.[712]

These cases illustrate that discrimination against women is widespread but that information about it is rarely accessible. The case of Snežana Banković would not have been resolved in her favour had the media not written about it so extensively. Discrimination against women is widespread in the private sector but more difficult to reveal. The Labour Inspectors should therefore devote more attention to reviewing the application of labour-related anti-discrimination regulations in practice.

### *2.7.7. Problems Related to Legal Protection against Discrimination and Ways of Combating Discrimination*

*2.7.7.1. Inadequacy of Criminal Law Protection*. – People are rarely criminally prosecuted for their discriminatory conduct. Those who make it to court are charged under Article 128 (violation of equality), Article 317 (instigating racial, religious and national hatred and intolerance) and Article 387 (racial and other forms of discrimination) of the Criminal Code. These provisions are insufficient to provide adequate criminal law protection. The main problem victims of discrimination face in court relates to proving that they had been discriminated against. Some headway in this area has been made in the *Krsmanovača* case – so-called "situation testing" was used for the first time to prove the commission of a crime incriminated by Article 128 of the Criminal Code. This evidentiary method is well-known in comparative law but is not envisaged by Serbian legislation. Situation testing has mostly been used in Serbia to prove discriminatory treatment of Roma with respect to their access to establishments for public use.[713] The *Krsmanovača case* is extremely important given that it reached the Supreme Court of Serbia, which upheld the views of the lower courts that had allowed the application of situation testing.[714] It also prompted the filing of a large number of cases regarding violations of equality. The first-instance proceedings in the "Akapulko" case ended in April 2007.[715]

712 The criminal responsibility of the plant director has not been established. The public prosecutor failed to react although this offence is prosecuted *ex officio*.

713 Situation testing uses two groups of people, one belonging to the majority and the other to a minority community. The two groups differ only in ethnicity. In the *Krsmanovača case*, Roma were not allowed to enter the pool grounds although the pool ought to be accessible to all citizens notwithstanding their personal features. One group was composed of Serb citizens and they were allowed to enter the pool grounds, while the other group, made up of Roma citizens, were forbidden entry. On the basis of the situation testing and subsequent testimonies of all members of both groups, the prosecution proved discriminatory conduct in the case and, thus, that the crime in Article 128 of the Criminal Code had been committed.

714 Serbian jurisprudence and legal order do not recognise the status of source of law but Supreme Court decisions command great authority, wherefore the practical importance of this decision is great.

715 This case is similar to the *Krsmanovača case* but it concerns access to a disco. The first-instance proceedings ended with a judgement finding the main defendant guilty and sentencing

Although these court cases corroborate that some headway has been made in proving discrimination, they have also pointed to another problem – that courts pass relatively mild sentences against the perpetrators of these crimes.[716]

The wording of Article 317 is unclear. This Article talks of "instigating" racial, religious and national hatred and intolerance, wherefore a number of incidents occurring in practice are not covered by criminal law. This description of the substance of the crime could rather be qualified as hate speech directed at racial, ethnic, religious and other minorities. It is nevertheless a rare example of the legislators' attempts to penalise gross forms of discrimination. Courts have, however, by and large sentenced the perpetrators of this crime to lenient sentences.[717] The fact that the legislators failed to prescribe higher minimum penalties[718] can hardly justify the courts' practice of passing mild sentences. The penal policy corroborates the assertion that such criminal law protection, even in case of gross forms of discrimination, is inadequate. The reform of criminal legislation is a step that must be taken as soon as a general anti-discrimination law is passed. All amendments ought to be linked to the General Part of the Criminal Code.[719]

*2.7.7.2. Draft Act against Discrimination*. – Serbia still lacks a comprehensive protection system that would adequately deal with the widespread practice of direct and indirect discrimination. Numerous laws include norms penalising discriminatory conduct but these provisions have not proven efficient in combating discrimination in the circumstances. A public debate on the need to pass a general anti-discrimination law began in Serbia several years ago, but there were no indications when such a law would be passed by the end of the reporting period. The anti-discrimination law drafted by the Anti-Discrimination Coalition was submitted to the National Assembly for adoption by the opposition Liberal Democratic Party

him to a six-month provisional prison sentence which will be enforced should he commit the same crime within the following two years.

716 For instance, the main defendant in the *Akapulko case* was found guilty but sentenced to a six-month provisional prison sentence although the penalty for this crime ranges from 3 months to 5 years in jail.

717 For instance, three youths in February 2005 physically assaulted a Roma youth, who had sustained light bodily injuries. They were convicted to maximum 18 months in jail in October 2007 (the Criminal Code foresees a maximum 5 year prison sentence for the crime and a maximum 8 year sentence if it was committed by an official in discharge of duty).

718 Article 137 of the Criminal Code foresees minimum 6-month and maximum 5-year imprisonment for the crime and a minimum 1-year and maximum 8-year imprisonment if the crime was committed by an official in discharge of duty.

719 An interesting example in that respect is the 2006 amendment of the Croatian Criminal Code which introduced the legal category of "hate crime". Under the amendments, hate crime constitutes every crime covered by the Criminal Code that was committed out of hatred of a person because of his/her personal features. The law amending the Criminal Code lists these features but leaves the list of grounds of discrimination open. The law defines hate crime and links it to all crimes in the Code. Under the amendments, such hate crimes constitute qualified forms of the crimes and the penalties for committing them are accordingly stricter.

(LDP) in early October 2007.[720] The Government of the Republic of Serbia drafted its own anti-discrimination bill in late 2006, but withdrew it from the procedure and submitted it to the Venice Commission for expertise.

The submitted draft law aims to provide comprehensive protection from various forms of discrimination in all walks of life. It also aims to facilitate access to court and provide better court protection to victims of discrimination. One of the most important novel mechanisms it envisages is the institute of "voluntary tester of discrimination".[721] This institute is to address the problems arising in jurisprudence and related to proving that discrimination had occurred. A voluntary tester of discrimination is a person who individually or together with other persons directly tests the application of regulations on the prohibition of discrimination by going to public venues. This actually amounts to situation testing, which has already been recognised in domestic jurisprudence.[722] The draft law entitles the tester to file charges if s/he establishes discrimination. The draft law includes general provisions explaining the main institutes and principles, including equality of rights and obligations, essentially reasserting the constitutional principle of equality of citizens notwithstanding their personal features. This Chapter also defines the qualified forms of discrimination[723] and lists the state's obligations to suppress discrimination.[724] A separate chapter of the draft law deals with special forms of discrimination and regulates discrimination on various grounds and in various situations.

The most important part of the draft law is the one envisaging protection mechanisms in discrimination cases. The injured party may file a constitutional appeal given that the prohibition of discrimination is a constitutional principle. The draft allows appeals and other legal remedies against discrimination in administrative proceedings. It also provides for challenging a final administrative act constituting discrimination by launching an administrative dispute in accordance with the Act on Administrative Proceedings. The draft also envisages court protection in civil proceedings in accordance with the Civil Procedure Act. It includes provisions aiming to step up proceedings related to discrimination and emphasising that such proceedings are urgent. Courts shall employ special expediency in reviewing motions for interim measures. The second-instance proceedings are also to be sped up and appeals of final decisions may be filed within eight days upon receipt of the final decision; the court must rule on the appeal within 30 days. Extraordinary legal remedies include review, which is admissible at all times, notwithstanding the conditions stipulated by the Civil Procedure Act. Another novelty in the draft is related to facilitating proving discriminatory conduct. Under Article 30, the injured party

720 See www.parlament.sr.gov.yu, accessed on 13 December.

721 See Article 2 (1) of the Draft Anti-Discrimination Act.

722 See the *Krsmanovača case*.

723 See Article 8 of the Draft Anti-Discrimination Act.

724 See Article 10 of the Draft Anti-Discrimination Act.

need only prove that discrimination was probable, while the burden of proof to the contrary is on the defendant. In addition, direct discrimination need not be proven if the parties do not contest it had occurred or if the court has established that it had occurred. The draft also entitles the injured party to directly address international human rights organisations in accordance with international conventions. The last part of the draft deals with disciplinary and criminal responsibility.

The adoption of this law would complete Serbia's anti-discrimination legislation and, together with the protection afforded by the Criminal Code, would help bring to justice a greater number of perpetrators of discrimination.

## *2.8. Right to Life*

*2.8.1. Court Proceedings*. – The retrial for the assassination attempt on Serbian Renewal Movement (SPO) leader Vuk Drašković on the Ibar Road in 1999 which left four men (Veselin Bošković, Vušur Vučko Rakočević, Dragan Vušurović and Zvonko Osmajlić) dead ended in February. Milorad Ulemek Legija was convicted to 15 years' imprisonment for organising the crime. Nenad Ilić, who had driven the truck that caused the accident, was also sentenced to 15 years in jail. JSO members Dušan Maričić Gumar, Branko Berček, Nenad Bujošević and Leonid Milivojević were found guilty of complicity and sentenced to 14 years in jail. Radomir Marković, the chief of the State Security Service at the time, was convicted only of accessoryship after the fact to 8 years' imprisonment. The then Federal Customs Director Mihalj Kertes was sentenced to two years and five months in jail, the then chief of Serbia's Traffic Police Dragiša Dinčić to 19 months in jail and Vidan Mijailović to nine months' imprisonment. All of them were found guilty of accessoryship after the fact and got sentences shorter by a fifth than the ones they had initially been convicted to. The judicial panel in this case deviated from the Supreme Court of Serbia practice of sentencing persons guilty of similar crimes to 40' years imprisonment (*Blic*, 17 February, p. 14 and *Politika*, 17 February, pp. 1 and 17*)*.

The Supreme Court of Serbia modified Anđelko Bitićević's 9-year prison sentence to 6 years in jail. Bitićević was found guilty of grave general endangerment in the so-called Zozovača scandal but not guilty of selling methyl alcohol for the production of brandy which resulted in the poisoning of 56 and death of 43 people back in 1998 (*Večernje* n*ovosti,* 6 July, p. 13).

The Supreme Court of Serbia also reduced to 4 years in jail the first-instance 5 years' imprisonment sentence pronounced against former Farm Minister Dragan Veselinov's official driver Stevan Bakalov for causing a traffic accident that left one person dead and three injured, (*Blic*, 16 June, p. 16).

The Supreme Court of Serbia in July affirmed the convictions of Milorad Ulemek Legija and JSO member Branko Berček to 40 years in jail for killing Ivan Stambolić and attempting to assassinate Vuk Drašković in Budva at the order of

former FRY and Serbian leader Slobodan Milošević. Defendant Nenad Bujošević was sentenced to 35 years in jail, while Leonid Milivojević and Duško Maričić were each convicted to 30 years' imprisonment. Radomir Marković and Nenad Ilić were each sentenced to 15 years in jail and Milorad Bracanović to two years' imprisonment (*Vreme*, 12 July, p. 18). The actions of judge Milena Inić Drecun, who presided over the Supreme Court's third-instance panel in this case, are unprecedented. She violated the decision-making procedure in third-instance criminal proceedings by refusing the sign the records on the court deliberations and voting because, as she explained, she "did not want to sign something in contravention of the law".[725]

The FBI report on the analysis of ballistic evidence of the deaths of two Army Guard Brigade members Dragan Jakovljević and Dražen Milovanović in 2004 arrived in Serbia in October 2007. The court waited for the report for two years because the documentation was kept in the Serbian consulate in Frankfurt and the embassy in Berlin for a year (*Blic*, 25 October). Acting Republican Public Prosecutor Slobodan Radovanović assigned the case to Deputy District Prosecutor Aco Stojev after the soldiers' families asked that the case be assigned to a civilian deputy public prosecutor because they distrusted the army judicial bodies that had still been operating at the time their sons died. (*Blic*, 26 November, p. 16). The court issued a warning to former military magistrate Vuk Tufegdžić, who had handled the case, for publicly disclosing Jakovljević's personal and family circumstances (*Večernje novosti*, 6 November, p. 12).

*2.8.2. Negligent or Unprofessional Medical Treatment*. – The media in 2007 reported on a quite a few instances of inadequate medical care, some of which had fatal consequences.

The Knjaževac Municipal Court sentenced Belgrade doctor Milorad Milić to one year in jail for causing the death of Bor resident Dušica Milojković by his inadequate treatment and negligence (*Kurir*, 14 September, p. 8).

The Kragujevac Municipal Court in October found Nebojša Zlatanović, a doctor in the Kragujevac Clinical Centre, guilty of a grave crime against human health by which he caused the death of three-year-old Mila Andrić. The court proceedings in this case had dragged on for nine years. Zlatanović was sentenced to eight months in jail although the Criminal Code envisages between 1 and 8 years' imprisonment for this crime (*Večernje* n*ovosti,* 2 October, p. 6).

Three-year-old Ana Grahovac died on 4 June at the Belgrade Mother and Child Institute, where she was transferred after failing to wake up from anaesthesia following a cataract operation in the private plastic surgery hospital Perfekta. The operation in Perfekta was carried out by the doctors of the private ophthalmological office Ilić. The Health Ministry shut down both institutions (*NIN*, 14 June, p. 34). The Serbian Medical Society Ethics Committee concluded that the whole medical

725 See II.2.5.

team, which had operated on Anja Grahovac, had breached the medical code of conduct by performing the operation in a surgery not registered for cataract operations and because it used old anaesthesia equipment. Court experts were due to analyse the anaesthesia equipment; it was established that the system's quality control certificate had been forged (*Večernje novosti,* 13 July, p. 6). The Novi Sad Medical College Committee of Court Experts concluded that the doctors had not made any mistakes which could have caused the little girl's death (*Večernje novosti,* 18 October, p. 6).

First-aid doctor Sead Šehić was dismissed after refusing to send an ambulance to bring in a patient who had fallen sick and soon died. Apart from refusing to provide her with medical care, Šehić grossly insulted her husband who had called First Aid a number of times when she started feeling sick, as was corroborated by the tape recordings of the telephone calls to First Aid (*Blic*, 27 November).

The Belgrade Third Municipal Prosecution Office filed charges against a surgeon, two anaesthesiologists and assistant director of the private hospital Decedra over the death of student Jelena Radović after a minor foot operation at this clinic in October 2006.[726] (*Večernje novosti*, 19 December, p. 13).

According to data in *Maternal Mortality 2005*, a report published by the World Health Organisation, the World Bank and the UN Population Fund, there are 14 maternal deaths per 100,000 live childbirths in Serbia (and Montenegro given that the report was published in 2005). Serbia ranked 41st on the list of countries by the number of maternal deaths at childbirth. The Public Health Institute "Milan Jovanović Batut" data for 2006 show that 69,472 women gave birth in Serbia, that 9 died during pregnancy, at child birth and within the first six weeks from childbirth that year (*Politika,* 2 November, p. 9).

Disposal of medical and human waste is a major problem in Serbia. Infectious medical waste in Kragujevac is thrown away with the rest of the garbage and frequently finds itself on the city streets. Only the Kragujevac Clinical Centre has a crematorium for incinerating organic waste. The private clinics in the city do not have agreements with the Clinical Centre on burning their waste in the crematorium and it usually ends up in the sewage system (*Kurir,* 16 July, p. 7)

*2.8.3. General Endangerment*. – According to MIA data, an average of 60,000 traffic accidents, leaving nearly 1,000 people dead and between 15,000 and 18,000 injured, occurs in Serbia every year. The mortality rate is five times higher in Serbia than in other European countries. Serbia is one of the more unsafe countries in Europe by all traffic safety parameters. Moreover, traffic accident statistics are not kept adequately (*Vreme*, 13 September, p. 26).

*2.8.4. Life in a Healthy Environment*. – A number of environmental disasters caused by pollution occurred in 2007. The concentration of benzene and other harm-

726 More in *Report 2006*, II.2.4.

ful matter exceeded the permissible limits in the Pančevo air many times. The Environment Protection Ministry ordered the Pančevo Petrol Refinery and the local artificial fertiliser plant Azotara to adjust their activities to the weather. These orders were ignored and the state envirnment inspectors ordered the temporary shut-down of Azotara (*Vreme*, 30 August, p. 11). State environment inspector Jelena Stanković filed criminal reports against several Azotara directors for disregarding the inspection's orders to halt production in four of the plant sections, which had led to ammonium pollution. She charged them with the crime of failing to take environmental protection measures to prevent air pollution (*Press*, 8 August, p. 15)

Speleologists found 10 containers with the cancerogenous substance cresol in the Zlot caves in 2007. The containers with cresol had been transferred to the caves from the Lak žica factory and their content was to have been used for paving the cave paths. They were returned to the factory compound which at the time had another 100 containers full of cresol and 150 partly filled with this substance. What is even more alarming is that the factory management had no idea until a year ago that cresol was cancerogenous and had been selling the empty containers in Bor, where citizens bought them to make sauerkraut (*Večernje novosti*, 7 May, p. 9 and *Kurir*, 7 May, p. 6).

State environment inspector Slaviša Banković ordered the temporary shut down of the Dževrin, Džersi, Venus and Stokoimpeks plants after they released their waste water into the Beli Timok River, polluting it and causing the death of around 50 tons of fish. None of the plants heeded the orders and were served with orders prohibiting their work (*Press*, 5 July, p. 7). The managements of the four companies, charged with the systematic pollution of Timok, spent 48 hours in custody (*Blic,* 6 July, p. 4 and 10 July, p. 14). Knjaževac municipal authorites appealed on citizens, who had been drawing great quantities of the poisoned fish out of the water, not to eat it because they may suffer serious health problems (*Blic*, 7 July, p. 16).

*2.8.5. Other Violations of the Right to Life*. – The first indictment for the attempt to infect another person with an extremely dangerous disease came into force in March. The defendant is charged with trying to infect his former girlfriend and now mother of his two children with HIV because he did not tell her he was suffering from this lethal disease (*Blic*, 30 March, p. 15).

Mališa Jevtović was sentenced to 40 years in jail for raping to death three-year-old Katarina Janković. The little girl's mother, Ana Filipović, was convicted to 37 years' imprisonment for assisting him (*Press*, 10 May, p. 11).

Children were attacked by stray dogs on a number of occasions in 2007. The Niš Municipal Court found the City of Niš guilty because its authorities were duty-bound to eliminate this public hazard (*Vreme*, 21 January, p. 7 and *Blic*, 15 July, p. 4).

Policemen Igor M. and Aleksandar J. and their accomplice Milan V. killed Croatian citizen Jakup Haradinaj. They were in their uniforms when they stopped the victim who was driving down the highway near Belgrade, confiscated his Citroen C4, cell phone and 600 Euro he had on him, killed him by hitting him with a blunt object and buried his body on Mt. Goč (*Blic,* 5 June, p. 14).

A group of Skinheads hit Dalibor Borota on the head with a glass bottle and killed him after the concert of a local group Ritam nereda in the town of Crvenka. The concert had been reported as a public gathering and the police had to estimate whether it posed a security risk. According to witness testimonies, this group of Skinheads had been followed by a police car all the time (*Kurir*, 12 June, p. 15).

The dead naked body of a 22-year-old man was thrown into a bear cage in the Belgrade zoo in August. The details of the case have not been made public yet (*Politika,* 20 August, p. 12).

It was discovered in October that 95 patients had been innoculated with fake tetanus vaccines containing no active substance in the July-September period (*Blic*, 12 October, p. 7). It was established that fake "tetagram r" ampules and a large quantity of unregistered medications of foreign origin were sold in Serbia in the December 2006 – September 2007 period. The Director and Commercial Officer of the company General Trejd and the Director of the companies Lagato trejd and Malago trejd, have been suspected of illegally selling the unregistered drugs and producing the fake "tetagram r". General trejd's licence to sell medications was revoked (*Politika*, 18 October, p. 1 and *Blic*, 18 October, p. 17). Records show that five out of the seven people suffering from tetanus died in 2006; of the fifteen people, who had contracted the disease in 2005, five died (*Politika*, 12 October, p. 8).

A convict in the Niš Prison, placed in solitary confinment in the Special Supervision Unit and tied to his bed by belts, managed to set fire to the bed with his lighter and suffocate due to the negligence of the guards on duty. Five guards have been suspended until the end of the disciplinary proceedings (*Blic*, 1 December, p. 13).

## *2.9. Prohibition of Torture*

Violations of the prohibition of torture and other prohibited forms of ill-treatment, apparently the consequence of systemic problems plaguing society, ranked high on the public agenda in 2007. The violations of the prohibition of torture have become more evident since the adoption of new legislation related to the prohibition of torture (Penal Sanctions Enforcement Act, Criminal Procedure Code, Police Act), the ratification of international treaties and the adoption of subsidiary legislation. Many of these problems have originated from the lack of readiness of the state authorities, above all the police, to radically change their attitude towards this civil

right and the absence of effective legal mechanisms for preventing and punishing torture. The situation in prisons and other detention facilities also leaves a lot to be desired.

*2.9.1. Court and Disciplinary Proceedings Related to Ill-treatment.* – The Humanitarian Law Centre (HLC) filed a compensation claim against the Republic of Serbia with the Belgrade First Municipal Court on behalf of Murat Pepić from the town of Tutin, who had allegedly been beaten up by three local policemen in January 2002.[727]

According to the HLC, Murat Pepić and his relatives were celebrating New Year's Eve in the Tutin disco Panorama on 31 December 2001. Fifteen minutes into the New Year, he headed off to the next-door establishment to wish his friends there a happy New Year. As he was leaving Panorama, he met policeman Sabahet Kurtović on the stairs, who drew his revolver, said he had been "waiting a long time" for him and hit him on the nose with the butt of his revolver. Sabahet Kurtović hit him once more in front of the disco, tied him up and pushed him down on the ground. Policeman Milijan Luković then hit Pepić with his baton, while policeman Sabahet Nurković kicked him. Murat Pepić fainted from the blows soon, but the policemen continued beating him up. A large number of people witnessed the incident. One of them, Haćif Kurbadović, wanted to help Pepić but was prevented by policeman Nurković. Pepić regained consciousness the following day in the Novi Pazar hospital. He was soon transferred to the Clinical Centre of Serbia in Belgrade, where the doctors diagnosed fractures of the nose, skull and two ribs. Policemen Luković, Kurović and Nurković were found guilty of inflicting Pepić grave bodily injuries and ill-treatment while they were discharging their duty and convicted to one-year suspended prison sentences. They have, however, never been dismissed from the police. Pepić was sentenced to a six-month suspended prison sentence for preventing an authorised official from maintaining law and order.

The Leskovac Human Rights Committee claims that a Momčilo Rajković from Vlasotince was beaten up by a local policeman on 16 March. Rajković alleges the policeman hit him with his fist several times, after which he fell to the ground and lost consciousness.[728]

The Niš Municipal Court in June found four Doljevac policemen guilty of torturing eleven-year-old I.S back in 2003.[729] Policemen Predrag R. and Ljubiša S. were sentenced to four months in jail each, while policemen Slaviša P. and Miroljub S. were each sentenced to five months in jail. The first-instance verdict specified they "abused their posts and violated the inviolability of residence and violated the rights of underage I.S. protected by the Convention on the Rights of the Child, the Constitution and law". The Youth Initiative for Human Rights, which initiated the

727 See HLC statement, 28 May, www.hlc-rdc.org.

728 More at http://www.humanrightsle.org.

729 More about this case in *Report 2003,* II.2.3.1.

proceedings against the policemen, said it would appeal the lenient sentences (*Blic,* 29 June, p. 17).

The Kruševac police administration in early October stated its members had exceeded their powers when they used force against Milan Lukić (51) and his son Nemanja (24). The police said they would launch disciplinary proceedings against the five policemen and that three of the perpetrators would be suspended until the proceedings were completed.[730] No details on any undertaken measures were published by the time this Report went into print.

Two Leskovac policemen were suspended in mid-October on suspicion of unlawful conduct during the arrest of Natkrivanj villager Predrag S. Police officials say the suspended policemen failed to react promptly and tie Predrag S. up, who thus used the opportunity and killed his father Novica S. Investigation of this case was under way at the end of the reporting period (*Press,* 18 October, p. 7).

The Leskovac Human Rights Committee in late October accused the police of torturing three Medveđa Albanians, Faik Hajdari, Burim Jahu and Nazim Muratović, who had been suspected of beating up a gas station employee (*Kurir*, 29 October, p. 10).

The HLC in late October filed a compensation claim against the Republic of Serbia on behalf of Hazbija Smajlović from the village of Suvi Do. Smajlović had allegedly been tortured by Tutin policemen in 1994.[731] The HLC filed a compensation claim because "three Tutin policemen came to the Smajlović house on 15 March 1994 and took him into custody to the police station on the count of illegal possession of arms". HLC claims the policemen had hit the detainee with their batons on the back, kidneys, legs, arms and face.

There were instances of violent behaviour and infliction of bodily injuries by policemen off duty in 2007 as well. According to a criminal report filed by the Pirot police administration office in Bela Palanka, Bela Palanka policeman Milan Rajković is suspected of inflicting grave bodily injuries on Milan Mitić from that town. The police claims in the report that Rajković hit Mitić in the face with his fist, breaking his jaw in two places. Rajković was not on duty at the time of the incident (*Press*, 24 August, p. 9).

Even local municipal leaderships in some Serbian towns protested against the conduct of some policemen and called on the competent state bodies to protect the citizens from their ill-treatment and chicanery. The Osečina municipal authorities on several occasions called for legal measures against the local policemen after the citizens complained that their conduct was unlawful and that they were overstepping their powers. Mayor Bogdan Đurić confirmed in his statement to the media that "the policemen are a greater problem than the citizens" and said they were "terrorising the whole population". The MIA Inspector General's Service established irregularities in the work of the Osečina policemen in several cases, but none of the

730 *B92*, 8 October, www.b92.net.

731 See: *B92*, 25 October, www.b92.net

incidents saw a court epilogue "due to the expiry of the statute of limitations" (*Blic*, 17 June, p. 4).

The MIA in June stated that criminal reports had been filed against a total of 506 policemen for allegedly perpetrating 633 crimes in 2006. Fifteen reports regarded abuse and torture, 12 domestic violence, 13 violent behaviour, 16 abuse of post (*Blic*, 6 June, p. 14). In the first five months of 2007 alone, citizens filed as many as 890 reports against policemen. It was established that 69 of the 328 reviewed reports were grounded (*Blic,* 6 June, p. 14).

*2.9.2. Situation in Prisons*. – Penal Sanctions Directorate officials stated in mid-August that "around 8,500 people were currently in detention in Serbia which is double the capacity of Serbian prisons under European standards" (*BETA*, 11 August). The officials also said that the prisons had initially been built to hold around 6,000 people and that they were evidently overcrowded. The head of the Directorate department charged with treatment of prisoners Damir Joka said that the number of prisoners has been constantly on the rise in the past few years and that it was 30% higher than in 2001. A total of 6,500 people are serving the sentences handed down by courts, around 1,800 are detained pending trial, while 200 are serving misdemeanour sentences. According to recent data, 168 juveniles are in juvenile homes and 35 are serving juvenile prison sentences. Around 500 people are undergoing psychiatric treatment in the specialised prison hospital (*BETA*, 11 August).

The situation in Serbian prisons calmed down after the numerous rebellions and tensions in late 2006 and early 2007.[732] The effects of the November 2006 rebellion and its quashing, however, remained in the public limelight. In the meantime, courts opened proceedings against the alleged perpetrators of torture during the quelling of the rebellion.

The Leskovac Human Rights Committee filed 31 criminal reports against the prison guards and Gendarmerie troops suspected of torturing the prisoners during the stifling of the prison riot in November 2006. The Committee claims that over 40 prisoners were first beaten up and then "thrown onto the wet concrete floor in the prison yard, where they were forced to lie for some time in their scant clothing" (*Blic*, 31 March, p. 12).

Najdan Mitić from Leskovac filed a criminal report against the local District Prison warden and the prison guards on suspicion that they were responsible for the death of his son Jovan Mitić (28) who hanged himself in prison in early September. According to the prison administration, Mitić killed himself by hanging himself on a bed sheet he had tied to the bed whilst in solitary confinement. Mitić claims his son had tried to commit suicide earlier that same day but was saved. He believes the prison administration is responsible for leaving a prisoner in such a state in solitary confinement and not taking measures to prevent any other suicide attempts. Mitić also disbelieves the autopsy results. The prison administration dismissed Mitić's al-

732 More in *Report 2006,* II.2.3.4.

legations and said that his son had already tried to kill himself earlier. The administration admitted that there are many prisoners in solitary confinement and that "it is technically impossible to keep them under surveillance round the clock" (*Blic*, 16 October, p. 17).

*2.9.3. Situation in Psychiatric Institutions*. – The difficult situation in psychiatric institutions frequently made the headlines in 2007. The public was shocked after the organisation Mental Disability Rights International (MDRI) published the results of its investigations of some psychiatric institutions in Serbia in November. The report, entitled, "Torment not Treatment: Serbia's Segregation and Abuse of Children and Adults with Disabilities", highlights the difficult circumstances in institutions caring for children, including filthy conditions, contagious diseases, lack of medical care, rehabilitation and judicial oversight. MDRI found that the situation rendered "placement in a Serbian institution life threatening for both children and adults".[733] The publication of the findings prompted negative reactions amongst the competent ministers (for health and labour and social policy) who questioned their accuracy and impartiality. The Serbian Government in late November adopted its own Report on the Situation in Institutions Accommodating Children and Adults with Special Needs dismissing the MDRI findings.[734]

Other organisations, like the Helsinki Committee for Human Rights in Serbia, have, however, also reported on the dire, and in some cases even alarming conditions in these institutions in Serbia. In its report for the September 2006-March 2007 period, the Helsinki Committee underlines *inter alia* that "even the minimum conditions necessary for the accommodation and treatment of the patients are not met in the institutions with the high ceilings, absence of heat and water isolation, musty and dank walls, concrete floors, draughty doors and windows, lack of natural and artificial light and fresh air, cold or tepid radiators. Living conditions in some wards (Oligophreny Department of the Vršac Hospital) may be defined as inhuman or humiliating treatment." The report emphasises that the conditions for tying the patients down and applying other means of restraint are unclear and that not all application of such measures is recorded in the logs.[735]

## *2.10. Prohibition of Slavery, Status akin to Slavery and Smuggling of Humans*

The fight against human trafficking and smuggling has somewhat improved in Serbia in 2007 judging by reports of media, NGOs and international organisations.

733 *B92*, 14 November, www.b92.net.

734 *B92*, 22 November, www.b92.net.

735 People on the Margin – Human Rights in Psychiatric Hospitals, September 2006 – March 2007, Helsinki Committee for Human Rights in Serbia, Belgrade, 2007, pp. 7 and 8.

According to the annual Trafficking in Persons Report of the US State Department Office to Monitor and Combat Trafficking in Persons,[736] Serbia is a source, transit, and destination country for women and girls trafficked transnationally and internally for the purpose of commercial sexual exploitation. The Report ranks Serbia as a Tier 2 country, along with other states working on suppressing human trafficking but needing to invest additional efforts to do so. The 2007 report emphasises that there has been an increase in internal sex trafficking of Serbian women and girls with traffickers increasingly using Internet chat rooms and cell phone text messages to recruit young victims. It notes trafficking of children into forced labor or forced street begging in some cases and the failure of Serbia's authorities to provide information about the alleged involvement of the Novi Pazar local police in a prostitution chain. Although it recognises the efforts invested by the legislative and executive authorities in combating human trafficking, the Report states that Serbia should "aggressively prosecute human trafficking cases and ensure that traffickers receive jail sentences consistent with the heinous nature of the offense".

Identification of the victims remains the gravest problem in successfully combating human trafficking in Serbia (*Danas*, 8 March, p. 11). The post-identification process is burdened by the lack of appropriate reintegration programmes, of accommodation for victims with psychological problems (*ASTRA*, 14 May), and of shelters for underage human trafficking victims.

NGOs remain the most active anti-trafficking awareness and prevention campaigners.[737] The state authorities, too, have been increasingly involved in human trafficking prevention and education activity.

No activity aimed at increasing demand (clients and/or potential clients) has been registered in 2007.

*2.10.1. Human Trafficking*. – According to data of the NGO *ASTRA*, 242 victims of human trafficking, 95 of whom were children, were discovered from 2002 to June 2007. Seven of the victims, four of them children, were discovered in 2007 (*Danas*, 8 June, p. 7).

According to MIA data, Serbian nationals accounted for most of the victims of human trafficking in the past few years, while the others were nationals of Romania, Moldova, the Ukraine and the Russian Federation. MIA records show that most of them were discovered in the cities and border areas, notably Novi Pazar, Zaječar, Požarevac and Šabac (*TANJUG*, 29 June).

Serbia's police apprehended scores of people involved in human trafficking in 2007. Arrests were made in Niš (*Glas javnosti*, 24 January, p. 8), Šabac (*Blic*, 6 February, p. 6), Novi Pazar (*24 sata*, 23 March, p. 5), Aleksinac (*Politika,* 13 June, p. 5), Novi Sad (*Večernje novosti*, 29 July, p. 3) and Obrenovac (*ASTRA*, 22 November).

736 See http://belgrade.usembassy.gov/policy/reports/070612.html.

737 See *ASTRA* E-bulletins Nos. 11, 12, 13 and 14, www.astra.org.yu.

Media frequently reported on alleged human trafficking in Novi Pazar night clubs (*B92*, 7 March and 12 July, *24 sata*, 23 March, p. 4 and *Danas*, 16 July, p. 12). The Novi Pazar police at first claimed they had no information about prostitution and abuse of the girls. Encouraged by the reaction of the police, the owners of the Novi Pazar night club Jet Set even organised a news conference at which the owner and the girls working there denied the allegations (*Večernje novosti*, 14 March, p. 12).

An investigation of Jet Set's owners Branka Ružić and Hasib Šećović was opened in March on suspicion of mediation in prostitution (*24 sata*, 23 March, p. 5). Nine other people in Novi Pazar were taken into custody on suspicion of human trafficking in July (*Danas*, 16 July, p. 12). The potential victims of human trafficking from Sombor, Loznica and Belgrade were placed in a shelter in Belgrade (*B92*, 12 July).

The Zrenjanin district prosecutor in May filed criminal charges against one person reasonably suspected of trafficking one woman (*Glas javnosti*, 17 May, p. 12).

The Belgrade District Court Organised Crime Chamber in early March delivered a first-instance judgement convicting Miroljub Radivojević, Miodrag Milanović, Gorana Gmijović, Marko Begović and Gradimir Rilaković to a total of 22.5 years in jail for human trafficking, forging documents and illegal possession of weapons (*ASTRA*, 9 March).

The Sombor District Court in late March delivered a first-instance verdict against Marija Ivanek and Josa Zlatković, sentencing them to a total of 8.5 years' imprisonment for the crime of human trafficking (*ASTRA*, 11 April).

The Serbian MIA has alerted to the trend of human trafficking for the purpose of labour exploitation – seasonal workers from FYR of Macedonia are being brought into Serbia to work on the construction sites and there are indications that they are being swindled, blackmailed, exploited and subjected to humiliation, suffering and physical violence (*Večernje novosti*, 25 January, p. 10).

There are no official data on trafficking in human organs in Serbia. Quite a few ads in which people are offering their body parts for a fee or seeking to buy organs are, however, posted by Internet advertisers with a Serbia web page on their domains. There is no information about investigations of either persons trading in organs or the owners of the domains publishing such ads.[738]

Belgrade prosecutors have not had any cases regarding the trafficking in human organs. MIA officials state that the police cannot adequately combat the problem of exploitation via the Internet because it lacks "a special department for fighting high technology crime" (*B92*, 9 April and *Blic*, 10 April, p. 12).

*2.10.2. Smuggling of Humans*. – The Serbian police in late January took into custody a national of the Republic of Korea Kim Man Sik suspected of illegally crossing the state border and smuggling humans. The Belgrade police cut off an-

738 See also *Report 2005*, II.2.4.4.

other human smuggling chain in late February when it arrested 19 people in Zemun. The 18 Albanian and one Macedonian citizen had been hidden by a resident of Belgrade Nuredin R.A. (*TANJUG*, 11 April). Two people in Novi Sad and one person in Šid were arrested for smuggling Albanian nationals into Croatia (*Dnevnik,* 23 April, p. 10 and *ASTRA*, 18 July).

Three criminal reports were filed against four persons, two of them nationals of Serbia, for the attempt to smuggle an under-age girl from Kosovo through the Horgoš border crossing with Hungary (*Blic*, 10 April, p. 15). The Serbian police have been warning that more and more Roma children are being smuggled into Hungary and then on to Austria, Germany or Switzerland (*Blic*, 10 April, p. 15).

The trial of a group of 12 Serbian and Chinese nationals, accused in January 2006 of smuggling people from China via Romania, Serbia, Montenegro, Bosnia and Herzegovina and Croatia, ended in March. The Belgrade District Court Organised Crime Chamber delivered a first-instance judgement convicting them to a total of 45 years' imprisonment (*RTS*, 12 March).

In May, the Belgrade District Court Organised Crime Chamber opened a trial of a 12-member organised group charged with smuggling citizens of Turkey, Albania and Serbia across the Danube and into Croatia from mid-June to mid-August 2006. They are accused of smuggling people via Belgrade and Bačka Palanka and charging them 350–400 Euro each for their services (*Glas javnosti*, 8 May, p. 5).

## *2.11. Right to a Fair Trial and the State of the Judiciary*

*2.11.1. Appointment of the Republican Public Prosecutor*. – Slobodan Janković remained the Republican Public Prosecutor until July 2007[739] although he had met all retirement requirements back in 2005.[740] The High Judicial Council appointed the then Special Organised Crime Prosecutor Slobodan Radovanović to be Acting Republican Public Prosecutor. Radovanović then appointed the then Kruševac Deputy Prosecutor Miljko Radisavljević to take his place as Organised Crime Prosecutor (*Politika*, 25 July, p. 1 and *Večernje novosti*, 25 July, p. 7)

The Assembly on 23 July relieved the then Belgrade District Prosecutor Milovan Božić, who had also stayed on although he had met the legal requirements for retirement.[741]

*2.11.2. Trial within a Reasonable Time*. – The Serbian judiciary has not been reformed yet, nor does anyone have an inkling when the new courts will be estab-

739 The Assembly Judicial Committee took the decision to terminate his mandate on 23 July, http://www.parlament.sr.gov.yu/content/cir/akta/akta_detalji.asp?Id=323&t=O#

740 See *Report 2006,* II.2.5.2.

741 http://www.parlament.sr.gov.yu/content/cir/akta/akta_detalji.asp?Id=325&t=O#

lished. The backlogs in the district courts and Supreme Court are caused by the many cases that ought to be within the jurisdiction of the appellate courts. The delay in reforming the judicial system is one of the reasons for the backlogs, which, in turn, leads to the courts' failure to close the proceedings within a reasonable time (*Politika*, 8 September, p. 12).[742] Moreover, when a court judgement becomes final at last, its enforcement usually takes ages (*Blic*, 30 September, p. 22). Most of the applications against Serbia submitted to the ECtHR concern overly long trials. Because of the unduly long proceedings or the non-enforcement of the final judgements, the Court found Serbia in violation of the right to a fair trial in 11 of the 15 judgements it pronounced by end 2007.[743]

*2.11.3. Expiry of the Statute of Limitations*. – Delays in proceedings frequently lead to the expiry of the statute of limitations in cases. The Serbian Justice Minister said that the statute of limitations had expired for 517 criminal cases in the past two and a half years (*Blic*, 16 October, p. 17). One of the cases was related to the 34 followers of the Socialist Party of Serbia, who had tried to prevent Milošević's arrest in 2001; 29 of them can no longer be tried for the offence (*Večernje novosti*, 12 April, p. 13). Another highly profiled case in which the statute of limitations had expired regarded former Abbot Ilarion accused of paedophilia; the procedure to dismiss the judges trying the case was initiated; (*Blic*, 15 September, p. 16 and *Večernje novosti*, 27 October, p. 13). Delays in proceedings also led to the expiry of the statute of limitations on two of the four counts in the criminal trial against Bishop Pahomije (*Blic*, 29 September, p. 4 and 31 October, p. 14). The Justice Ministry asked the Niš Municipal and District Courts to present reports on the actions taken in the proceedings against Pahomije (*Blic*, 3 November, p. 16) and the whole case was referred to the Supreme Court Supervisory Board to decide whether it should initiate the procedure for the dismissal of the judges (*Blic*, 13 November, p. 14 and 16 November, p. 16). In the end of 2007, the High Personnel Council rejected to reprimand the judges in this case.[744]

*2.11.4. Strike in the Judiciary*. – The work of the courts was additionally blocked when their staff went on strike demanding higher salaries and the signing of a collective agreement. The courts provided only "minimum process of work"

742 It should be borne in mind that the court's backlog cannot be justification for long proceedings, a view shared also by the European Court of Human Rights and reiterated in its judgements of cases against Serbia, e.g. *Ilić v. Serbia,* App. No. 30132/04, para. 86 and the judgement in the case *Samardžić and AD Plastika v. Serbia,* App. No. 28443/05, para. 41.

743 *V. A. M. v Serbia*, App. No. 39177/05, *Ilić v. Serbia*, App. No. 30132/04, *EVT v. Serbia,* App. No. 3102/05, *Tomić v. Serbia*, App. No. 25959/06, *Samardžić and AD Plastika v. Serbia*, App. No. 28443/05, *Jevremović v. Serbia*, App. No. 3150/05, *Mikuljanac, Mališić and Šafar v. Serbia*, App. No. 41513/05, *Stevanović v. Serbia*, App. No. 26642/05, *Popović v. Serbia*, App. No. 38350/04, *ZIT Company v Serbia*, App. No. 37343/05, *Jovićević v. Serbia*, App. No. 2637/05. Translations of all ECtHR judgements against Serbia are available at the website of the Serbia's Agent before the ECtHR – www.zastupnik.sr.gov.yu.

744 *B92*, 29 December, www.b92.net.

and most of the trials were put off (*Blic*, 6 November, p. 5, 7 November, p. 14, 16 November, p. 14, *Politika*, 14 November, p. 12 and *Večernje novosti*, 7 November, p. 7, 13 November, p. 5, 15 November, p. 6).

*2.11.5. Penal Policy*. – The courts have a lot of discretion in handing down punishment given the extensive scope of penalties afforded by the law, which has led to an inconsistent penal policy in Serbia. According to a Comparative Law Institute survey, 93% of the persons found guilty of the gravest crimes were convicted to sentences below the legal minimum by Čačak courts; the percentage of such convictions stood at merely 19.6% in Belgrade (*Blic*, 28 October, p. 4). Such inconsistent punishment leads to even greater legal insecurity.

*2.11.6. Threats and Attacks on Judges*. – Judges and other judicial staff are not adequately protected, which, too, may impact negatively on their independence and work.

Judicial staff was exposed to threats and the media recorded a number of cases when the judges were physically assaulted by the disgruntled parties (*Blic*, 5 April, p. 15, 11 June, p. 15 and *Politika*, 5 April, p. 12). The most drastic incident occurred in Odžaci, where a dissatisfied party shot the judge and lawyer dead in the courtroom (*Večernje novosti*, 9 June, p. 13, *Blic*, 9 June, p. 14 and *Politika*, 9 June, p. 1).

This incident raised the issue of court security and how the man was able to bring a weapon into the courtroom in the first place. Data published after the incident showed that the court security services were understaffed, with 450 instead of the prescribed 731 personnel. There are only 37 metal detector doors in courts and another 137 need to be installed. Courts also lack other equipment ensuring proper security (*Večernje novosti*, 21 June, p. 6).

Another important issue is the security of judges and prosecutors working on organised crime and war crimes cases. The Chicago-based Organisation for the Protection of Serbs in 2007 sent threatening messages to judge Nata Mesarović, who tries organised crime cases, and War Crimes Prosecutor Vladimir Vukčević; this organisation sent a threat letter to Supreme Court of Serbia President Vida Petrović Škero in 2006 (*Blic*, 11 May, p. 16).

Media in April reported about the unscrewing of the front wheels of the car of President of the Special Organised Crime Chamber Milan Ranić; fortunately, he had not had an accident (*Politika*, 27 April, p. 12 and *Blic*, 26 April, p. 14).

*2.11.7. Corruption*. – The Supreme Court of Serbia reduced to six years' imprisonment the eight-year jail sentence against Supreme Court judge Ljubomir Vučković, convicted for bribery in 2006[745] (*Blic*, 29 June, p. 17 and *Politika*, 29 June, p. 12).

745 See *Report 2006*, II.2.5.4.

Former Belgrade District Attorney Rade Terzić was arrested in July and accused of enabling the release of Zemun Clan members after the abduction of Miroslav Mišković and of Milorad Ulemek Legija after the incident in the Stupica restaurant (*Politika*, 21 July, pp. 1 and 12). Thirteen NGOs reacted by issuing a statement in which they expressed the suspicion that Terzić was arrested to render senseless the motion for establishing the political background of PM Đinđić's assassination (*Večernje novosti*, 25 July, p. 12).

*2.11.8. Situation in Prisons*. – The situation in prisons did not improve in 2007.[746] They are still overcrowded. The number of inmates and detainees has grown in the past few years but neither have the prisons been expanded nor have the conditions in them improved (*Blic*, 7 July, p. 17). The prisons now hold around 8,500 people, although they have the capacity for a maximum 4,500 people under European standards (*Večernje novosti*, 28 October, p. 4–5)

*2.11.9. Enforcement of the Decisions of International Human Rights Protection Bodies*. – Serbia still lacks an efficient and legally defined mechanism for enforcing the binding decisions of these bodies, including the UN Committees and the ECtHR.

Although more than a year has passed since the UN Human Rights Committee issued its views on the *Bodrožić v. Serbia and Montenegro case* in which it found Serbia in violation of the guarantees of freedom of expression enshrined in the ICCPR, Serbia's state bodies have not fulfilled the obligations set by the Committee. Serbia's judiciary and, notably, its Justice Ministry have failed to take the necessary measures to enforce the decision of the Committee. The authorities have likewise ignored some other decisions taken by other international bodies against Serbia.

Serbia has been a party to the European Court of Human Rights since 2004. The ECtHR has reviewed a large number of applications accusing Serbia of violating the rights enshrined in the ECHR. Much harm will ensue if its state bodies fail to enforce the ECtHR's judgements. A state's attitude towards decisions of human rights supervisory bodies testifies above all of its attitude towards its own citizens and its willingness to see justice served.

*2.11.10. The Judgements of the European Court of Human Rights in Cases against Serbia.* – By the end of 2007, the ECtHR adopted 15 judgments on applications that had been submitted against Serbia. The first judgement was delivered in 2006 in case *Matijašević v. Serbia*,[747] where the ECtHR found that the Article 6 of the ECHR had been violated in relation to the presumption of innocence. The remaining judgments were issued in 2007.

746 The substandard prison conditions were one of the reasons for the riots that erupted in them in 2006. See *Report 2006*, II.2.3.4.

747 *Matijašević v. Serbia*, ECHR, App. No. 23037/04.

The ECtHR found violations of human rights guaranteed by the ECHR in all these cases; the largest number of violations relates to the rights from the Article 6 guaranteeing the right to a fair trial (see 2.11.2.). Thus the ECtHR found this violation in cases *Samardžić and AD Plastika v. Serbia* and *Popović v. Serbia* while in the cases *Mikuljanac, Mališić and Šafar v. Serbia*, *Stevanović v. Serbia*, as well as *Jovićević v. Serbia* the ECtHR found that the right to be tried within reasonable time and the right to effective legal remedy were violated. As established by the ECtHR, in the case *EVT Company v. Serbia*, the right to a fair trial and the right to peaceful enjoyment of property (Art. 1 of the Protocol 1) were violated.

Apart from the right to a fair trial and the right to effective legal remedy, the ECtHR found violations of other human rights guaranteed by the ECHR in the following cases: in cases *V. A. M. v. Serbia* and *Tomić v. Serbia*, related to the question of custody over a child, the ECtHR found a violation of the right to private life (Art. 8), in the case *Jevremović v. Serbia*, where the issue had been to determine fatherhood and alimony, it was established that the unreasonable duration of the procedure caused a violation of the right to privacy, while in the case *ZIT Company v. Serbia*, as well as in case *Ilić v. Serbia*, related to nationalised property, the violation of the right to a peaceful enjoyment of property was found.

In the case *Lepojić v. Serbia*, the ECtHR found that the right to freedom of expression (Art. 10) was violated because the applicant was sentenced for defamation after he had published in the local newspaper an article about the mayor of Babušnica. The ECtHR established that the interference into the freedom of expression of the applicant in this case was not „necessary in a democratic society". The same violation was found in the case *Filipović v. Serbia*, where the applicant, member of the DHSS from Babušnica, was also convicted for defamation of the mayor. In the case *Marčić et al. v. Serbia* the ECtHR found that the right to a peaceful enjoyment of property was violated due to the failure to execute the judgment which acknowledged the applicants' right to a compensation for working abroad.[748]

## *2.12. Freedom of Expression*

The trend of increase in violations of the freedom of expression and of professional press standards, which began in 2004, continued in Serbia in 2007 as well. Serbia was ranked 67th on the list of 169 countries in the Reporters sans Frontières Press Freedom Index (*Blic*, 17 October, p. 5).[749] The Independent Association of Journalists of Serbia (NUNS) survey showed journalists in Serbia were at the bottom of the list of reputable professions, followed only by tradesmen and politicians (*Večernje novosti*, 19 July, p. 6).

748 *Lepojić v. Serbia*, ECHR, App. No. 13909/05, *Filipović v. Serbia*, ECHR, App. No. 27935/05, *Marčić et al. v. Serbia*, ECHR, App. No. 17556/05.

749 Serbia ranked worse than any of the former Yugoslav communities, including Kosovo, which was rated 60th in the Index.

The media situation remained chaotic in 2007. Two hundred and seven print media were registered; around 800,000 copies of dailies were sold on a daily basis. However, only nine percent of the citizens informed themselves by reading the papers (*Vreme*, 18 October, p. 40 and *Politika*, 27 October, p. 5). The electronic media scene was additionally exacerbated by the relations between the media, the Republican Broadcasting Agency (RBA) and the judiciary. After the Supreme Court of Serbia annulled some RBA frequency allocation decisions, the latter accused the Court of unlawfulness, saying it was a "textbook example of a coup d'ètat in political theory and practice" (*Politika*, 5 April, 22 May, 6 June and 12 July, pp. 8 and 7, *Večernje novosti*, 4 April, p. 7 and *Kurir*, 9 July, p. 7). The Supreme Court concluded the RBA was not allowing the review of its discretionary decisions and called on the state bodies to protect it from such conduct (*Politika*, 14 July, p. 7).

The RBA's unclear application of the prescribed criteria was evident also during its allocation of regional TV frequencies. Frequencies were denied to well-known *Niš TV 5*, which appealed the RBA decision, to *RTV Kragujevac*, one of the most popular local stations, and *TV Pančevo*, which is by far more popular than Zrenjanin-based *TV Santos* which was granted a frequency (*Press*, 23 June, p. 7 and *Politika*, 22 June and 12 October, pp. 8 and 18). The RBA in July adopted a binding code of conduct for broadcasters but did not take into account any of the comments by professional press organisations (*Vreme*, 14 June, 12 July, pp. 28, 29 and *Politika* 22 and 23 June, p. 8).

The public broadcaster *Radio Television of Serbia* (*RTS*) in September stopped the live broadcasts of Serbian Assembly sessions under the explanation that they were disrupting its programme schedule. The RBA in the meantime ordered the RTS to carry the sessions from 10 to 18 hrs because, as it assessed, such broadcasts were an attainment of the new Serbian multi-party system. The *RTS* Management Board said the order was not in accordance with European practice, while the RBA retorted by claiming its decisions were unassailable (*Press*, 25 September, p. 4 and *Politika* 25, 29 September, pp. 6 and 8). *RTS* in the meantime filed charges with the Supreme Court; the RBA requalified its binding decision into a "recommendation" (*Večernje novosti*, 21 November, p. 7).

*2.12.1. Attacks on Journalists*. – One of the most drastic cases of violations of the freedom of expression and attacks on journalists included the preventing of the panel discussions and promotions of *Radio B92 Peščanik's* (Hourglass) latest book in the Aranđelovac Culture Hall in November and December. The first panel was scheduled for 19 November. Regional *RTV Šumadija* on that day interrupted its regular programme and ran a live show in which the members of the association Naši (Ours), rallying the Ravna Gora Movement, Svetozar Miletić and Naša Šumadija organisations, insisted that the panel be cancelled, called on the citizens to protest, telling *Peščanik* hosts and guests "to get Soros to rent them another facility to promote homosexuality". Municipal official Milan Podgorac, accompanied by

three people, interrupted the live programme after 20 minutes; *RTV Šumadija* Director Nataša Živanović claimed LDP and *B92* were behind his move. The Culture Hall management cancelled the panel. The leader of Naši, religion teacher Ivan Ivanović, denied his association issued the statement branding *Peščanik* as anti-Serbian. He refuted that his association was extreme rightist and Fascist, claiming that it was guided by St. Sava's Orthodox teachings and Serbian patriotism (*Vesti B92*, 19 November, *Kurir*, 20, 21 and 22 November, pp. 3, 6 and 6 and *Vreme*, 22 November, pp. 7 and 45).

Several hundred members of New Serbia, SRS, SDPO and *Naši* in Aranđelovac and the nearby town of Topola led by Topola Mayor and Vice-President of New Serbia Dragan Jovanović rallied to prevent the next attempt to hold the *Peščanik* panel discussion, scheduled for 3 December. *Peščanik*'s authors and guests were nevertheless willing to hold the discussion in the Culture Hall. The police, which had allowed scores of the protesters inside, assessed that the event constituted high risk after the protesters verbally and physically assaulted their political opponents and the panel discussion was cancelled. In an interview to *Politika* two days later, Jovanović said that B92 was in danger from "those who think Serbia is not what Soros, Nataša Kandić, and Čeda (Jovanović, LDP President) have to offer" and threatened to set B92 on fire when he said "I've already set one TV Bastille on fire". The BCHR filed a criminal report against Dragan Jovanović on 7 December for committing the crime of racial and other discrimination (Art. 387 (2) of the Criminal Code). Serbia's President, the DS, the LDP, G17+, a number of NGOs and the Independent Association of Journalists of Serbia condemned the incident. Three days later, Dragan Jovanović said that the Roma settlement in Topola would be encircled by a wall and wire because the neighbours feared for their safety. "I can guarantee you that you will have no undesirable contacts with them," he promised his fellow townsmen (*Blic*, 4, 5 and 8 December, pp. 5, 2 and 9, *Večernje novosti*, 4 December, p. 30, *Politika*, 6 December, p. 9 and *Vreme*, 6 December, p. 26).

No headway was made in 2007 in uncovering who assassinated owner and journalist of *Dnevni telegraf* Slavko Ćuruvija on 11 April 1999 (*Press*, 16 June, p. 16 and *Blic*, 23 June, p. 14). Nor was any light shed on the 2001 murder of *Novosti* journalist Milan Pantić. There was an attempt to kill *Vreme* journalist Dejan Anastasijević in mid-April 2007. Fortunately, no one was hurt when the hand grenade put on his window sill exploded. Fierce public reactions led to the qualification of the attempt as an act of terrorism, not as general endangerment as had been initially intended (*Politika*, 15 April, p. 1 and *Blic*, 28 April, p 15). Police Minister Dragan Jočić in mid-September said no headway had been made in the investigation "because it is not that easy to find out about something for which there had been no motive" (*Blic*, 12 September, p. 20). Anastasijević in October publicly claimed that there were indications that the attempt to assassinate him was part of the process of intimidating and liquidating potential witnesses in trials of SRS leader Vojislav Šešelj and Milošević-era state security chief Jovica Stanišić before the ICTY (*Blic*, 19 October, p. 17).

There were reports of physical assaults on journalists in 2007 in Gornji Milanovac (*Press*, 22 March and 5 June, pp. 9 and 11), Novi Sad (*Večernje novosti*, 28 August, p. 7), Leskovac (*Večernje novosti*, 1 April and 28 August, p. 7), Niš (*Press*, 3 July, p. 4), Belgrade (*Kurir*, 2 October, p. 11), Novi Pazar (*Politika*, 23 April, 9 October, pp. 12, 8, and *Kurir*, 11 October, p. 5) and the vicinity of Čačak, on the farm of Infrastructure Minister Velimir Ilić, who claimed journalists had been sexually harassing his sheep (*Blic*, 4 October, p. 14 and *Press*, 26 October, p. 6). According to IJAS data, over 100 assaults on journalists and NGO activists were recorded from December 6 to end April 7 alone (*Politika*, 25 April, p. 8).

*2.12.2. Trials, Pressures and Insults*. – The court ruled that tabloid *Kurir* and its editors pay one million dinars (around 12,500 Euros) to Minister Dinkić in compensation for "continual publishing of untrue information" (*Kurir*, 15 September, p. 11). Požarevac policemen sued the local *Kurir* correspondent for tainting their reputation in February (*Kurir*, 4 February, p. 11).

The courts failed to wrap up the case of Kikinda journalist Željko Bodrožić in 2007. Back in 2005, the UN Committee for Human Rights had ordered the local Serbian courts to rescind the disputed decisions violating Bodrožić's freedom of expression and compensate the damages he had sustained, but none of its views have been heeded yet.[750] Moreover, the Kikinda Municipal Court in April convicted Bodrožić to a prison sentence as he had not paid the fine he had been sentenced to (*Politika*, 4 April, p. 9). Bodrožić avoided jail only thanks to his friends who collected the money to pay the fine.

The most drastic example of pressure by the local authorities on the media occurred in Novi Pazar in September when the municipal authorities banned the *FoNet* town correspondent Enes Halilović from attending the press conference by the head of the European Commission because they were dissatisfied with Halilović's reports (*Politika*, 28 September, p. 8 and *FoNet*, 27 September).

Journalists were again the targets of a number of threats in 2007. The life of Bela Crkva *TNT TV* owner was threatened twice (*Press*, 5 May, p. 7 and *Kurir*, 11 August, p. 2). *BETA* correspondent in Novi Sad (*Blic*, 7–8 April, p. 7), the Chief Editor of *TV B92* (*Blic*, 7–8 April, p. 14) and the editor of the *Subotičke novine* (*Politika*, 11 September, p. 12) also received death threats. Threats against *TNT TV* owner Stefan Cvetković prompted a protest from the *South East Europe Media Organisation* (*SEEMO Protest Serbia and Press Release Slovakia,* 13 August).

Some politicians continued insulting journalists in 2007. SRS Secretary General Alekandar Vučić said *NIN* columnist Radmila Stanković "can be bought off for a 100 Euros and a plateful of sauerkraut and sausages" (*Kurir*, 20 May, p. 3). Vučić also hurled insults at Dejan Anastasijević after he said the assault on him was part of the process of intimidating potential witnesses against SRS leader Vojislav Šešelj. Vučić reacted at a press conference to Anastasijević's claims by saying such texts

750 More in *Report 2006*, II.2.8.1.

were published by the "utterly ruthless scum talking gibberish and accusing others of attempting murder without any evidence" (*BETA,* 18 October).

*2.12.3. Disrespect of Professional Standards and Codes of Conduct*. – Violations of the press codes of conduct by journalists and media increased in 2007 over the previous year. The following examples were observed in the media monitored by BCHR associates.

The tabloid *Kurir* in April accused four NGOs of treason because of their views on cooperation with the ICTY (*Kurir*, 4 April, p. 4). *Kurir* in August published a large photograph of the remains of a young man torn apart by bears in the Belgrade zoo without his family's authorisation. In September, this daily attacked actress Mirjana Karanović, branding her as a traitor because she played the role of an Albanian woman in a movie (*Kurir*, 21 and 22 September, pp. 17 and 2).

Tabloid *Press* in August published an article on rapes in the Leskovac prison. It did not name its source or the names of the convicts, only that the five rapists and the victim were all Roma (*Press*, 8 August, p. 11). This tabloid in September wrote with threatening connotations of plans to organise a gay parade Belgrade during the Eurosong 2008 contest (*Press*, 2 September, p. 5).

*Radio Fokus* has continually been spreading hate speech, fascism, racism and intolerance and lynch of those who do not share its political views. The RBA dismissed several NUNS requests to review the station's work, saying it did not have enough specific data. *Radio Fokus* Director Obren Joksimović denounced the accusations, saying they were voiced by those who hate everything that is Serbian (*Vreme*, 30 August, p. 8 and *Politika*, 28 August, p. 8).

The code of conduct and the law was also broken by RTS Director Aleksandar Tijanić, who allowed the station to broadcast the show "48 Hours – Wedding" in which the future groom publicly admitted he beat his wife to be. Tijanić dismissed the public criticism, saying the show was an "excellent social and psychological analysis, not an ode to violence" (*Blic*, 4 October, p. 2 and *Politika*, 5 October, p. 1).[751] The event prompted LDP to file a report against the RTS to the RBA Council and ask it to take legal measures against it because of multiple violations of the Broadcasting Act. The RBA had not reacted to the LDP report by the time this Report went into print.[752]

*2.12.4. Media Coverage of Sensitive Trials*. – Like in the previous years, some media violated the professional codes of conduct and the fundamental principles involving the respect of the independence of the judiciary. The practice was notably evident with respect to investigations and trials of cases with political connotations or linked to violations of rights in the wars in the former Yugoslavia. The

751 In May, Tijanić barged into the studio during a live show on RTS. He banged his fist on the table, took over the role of show host, insulting both the host and the guests. He later justified his anger by saying he had lost his composure when he saw a fly loose in the studio (*Kurir*, 16 May, p. 12).

752 http://www.ldp.org.yu/info/news.jsp?id=430; accessed on 26 November 2007.

instances of media abuse – the most frequent motive of such reporting – can be classified in several categories.

The daily *Glas javnosti* and its daughter tabloid *Kurir* in September began publishing a "mega-interview" with Milorad Ulemek Legija, who has been found guilty of assassinating PM Zoran Đinđić. Ulemek has additionally been sentenced to decades-long prison sentences for murdering Milošević's political opponents in the Ibar Road case, for the assassination of Ivan Stambolić in August 2000 and the attempted assassination of SPO leader Vuk Drašković in Budva (*Kurir*, 17 September, p. 3). In his interview, which had the form of a confession rather than of a regular interview, Ulemek continued voicing numerous accusations against members of other criminal groups and Serbian politicians for weeks. It remains unclear how his story reached the dailies' editors and journalists in the first place. No light was shed on how Ulemek, incarcerated in the special ward of the Belgrade Central Prison, had given this interview by the end of the reporting period.

The RBA Council issued a general binding instruction in May "on the publication of records declared inadmissible at criminal trials".[753] The instruction is binding on electronic media which "in their work and reports on criminal trials, must abide by court decisions on exempting from the records the statements of the defendants, witnesses or court experts where a court decision cannot be based on them". In addition, the RBA highlighted that all stations are duty-bound to "protect the public and audience in their programmes from publication of records the court had exempted in criminal trials and thus avoid sensationalism and anything that can turn a person into a potential object of manipulation." The problem, however, has not been resolved in practice as print media have continued publishing authentic or fabricated court records in their articles.

## *2.13. Special Protection of the Child and the Family in 2007*[754]

### *2.13.1. Domestic Violence*

*2.13.1.1. General.* – Although domestic violence is a criminal offence under Serbia's Criminal Code,[755] research has shown that victims are not provided with adequate protection. Moreover, much of domestic violence remains unreported, mostly because the victims fear the reactions of their community and the perpetrator and mistrust the legal system. At its panel discussion "Protection from Domestic Violence in the Refugee and IDP Populations in the Republic of Serbia", the NGO *Praxis* said that only one out of twenty cases of domestic violence is reported. UN-

753 http://www.rra.org.yu/srpski/zapisnici.htm; accessed on 26 November.

754 This text is the result of one-year work of BCHR associates on the project entitled "Monitoring and Reporting the Activities of Judical Institutions in Serbia in the Field of Organised Crime, War Crimes, Discrimination and Domestic Violence". See n. 569.

755 *Sl. glasnik RS*, 85/05.

HCR data show that the incidence of gender and sex-related violence is the highest amongst refugees, IDPs, asylum seekers and stateless persons.[756]

Domestic violence may take several forms. The most frequent is physical violence, which is followed by psychological, sexual and economic violence.

According to a survey conducted by the NGO Autonomous Women's Centre, 91.5% of the domestic violence is perpetrated by men; 48% of the offenders deny they committed a crime, 31% think the victim was to blame for the violence and only 10% accept the responsibility.[757] Women and children are the most frequent victims of domestic violence; children are also secondary victims of such violence. Only rarely are parents victims of domestic violence.[758]

The number of calls for assistance to NGO Counselling against Family Violence rose in 2006 over 2005 (4,558 over 3,500). These figures do not indicate an increase in domestic violence, but, rather that the victims are better informed and have greater trust in this NGO.

*2.13.1.2. Features of Domestic Violence Trials.* – Although the Family Act[759] prescribes urgent court proceedings in domestic violence cases, it does not set any deadlines within which the second hearing must be held. Due to this deficiency, the proceedings take a long time (sometimes as many as seven months). The first hearings are usually called within the legal deadline but the subsequent ones are scheduled to take place in more than a month's time which prompts many of the victims to abandon their lawsuits. The prosecutors rarely prosecute domestic violence cases of their own accord.

During their monitoring of domestic violence trials, BCHR associates noted that the judges' attitude towards the victims was often one of condemnation; some of them even directly accused the victims of having brought the violence on to themselves.

Close family members, neighbours, NGOs (if the victims asked them for help), social centres and the police are usually called in to testify in such cases. The courts have finally begun to take the testimonies of NGOs seriously in their review of the cases.

Moreover, there are visible differences between trials before judges who have undergone additional training in domestic violence and those have not. These differences mostly come to the fore in the manner in which the judges question the defendant, the victims and the witnesses, in the way they distinguish between material and immaterial facts during trial, when they schedule the subsequent hearings and in the speed of the trial.

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756 *B92*, 11 October, www.b92.net.

757 *B92*, *Lifestyle, News,* 2 November, www.b92.net.

758 Panel Discussion "Experiences in Providing Free Legal Aid to Women Victims of Violence" Zvezdara Municipality, 20 November.

759 *Sl. glasnik RS*, 18/05.

*2.13.1.3. Penal Policy.* – Jurisprudence indicates that the protection measures envisaged by the Family Act are pronounced extremely rarely and that the sentences pronounced for violations of the Criminal Code are extremely lenient. BCHR associates have during their monitoring of domestic violence trials concluded that most judges were reluctant to order protection measures of removing the perpetrator from the home or prohibiting him from getting in the vicinity of the victim's home or place of work. Courts still do not perceive these measures as efficient penalties and therefore rarely order them. The purpose of the protection measures is to help the victims during the proceedings or try and affect the conduct of the perpetrator. Their positive effects, however, can only be ascertained once the courts start issuing such orders to a greater extent.

Perpetrators of domestic violence are most often sentenced to one-year prison sentences or suspended two-year sentences, which testifies of the courts' extremely lenient penal policy. The courts are reluctant to issue security measures even if it has been proven that the perpetrator had on a number of occasions committed the violence while he was drunk. The "honest regret" the perpetrators express at the trials and their promises that they will never resort to violence again have also prompted judges to pronounce mild sentences.

The failure to order protection measures and the lengthy proceedings do not provide the victims of domestic violence with adequate protection and they face the risk of being subjected to it again.

One of the most important convictions in the Serbian courts' jurisprudence related to domestic violence was reached by the Belgrade District Court. First, after the injured party (victim) appealed the first-instance judgement, the District Court modified the verdict but did not send the case back to the first instance court. Second, the District Court issued a new protection measure (the perpetrator had initially been prohibited from coming within less than a metre from the victim) and ordered that he move out of the home and prohibited him from approaching the home within less than 30 metres. Third, the Court found the perpetrator had committed economic violence because he avoided paying the bills and delivered a judgement against him. This judgement indicates that some judges understand the importance of protection measures and apply adequate protection measures. The first protection measure (prohibiting the offender from approaching the victim less than a meter in a 40-square metre apartment) was inapplicable and uncontrollable. This is why the order to have the perpetrator move out was the most appropriate protection measure.

The media devoted the most attention to the judgements against Mališa Jeftović and Ana Filipović for killing Ana's 3-year-old daughter Katarina Janković. The Belgrade District Court convicted Jeftović to the maximum sentence of 40 years of imprisonment and Ana Filipović to 37 years in jail (*Press*, 10 May, p. 11 and *Večernje novosti*, 10 May, p. 11).

The Niš District Court also passed the maximum 40-year imprisonment sentence against Aleksandar Đorđević, who was found guilty of killing his former wife and in-laws.[760]

*2.13.1.4. Applications for Access to Information of Public Importance.* – In accordance with the Access to Information Act,[761] BCHR researchers submitted applications for access to information to municipal courts across Serbia asking for information on domestic violence trials. Nineteen of the twenty approached courts responded. Apart from data on the number of trials under way, most courts provided BCHR with copies of final decisions. BCHR researchers analysed these judgements and reached their conclusions about the Serbian judicial penal policy (see 2.13.1.3).

*2.13.1.5. Safe House.* – A Safe House, which can accommodate 28 women and children, victims of violence, opened in Belgrade after a joint campaign conducted by B92 and the NGO Counselling against Family Violence. The House provides educational programmes and various types of assistance to its beneficiaries.[762]

Another shelter for victims of domestic violence was opened in Šabac in early 2007. The chief criterion for taking in the victims is that they reported the offence to the police and that it is being prosecuted. SOS hotlines and mobile teams have also been assisting victims of domestic violence.[763]

The contract signed between Zrenjanin Mayor Goran Knežević, Vojvodina Labour Secretary Snežana Lakićević-Stojačić, chief of the Zrenjanin Social Work Centre Vesna Stankov and B92 Management Board Director Chairman Veran Matić on building a safe house in Zrenjanin is a positive step towards protecting victims of domestic violence in Vojvodina.[764]

*2.13.1.6. Free Legal Aid.* – The Free Legal Aid and Psycho-Social Assistance to Women Victims of Violence Office presented the results of its work at the conference entitled "Experiences in Providing Free Legal Aid to Women Victims of Violence" organised by the Zvezdara municipality in Belgrade and the Autonomous Women's Centre. In three months alone, the Office was approached by 150 women, wrote 150 lawsuits and 40 other submissions. The Office provides the women with free legal advice but does not represent them in court.[765]

760 B92, 8 February, www.b92.net.

761 *Sl. glasnik RS*, 120/04.

762 *B92*, 22 November, www.b92.net.

763 *Danas,*19 March, www.danas.co.yu.

764 *B92*, 14 May, www.b92.net.

765 Panel Discussion "Experiences in Providing Free Legal Aid to Women Victims of Violence", Zvezdara Municipality, 20 November 2007.

*2.13.1.7. Family Violence Survey by Misdemeanour Judges*. – The results of the survey of domestic violence conducted in 2005 by the Serbian Association of Misdemeanour Judges and the American Bar Association (ABA/CEELI) were presented in the report "Family Violence Survey, Misdemeanour Proceedings, Republic of Serbia, 2004".[766]

The survey showed that 6728 men and 814 women across Serbia were found guilty of domestic violence in misdemeanour proceedings, which obviously indicates that most victims of violence throughout the country are women.

Results vary with respect to the age breakdown of the perpetrators. The majority of the perpetrators in Belgrade, Zaječar and Užice were between 40 and 50 years old; perpetrators in Valjevo and Smederevo were mostly between 50 and 60 years of age, while those in Leskovac, Niš and Novi Sad were mostly between 30 and 40 years of age. Most victims were between 40 and 50 years old (between 18 and 30 years of age in Niš and Smederevo). Of the 7556 misdemeanour decisions pronounced against them, 505 were warnings, 6746 were fines and 305 were jail sentences.

Violence against partners is the most common form of violence established under the survey parameter "relationship towards the victim"; it is followed by violence against relatives, violence against parents, violence against one's children and violence amongst children.

No regularities were established in the survey with respect to the victims' and perpetrators' education levels. Domestic violence has been perpetrated in all social strata. Although specific indicators show higher incidence of violence amongst persons with less education, there are no definite data on violence amongst persons with higher education.

The survey established that unemployment does not account for a greater incidence of violence in any part of Serbia. Most of the accused said they were unemployed, which the courts usually took as a mitigating factor and delivered lenient sentences.

The survey showed that there was more domestic violence in villages than in cities. The incidence of violence in rural vs. urban communities opened a series of additional issues related to living conditions, family relations and the difficulty or ease of opting for a divorce or separation. The data obtained in the survey cannot totally shed light on the state of mind of the offender at the time he committed the violence given that the accused, fearing the sentences, deny they were under the influence of alcohol.

Twenty-seven police administrations were set up to cover the 161 municipalities in Serbia without Kosovo. They altogether registered 50,127 cases of domestic violence in the 2004–2006 period. There is a difference, however, between how police administrations define domestic violence "interventions". Some under

766 http://www.abanet.org/rol/publications/serb_family_violence_survey_2004.pdf.

interventions imply warnings, misdemeanour reports and criminal reports, while others imply only police visits to the scene of violence. "Intervention" in the survey entailed all instances when the victims contacted the police.

The Association's main goal is to set up a national database on domestic violence. Analysis of data ought to help define the ways to efficiently combat it, issue recommendations to improve the cooperation between the state authorities – the courts, the police and the social centres, and to influence the legislature to ensure better protection of the victims of violence.[767]

*2.13.1.8. Media*. – The show "48 Hour Wedding" broadcast on RTS 1 drew a lot of public attention in October. In the episode aired on 2 October, the groom said he sometimes slapped his future bride but that this in no way affected their relationship. After the showing of this episode publicly encouraging and condoning domestic violence, the National Assembly Gender Equality Committee asked RTS Director General to resign and called on the RTS Management Board to dismiss him.[768] The MPs also discussed the request in the Assembly.[769] Tijanić, however, denied that the show had promoted domestic violence because the young man said in the next show that he was sorry for what he had been doing and promised he would not resort to violence again.[770]

A large number of NGOs and most of the MPs condemned the broadcast of this show with elements of domestic violence. The sharpest criticisms were voiced by the female MPs of the Liberal Democratic Party and the Democratic Party.

However, several days after the Gender Equality Committee unanimously upheld the demand for Tijanić's dismissal, the Committee members clashed amongst themselves. The female MPs of the Democratic Party of Serbia and New Serbia denied they had voted for the call for Tijanić's resignation.[771]

### *2.13.2. Status of Women*

The UN Committee on the Elimination of Discrimination against Women held its 38th session in early 2007 at which Serbia presented its initial report on the implementation of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). The Committee also received an alternative report on the implementation of the Convention, headlined Voice of Difference from Serbia and prepared by the following NGOs: Voice of Difference, Autonomous Women's Centre, Astra, Incest Trauma Centre and Women in Black.[772]

767 http://www.usudprek.org.yu/projekti.html.

768 *Danas*, 5 October, www.danas.co.yu.

769 *Danas*, 4 October, www.danas.co.yu.

770 *Ibid.*

771 *Danas*, 9 October, www.danas.co.yu.

772 http://www.womenngo.org.yu/content/view/258

The recommendations the Committee made to Serbia[773] are largely based on the data in the alternative report for the following reasons: the alternative report demonstrated a serious understanding of the problem of violence in Serbia, it covered the 1992–2006 period (as opposed to the state's initial report which covered only the 1992–2003 period), its authors demonstrated their readiness to organise campaigns to prevent further violence against women and children, et al.

In its introduction, the initial report focuses on the importance of the domestic legislation, notably the constitutional provisions, by which its authors wished to demonstrate that the protection of women's rights is regulated in a general manner and by the highest legislation of the state, but it does not list the substandard provisions in the particular laws. The alternative report compares the international standards and domestic regulations on the protection of women and children and highlights that the provisions of the CEDAW are not applied in Serbia. The alternative report also includes recommendations and plans on how to combat violence against women.

Research has shown that the greatest problems in practice arise due to the poor cooperation between the state institutions (police, courts and social work centres) and between the state and civil sectors, the unduly long court proceedings, the pronouncing of minimal sentences against the offenders and the absence of a system for protecting the victims of domestic violence (women and children).

### *2.13.3. Status of Children*

*2.13.3.1. UNICEF's Report on State of Children in Serbia.* – UNICEF presented its State of Children in Serbia Report 2006 in early 2007. Notwithstanding all attempts to protect child rights in the recent years, the UNICEF data, based on the Multiple Indicator Cluster Survey (MICS) in Serbia, show that over 300,000 children live in poverty or on the verge of poverty.

Roma children are especially vulnerable: over 80% of children living in Roma settlements are poor, only 4% attend kindergarten, four times as many Roma children than other children have development difficulties, the mortality rates of Roma infants and children under five are three times higher than the mortality rates of the rest of the population. Roma children living far from cities and those whose family members do not have even elementary schooling are worse off than those living in cities and those whose parents completed primary schools.

The problems of children with developmental difficulties are exacerbated in local communities due to the lack of counselling centres, professional assistance, the parents' lack of information and prejudice (16% of the parents would not want their children to go the same school with children with developmental problems).

Apart from domestic violence against children, the report highlights the high percentage of violence in schools, committed by teachers and peers (one-fourth of

773 http://www.un.org/womenwatch/daw/cedaw/cedaw38/cc/Serbia.pdf.

the children in elementary schools were victims of violence). Teachers believe that the family is the most important factor influencing violent behaviour. The fact that parents beat their children up and consider that to be the most efficient pedagogical tool and lack of societal condemnation of physical punishment lie at the root of violent behaviour of children.[774]

*2.13.3.2. Altnernative Report on the Rights of the Child.* – The Centre for the Rights of the Child in September 07 brought together an *ad hoc* coalition of Serbian NGOs to collect and process data on the state of children in Serbia and draft an alternative Report on the Implementation of the Convention on the Rights of the Child in Serbia which it will present to the Committee for the Rights of the Child in Geneva in 2008. The BCHR has taken part in the work on the report.

The Alternative Report observes that protection of the rights of the child can be effectively realised if the institute of a child ombudsman is introduced at the state level, if the budgetary allocations for children are increased, if the education system is reformed and youth health care improved and if an adequate system of protecting children from abuse is established. Apart from the recommendations on how to improve child protection, the Report also lists the positive steps made by the adoption of a number of strategies on the protection of children from abuse, exploitation and human trafficking, rights of persons with disabilities, the inclusion of Roma, youth health and development. It, however, also emphasises that the poor cooperation between the state and civil sectors has retarded the implementation of these strategies.[775]

*2.13.3.3. Infanticide.* – Several cases of infanticide were registered in Serbia in early March (*Blic*, 6 March, p. 15 and 7 March, p. 15, *Večernje novosti*, 6 March, p. 11, 7 March, p. 13 and 21 March, p. 11 and *Politika*, 7 March, p. A12). Society's condemnation of children born out of wedlock and post-natal stress are the main reasons for infanticide.

*2.13.3.4. Sexual Abuse of Children.* – Incest Trauma Centre presented its statistical data on the sexual abuse of children in the September 6-September 7 period.

The survey encompassed 47.06% of children under 18 and 52.94% adults who had been exposed to sexual abuse. Girls were abused to a much greater extent than boys (88.24% to 11.76%). Most of the perpetrators were men (92.11%); women accounted for 7.89% of the sexual abusers. Most of the children knew the perpetrator: 36.86% were their fathers, 10.53% their step-fathers, 7.88% their grandfathers and 2.63% their mothers.

774 The State of Children in Serbia Report 2006: Poor and Excluded Children, 8 February, Media Centre. Available at: http://www.unicef.org/ceecis/SOSC-2006_en.pdf.

775 See *Report on the State of the Rights of the Child in Serbia*, Child Rights Centre (in preparation).

Sexual abuse of children usually occurs for the first time when the child is six and a half years old. In 14.71% of the cases, sexual abuse lasts several months and in 85.29% of the cases several years.[776]

In 2007, the media reported on a number of cases of persons arrested because of allegations that they had sexually abused minors, *inter alia* in Užice (*Večernje novosti*, 25 January, p. 12 and *Kurir*, 25 January, p. 11), in village Lubnice near Zaječar (*Press*, 20 March, p. 11 and *Kurir*, 20 March, p. 11, 23 March, p. 11), in Bačko Gradište (*Press*, 1 August, p. 9), in Aleksinac (*Blic*, 20 August, p. 15, *Večernje novosti*, 21 August, p. 12 and *Politika*, 24 August, p. A12) in Bor (*Večernje novosti*, 26 September, p. 13, *Blic*, 26 September, p. 17, *Press*, 26 September, p. 14 and *Kurir*, 27 September, p. 11) and in Ostojićevo (*Večernje novosti*, 27 November, p. 13 and 28 November, p. 12, *Blic*, 28 November, p. 17 and *Kurir*, 28 November, p. 10). The media also reported on cases of raising indictments, *inter alia* in Lazarevac (*Press*, 1 February, p. 9) and Belgrade (*Politika*, 5 June, p. A12 and *Večernje novosti*, 5 June, p. 12), as well as on releasing judgments for sexual abuse of minors, *inter alia* in Belgrade (*Press*, 25 January, p. 10, *Kurir*, 25 January, p. 11, *Politika*, 6 July, p. A12 and *Večernje novosti*, 6 July, p. 13), Sombor (*Press*, 14 February, p. 9), Obrenovac (*Press*, 27 April, p. 11) and Novi Sad (*Kurir*, 4 July, p. 11).

## *2.14. Economic, Social and Cultural Rights*

*2.14.1. Unemployment*. – National Employment Service records show that there were around 913,000 unemployed in Serbia, who spend an average 49 months looking for a job. As many as 55% of the registered job-seekers are long-term unemployed. The average unemployed citizen is 37 years old. Women account for 54% of the jobless (*Blic*, 14 June, p. 8). Although people with tertiary education account for the smallest share of the unemployed, 45 people with PhDs and 32,552 with Bachelor degrees were registered with the National Employment Service in November (*Večernje novosti*, 2 November, p. 5). The Employment State Secretary in December stated that the number of unemployed had fallen for the first time in seven years, standing at around 797,000 (*Blic*, 6 December, p. 5).

*2.14.2. Protection at Work*. – Inspections of construction sites were stepped up in Belgrade and Novi Sad during the summer of 2007, leading to a 60% decrease in injuries at construction sites compared to 2006. Sixteen people died in the first nine months of 2006 while only five deaths from injuries at work were recorded in the same period in 2007 (*Večernje novosti,* 25 October, p. 6). Data indicate that inadequate protection at work is a major problem in Serbia, wherefore such inspections ought to be conducted throughout the year, not only during campaigns in specific months.

776 http://www.incesttraumacentar.org.yu/letters_reports/Statistike%202006-2007.pdf.

Statistics on injuries at work covering a 40-year period and collected by Niš Protection at Work College Dean Dragan Spasić show that a life is lost at work every other day in Serbia. Spasić warns that the statistics would be much direr if they also included the deaths of workers that ensued several days after they sustained the injuries. The extent of disrespect of protection at work regulations in Serbia is corroborated by the fact that one out of three pensioners receive disability benefits. Spasić's data indicate that the number of injuries has fallen in the past fifteen years; this cannot be ascribed to investments in protection at work, but, rather to lack of economic and industrial activity (*Blic,* 29 November, p. 16).

Two Energoprojekt workers Ljubomir Vidović and Tomislav Ristić were killed when part of the Straževica tunnel under construction in Resnik near Belgrade collapsed in November.[777] The two men had not been qualified to work in tunnels and were hired by Energoprojekt to do other jobs. The Labour Inspectorate established that the Health and Safety at Work Act had not been fully abided by.[778]

A comparative analysis of inquiries into work-related injuries shows that there were 55% more fatal work-related injuries in 2006 than in 2007, when 22 such accidents occurred. Most of them were sustained by industrial and construction workers and miners. Most of the injured were between 41 and 55 years of age and had secondary schooling or were unqualified. The main causes of such accidents include unsecured work at heights or on the edges of buildings, on inadequately secured facilities and work without personal protection gear, such as helmets and safety belts.[779]

The Labour and Social Policy Ministry denied information on the number of work-related injuries in 2005 and the first seven months of 2006 made public by the Nezavisnost Trade Union. Nezavisnost said that there had been 43 fatal and 933 grave work-related injuries in 2005, while, in the January-July 2006 period, there were 27 fatal work related injuries, five of them at construction sites, and 533 grave work-related injuries, 158 of which were sustained at construction sites.[780]

*2.14.3. Mobbing*. – Abuse and harassment at work is a widespread problem but it only recently caught the public eye. According to studies of this phenomenon conducted in Belgrade by clinical psychologist Mirjana Vuksanović and in Central and South Serbia by Vesna Baltazarević, every other man and every other woman are exposed to some form of harassment. Their studies show that one out of fourteen men and one out of three women were at least once the victim of sexual abuse at work (*Blic*, 10 June, p. 4). The media devoted much space to the case of the

777 *B92*, 23 November, www.b92.net.

778 *B92*, 30 November, www.b92.net.

779 *B92*, 23 November, www.b92.net.

780 Labour and Social Policy Ministry statement *Data on fatal and other work-related injuries*, http://www.minrzs.sr.gov.yu.

Inđija TV station Sveti Đorđe journalist Verica Marinčić, who sued the station owner Živan Jojić for abuse. He had been threatening his staff that he would kill them, shut them in his car trunk, tie them to his car and drag them through the fields, cut off their heads and arms, break their legs. He forced Maričić to sit in the basement or stand on one leg in the office next to his.[781] The NGO Antimobing claims workers are systematically harassed in the Sunce, Vital and Jumko plants, which is corroborated by the fact that this NGO receives between 5 and 10 complaints every day (*Kurir*, 19 November, p. 6).

TU Nezavisnost in December spoke publicly about the increasing incidence of mobbing in US Steel Serbia. It emphasised that the company's management was dividing its female staff into young women and "old hags". One worker, Vukosava Milosavljević, who has been working for 32 years and has never taken a day of sick leave, was insulted so much by her boss that she, a diabetic, fainted and had to be rushed to the Smederevo Hospital Emergency Department. The US Steel Serbia management said people were the company's greatest strength and value but did not respond to the TU's demand to look into the cases of mobbing and prevent it (*Večernje novosti*, 17 December, p. 7).

Public institution staff is also subjected to mobbing. The Bačka Palanka Municipal Court opened a trial against Darija Šajin, former chief of the town's municipal administration and now heading the South Bačka District. She is charged with abusing six workers and treating them in a manner denigrating their dignity while she worked as head of the municipal administration in 2005 (*Večernje novosti,* 27 November, p. 32).

At a round table organised by the Vojvodina Assembly in September, female TU representatives said that young and freshly hired workers, employees with fixed term contracts and elderly workers were subjected to mobbing the most. Vojvodina Assistant Labour and Employment Secretary Jelica Rajačić-Čapaković said the Executive Council would form a working group to draft amendments to the law to allow for the punishment of mobbing.[782]

*2.14.4. Poverty*. – Poverty remained one of the gravest problems in Serbia in 2007. Over 450,000 citizens receive some form of welfare (*Press*, 13 November, p. 10). Serbia received a 500,000 Euro grant from the World Bank to fight poverty. The Government in August endorsed the Second Report on the Implementation of the Poverty Reduction Strategy.[783] The report states that nearly 9% of the population live on less than 6,000 dinars a month (the poverty line has been drawn at 6,221 dinars – nearly 78 Euro). The population in the interior of the country is three times poorer than the one living in Belgrade.

781 *B92*,19 November, www.b92.net.

782 *B92*, 25 September, www.b92.net.

783 The Poverty Reduction Strategy, adopted in 2003, aims to halve the number of poor in Serbia by 2010.

South Serbia is the poorest region, while Roma are the ethnic group suffering from poverty the most. According to UNICEF data, 65.8% of Roma women have not completed even elementary schooling, 32% have only elementary education and only 3.9% of Roma children go to kindergarten due to poverty and social exclusion. The share of poor Roma in the total Roma population is six times higher than in the other categories of the population. It therefore comes as no surprise that as many as 70% of the Roma children refuse to go to school because they have no decent clothing and that 60% think they would be unable to find a job even if they finished school (*NIN,* 2 August, pp. 32–33).

What is especially concerning is that children under 13 accounted for the greatest share of the poor, 21% of whom are barely making ends meet (*Večernje novosti,* 30 November, p. 6).

*2.14.5. Living Standards*. – The Republican Statistics Bureau data show that living expenses have increased by 8.6% from December 2006 to October 2007. The average net salary stood at 28,270 dinars (around 353 Euros) in October 2007 (V*ečernje novosti,* 3 November, p. 9).

The purchasing power fell somewhat in October over September. The Ministry of Trade survey shows that the average monthly net salary was enough to cover the minimal but not the average consumer basket. An average consumer basket cost 1.02 of the average net pay and the minimal consumer basket cost 0.65 of the average net pay. The average consumer basket in October cost 29,389.70 dinars (around 367 Euros) and the minimal consumer basket cost 18,659.70 dinars (around 233 Euros).[784]

According to Republican Statistics Bureau data, the average monthly salary in November stood at 29,373 dinars (around 374 Euros), which marked a real increase of 0.66% and a nominal increase of 2.27% over the October 07 salary. The average net salary in November 07 was 14.94% higher in real terms and 26.89% nominally than the November 06 average net salary.[785]

Statistics indicate that Serbia's citizens spend 40% of their income on food, 24% on public utilities and around 12% on transportation. This means they are left with between 6,000 and 7,000 dinars (between 75 and 85 Euros) to cover their health, cultural and other needs. The Consumer Protection Movement alleges that even these dismal data were arrived at by statistical manipulation and warns that the situation is even direr. The constant increase in prices of staples, especially food, has contributed to the increase in living costs. The high prices of the basic produce can *inter alia* be attributed to high sales profit margins, some of which account for 70% of the price of the product. Such high profit margins corroborate views that there are monopolies in Serbia. This was indirectly confirmed by the Serbian Gov-

784 *24 sata*, 17 December, www.24sata.co.yu.

785 *B92*, 20 December, www.b92.net.

ernment which formed a team in late 2007 to establish how prices are formed and why the prices of the staple foods are so high (*Vreme*, 6 December, pp. 24–25).

*2.14.6. Trade Union Freedoms*. – Social dissatisfaction continued growing in Serbia in 2007. Public sector employees expressed their displeasure over salaries and working conditions on a number of occasions. A series of strikes broke out as the Government and the representative trade unions more often than not failed to come to terms. Trade unions of workers in the private sector were also active, albeit to a much lesser extent.

*2.14.6.1. Trade Union Activities in the Public Sector*. – Members of the Independent Police Trade Union in late November threatened to go on strike over the Government decision not to pay the police Christmas bonuses. Around five hundred policemen rallied in protest in front of the Serbian Government building. They were in their uniforms but did not carry their weapons. The protest ended and no strike ensued although the talks with the Government failed (*Press*, 19 January, p. 2).

Representatives of all six metal workers' TUs in Kragujevac (Autonomous TU, Association of Autonomous and Independent TUs, the Serbian Car Industry TU, the *Nezavisnost* (Independence) TU, the *Šumadija* TU and the *Solidarnost* TU) travelled to Belgrade to submit to the Prime Minister their demands to stop dismissing workers and adopt a metal industry development strategy for Kragujevac. The TU representatives were received by a Serbian government delegation headed by the then Labour and Employment Minister Slobodan Lalović. The delegation supported most of the TU demands (*Večernje novosti*, 11 April, p. 61).

The Independent Police TU again rallied in late July. Some 400 TU members protested because the agreement they had reached with MIA Dragan Jočić had not been honoured (*Blic*, 25 July, p. 15 and *Press*, 30 July, p. 5).

The workers of the Employment and Education Department, part of the Kragujevac Zastava Company, staged a large-scale strike in late August, dissatisfied with the Government decision to shut the Department down and dismiss 4,000 of its workers. Economy and Regional Development Minister Mlađan Dinkić stated that the workers who did not apply for the offered severance packages by 27 August would not be entitled to them. The 100 or so workers who rejected the Government severance programme said they would go on a hunger strike. They subsequently decided against a hunger strike and said they would sue the state (*Politika*, 21 August, p. 14, 23 August, p. 1, 29 August, p. 13 and *Press*, 21 August, p. 7).

Judicial staff launched a strike of warning in early September which grew first into a partial and subsequently into a general strike. Their TU demanded 100% pay increases, the signing of a collective agreement and the suspension of the Act on Civil Servants and Salaries. The strike ended when the Government and the TU agreed on staff lay-offs and a subsequent 30% pay rise (*Press*, 14 September, p. 9 and *Kurir* 21 September, p. 8).

Primary and secondary school staff across Serbia launched a warning strike in early September, which in November turned into a "legal" strike – the duration of classes was cut down from 45 to 30 minutes.[786] The strike ended in early December after two representative trade unions reached agreement with the Government. Under the agreement, school staff were promised a maximum 5% pay raise in 2008.

In late October, public administration also threatened to resort to TU activities over their low salaries. They also demanded the urgent amendments of the Act on Civil Servants and the signing of a collective agreement. Talks with the Government were ongoing at the end of the reporting period (*Večernje novosti*, 24 October, p. 6).

*2.14.6.2. Trade Union Activities in the Private Sector*. – Some 100 workers of the Car Parts Plant (FAD) in Gornji Milanovac staged a general strike in early June, demanding a 40% raise and regular salary payment. The workers had threatened to go on a general strike after the warning strike if their demands were not met. The employer reacted to their demands by prohibiting the strike committee members from entering the plant grounds. The other workers showed solidarity with their colleagues on strike and launched a general strike (*Politika*, 5 June, p. 14, *Večernje novosti*, 5 June, p. 6 and *Kurir*, 5 June, p. 7).

The Vranje textile plant Jumko faced problems in October because some of the workers did not want to sign contracts with the British company Zamber Ltd, which had leased the plant in agreement with the Economy and Regional Development Ministry on condition that it kept on the Jumko workers. Some workers signed the employment contracts with Zamber Ltd, others would not. The latter claimed Zamber Ltd was offering below-average salaries and that they would not be able to make ends meet and demanded that the Government break off the lease contract. On the other hand, Economy and Regional Development Minister Mlađan Dinkić emphasised that the workers who did not sign contracts with Zamber Ltd. would be sacked and not entitled to severance pays, adding that they were now being offered higher salaries than they had been receiving in Jumko. The disgruntled workers staged a protest rally in Jumko and in Belgrade, in front of the Serbian Government building. At the end, some workers decided against signing the work contracts, while the others signed them (*Politika*, 19 October, p. 13, 20 October, p. 8 and *Večernje novosti*, 20 October, p. 8).

*2.14.6.3. Hunger Strikes*. – A large number of people went on hunger strike in 2007.

The worker of the "Zorka nemetali" plant in Šabac Borivoje Vučinić staged a hunger strike in front of the entrance into the plant over the management decision to lay off surplus labour. He died in March (*Blic*, 28 March, p. 15).

786 *B92*, 3 December, www.b92.net.

Seventy-eight workers of the Zrenjanin plant Jugoremedija launched a hunger strike in September. They protested against the lay-offs, contested the additional capitalisation of the company and insisted that the state arbitrate in their dispute with the plant management. The strike ended when they were forbidden entry into the plant.[787]

*2.14.6.4. Inadmissible Unionist Activities*. – Lessees and owners of provisional shops, members of the association Opstanak (Survival) interrupted the session of the New Belgrade municipal assembly because it had decided to continue tearing down these illegal facilities. Not even the police succeeded in restoring law and order in the municipal hall. The councilmen left the municipal building in which only the representatives of the association remained. This was an example of how a group of citizens tried to achieve their goals in an illegal manner (*Večernje novosti*, 28 March, p. 18).

Cab drivers also went on strike in September after the Belgrade city assembly decided to cut down the number of cabs in the capital to under 5,000. Cab drivers' associations dissatisfied with the decision blocked the streets until the decision was rescinded. Traffic in the centre of the city was completely paralysed for hours during the strike (*Blic*, 24 September, p. B1 and *Politika* 25 October, p. 23).

Intensified TU activities are a consequence of the undergoing transition to market economy. The year 2007 has been marked by clashing interests of workers and their employers. The problem lies in the fact that the state still employs a large number of citizens who set demands to the Government in their attempt to realise and protect their rights. On the other hand, the state has attempted to step up transition by conducting a more restrictive economic policy, which runs counter to the workers' interests. The state and workers must improve their dialogue and address problems together, by seeking longer-term solutions. Moreover, measures need to be undertaken to accustom Serbia's society to market economy and new economic relations.

787 *B92*, 8 September, www.b92.net.

# 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.
- Additional Protocol to the Criminal Law Convention on Corruption, *Sl. glasnik RS*, 102/07.
- Agreement between the Republic of Serbia and the European Community on the Readmission of Persons Residing without Authorisation, *Sl. glasnik RS,* 103/07.
- Agreement between the Republic of Serbia and the European Community on Visa Facilitation, *Sl. glasnik RS,* 103/07.
- Agreement on Amending and Accessing the Central Europe Free Trade Agreement – CEFTA 2006.
- Civil Law Convention on Corruption, *Sl. glasnik RS,* 102/07.
- 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 Environmental Impact Assessment in a Transboundary Context, *Sl. glasnik RS*, 102/07.
- 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 Police Cooperation in South East Europe, *Sl. glasnik RS,*70/07.
- 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.
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- ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, *Sl. list FNRJ (Dodatak)*, 8/58.
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- 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.
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- ILO Convention No. 103 Concerning Maternity Protection (Revised), *Sl. list FNRJ (Dodatak)*, 9/55.
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- 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.
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- 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.
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- 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.
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- 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.
- Kyoto Protocol to the UN Framework Convention on Climate Change, *Sl. glasnik RS,* 88/07.

- 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 Administrative Proceedings, *Sl. list SRJ*, 46/96.
- Act on the Army of Serbia, *Sl. glasnik RS,* 116/07.
- Act on Attorneys, *Sl. list SRJ*, 24/98, 26/98, 69/00, 11/02 and 72/02.
- 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 and *Sl. glasnik RS*, 101/05.
- Act on the Constitutional Court, *Sl. glasnik RS*, 109/07.
- 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. glasnik RS*, 116/07.
- Act on General Interest Activities in Culture, *Sl. glasnik RS*, 49/92.
- Act on Movement and Residence of Aliens, *Sl. list SFRJ*, 56/80, 53/85, 30/89, 26/90, 53/91 and *Sl. list SRJ*, 16/93, 31/93, 41/93, 53/93, 24/94, 28/96, 68/02.
- Act on Preventing Violence and Unbecoming Behaviour at Sports Events, *Sl. glasnik RS*, 67/03 and 90/07.
- 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 and 37/02.
- Act on Security Services, *Sl. glasnik RS*, 116/07.
- Act on Security Services of the FRY, *Sl. list SRJ*, 37/02 and 17/04.
- Act on Travel Documents, *Sl. glasnik RS*, 90/07.
- 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 and 101/05.
- Asylum Act, *Sl. glasnik RS*, 109/07.
- 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 and 32/97.
- Act on Assembly of Citizens, *Sl. glasnik RS*, 51/92, 53/93, 67/93, 48/94 and 29/01.

- Act on the Bases of the System of Education, *Sl. glasnik RS*, 62/03, 64/03, 58/04 and 62/04.
- Act on Broadcasting, *Sl. glasnik RS*, 42/02, 97/04 and 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 and 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 and *Sl. glasnik RS*, 6/90, 15/90, 53/95 and 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 and 75/03.
- Act on Free Access to Information of Public Importance, *Sl. glasnik RS*, 120/04 and 54/07.
- 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 and 61/05.
- Act on Labour Relations in Government Agencies, *Sl. glasnik RS*, 48/91, 66/91, 44/98, 49/99, 34/01, 39/02 and 49/05.
- Act on Local Self-government, *Sl. glasnik RS*, 9/02, 33/02 and 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 and 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 and 58/04.
- Act on the Organisation and Jurisdiction of State Bodies in War Crimes Proceedings, *Sl. glasnik RS,* 67/03, 135/04, 61/05 and 101/07.
- Act on Organisation of Courts, *Sl. glasnik RS*, 63/01, 42/02, 17/03, 27/03, 29/04, 101/05 and 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 and 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 and 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 and 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 and 54/07.
- Act on Public Law and Order, *Sl. glasnik RS*, 51/92, 53/93, 67/93, 48/94, 85/05 and 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 and 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 and 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 and *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 and 84/04.
- Act on Supervision of the Safety of Foodstuffs and Objects in General Use, *Sl. glasnik SRS*, 48/77, 29/88 and *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 and *Sl. glasnik RS*, 58/04.
- Criminal Procedure Code, *Sl. glasnik RS*, 46/06 and 49/07.

- Decree on Military Service *Sl. list SRJ*, 36/94, 7/98 and *Sl. list SCG*, 37/03, 4/05, 49/07.
- Decision on the Provincial Ombudsman, *Sl. list AP Vojvodine*, 23/02.
- Directive on Updating Election Rolls, *Sl. glasnik RS*, 42/00 and 118/03.
- Decree on Opening State Security Service Secret Files, *Sl. glasnik RS*, 30/01 and 31/01.
- Decree on SaM's Agent before the European Court for Human Rights in Strasbourg, *Sl. list SCG*, 7/05 and *Sl. glasnik RS,* 49/06.
- Directive on Police Ethics and Conduct, *Sl. glasnik RS*, 41/03.
- Election Act, *Sl. glasnik RS*, 35/00, 57/03 and 18/04.
- Elections of the President of the Republic Act, *Sl. glasnik RS*, 111/07.
- Employment and Unemployment Insurance Act, *Sl. glasnik RS*, 71/03 and 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.
- House Rules on Applying Detention Measures, *Sl. glasnik RS*, 35/99.
- 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 and 26/01.
- Juvenile Justice Act, *Sl. glasnik RS*, 85/05.
- Labour Act, *Sl. glasnik RS*, 24/05 and 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 and 26/98.
- Planning and Construction Act, *Sl. glasnik RS*, 47/03.
- 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 and 61/05.
- Public Registries Act, *Sl. glasnik RS*, 57/03.
- 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 and 61/03.

- Rulebook on the Content and Keeping of the Register of Churches and Religious Communities, *Sl. glasnik RS*, 64/06.
- 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 and 28/02.
- Rules on Entry of Trade Union Organisations in Register, *Sl. glasnik RS*, 6/97, 33/97, 49/00, 18/01 and 64/04.
- Serbian Citizenship Act, *Sl. glasnik RS*, 135/04 and 90/07.
- 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 and *Sl. list SCG*, 44/05.

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