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HUMAN RIGHTS IN SERBIA 2008
LEGAL PROVISIONS AND PRACTICE COMPARED TO
INTERNATIONAL HUMAN RIGHTS STANDARDS

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HUMAN RIGHTS IN SERBIA 2008

LEGAL PROVISIONS AND PRACTICE COMPARED TO INTERNATIONAL HUMAN RIGHTS STANDARDS

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Abbreviations

AEAD – Act on the Election of Assembly Deputies

AI – Amnesty International

ANCP – Act on Non-Contentious Procedure

AP Vojvodina – Autonomous Province of Vojvodina

ASO – Act on Social Organisations and Citizens' Associations

BCHR – Belgrade Centre for Human Rights

BIA – Security and Information Agency

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

ECmHR – European Commission of Human Rights

ECtHR – European Court of Human Rights

EU – European Union

EULEX – European Union Rule of Low Mission

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

PUPS – Party of United Pensioners

RBA – Republican Broadcasting Agency

REC – Republican Election Commission

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

Report 2007 – Human Rights in Serbia 2007, Belgrade Centre for Human Rights, Belgrade, 2008

RTS – Radio Television of Serbia

RTV – Radio Television

SAA – Stabilisation and Association Agreement with the EU

SAI – State Audit Institution

SAJ – Special Anti-terrorist Unit

SaM – Serbia and Montenegro

SEEMO – South East European Media Organisation

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)

SNS – Serbian Progressive Party

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

UK – United Kingdom

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

UPR – Universal Periodic Review

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

ZES – Coalition for a European Serbia

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 eleven 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.

Like the 2007 Report, this Report is also 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 this Report, as in last year's, 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 hu-

man rights in the country. As opposed to the previous reports, Section II follows last year's methodology and opens with the mentioned thematic wholes which give the reader a more appropriate 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. BCHR associates monitored 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.

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Introduction

The year 2008 was the second year that Serbia spent as an independent state after having been part of a bigger community in the 1918–2006 period, that was first called Yugoslavia and subsequently the State Union of Serbia and Montenegro. The constitutional foundations of modern Serbia were laid by the Constitution endorsed at a referendum on 28/29 October 2006. Given the speed at which the Constitution was adopted and the absence of a public debate, its shortcomings will no doubt continue to be the subject of academic debates and put to practical tests in the many years to come.

Serbia underwent important political changes in 2008.

In face of major difficulties, the coalition government headed by Democratic Party of Serbia (DSS) President Vojislav Koštunica decided to resign on 8 March. No party won a convincing majority at the parliamentary, local and provincial elections held on 11 May. Mathematically, the government could have been formed either by the parties considered pro-EU and headed by the Democratic Party (DS) or those openly distrustful of EU integration and advocating a strong nationalist policy focusing on cooperation with other world powers, above all Russia The latter faction, comprising mostly rightist parties, was spearheaded by former PM Koštunica's DSS and the Serbian Radical Party (SRS), an extreme nationalist group that failed to undergo reform since the time it was part of Slobodan Milošević's regime, a party whose President is standing trial for war crimes before the International War Crimes Tribunal for the Former Yugoslavia (ICTY). The talks on the government lasted a long time and ended with a deal between the DS-led Coalition for a European Serbia (ZES) and several smaller parties, including the Socialist Party of Serbia (SPS), which had been founded by Milošević. The coalition agreement enabled forces presenting themselves as pro-European to finally, on 7 July, form a government headed by DS official Mirko Cvetković, a well known economic expert and former Minister of Finance.

Similar uncertainties plagued the formation of the extremely important local government in the capital, Belgrade. For a while, it appeared that the rightists would elect the mayor and command the majority in the city hall. DS and ZES candidate Dragan Đilas was elected Mayor on 19 August, after a compromise, similar to the one reached at the republican level, was struck.

The DS and the SPS signed a declaration on political reconciliation in mid-November. This document, endeavouring to be a kind of historical compromise and iron out the serious conflicts in the past, especially those dating back to the Milošević era, caused some consternation, as it was perceived as a sign that all efforts to con-

front the past and bring to justice persons who had violated human rights would be halted. In that respect, it would be interesting to find out the outcome of the motion filed with the Constitutional Court to review the constitutionality of the Responsibility for Human Rights Violations Act. This law was passed in 2003 but has never been applied in face of opposition from the SPS and other parties that reigned in the 1990s.

The parliamentary elections were preceded by presidential elections, held in two rounds, on 20 January and 3 February. The two favourites in the run-off were the then President of Serbia and DS President Boris Tadić and Tomislav Nikolić, the Deputy to SRS President (who, as noted above, is standing trial in the ICTY). Tadić was re-elected President of Serbia by a slim majority (he won 50.31% and Nikolić won 47.97% of the votes). Having lived in an unpleasant cohabitation with a government headed by one of his political opponents, Tadić has found himself in a much more comfortable political position and has been able to significantly influence state policy since the new government dominated by his DS was formed.

The crisis in the SRS, which led to its disintegration, was apparently a very important side-effect of the presidential and parliamentary elections. It transpired that this party, which had long been the strongest party in the National Assembly, leaving an impression of a monolith unconditionally submissive to its leader Vojislav Šešelj, was obviously no longer able to live with the fact that it always an inch away from power but never able to seize it. The first signs of the crisis appeared in the form of sharp criticism – first shrouded and later explicit – of Tomislav Nikolić, who, as some observers believed, wanted to gradually change the SRS' image by moderating its nationalist rhetoric, abandoning its extremist nationalist project and reconciling with Serbia's headway towards the EU. Junior SRS officials, who crassly attacked Nikolić in the Assembly, were believed to be operating on Šešelj's instructions. Nikolić himself confirmed these suspicions when he resigned from all party posts in early September and was ousted from the SRS. Nikolić established his own party, the Serbian Progressive Party (SNS), and drew to his camp 21 of SRS' 78 deputies. Nikolić's ranks were after some hesitation reinforced by Aleksandar Vučić, the former SRS Secretary General, long-standing loyal Šešelj follower and minister in various governments in the Milošević era, best known for pushing through the notorious Information Act in 1998.

The effects of the SRS split on the National Assembly were still felt at the end of 2008. The new SRS leadership appointed by Šešelj believes that the deputies, who had crossed over to SNS, have to be deprived of their mandates because they were elected on the SRS election list, to which they are duty bound to return the mandates at any time. The obligation arises from an interpretation of the 2006 Constitution, according to which the essence of the election system in Serbia lies in the fact that voters vote for party lists and not individual candidates, wherefore the elected deputies are duty bound to cede their mandates at the request of their parties. The interpretation has been corroborated in practice: the elected deputies have

signed blank resignations which the party leaderships can activate as soon as they are dissatisfied with their conduct. This interpretation of the Constitution is disputable inasmuch as a deputy may, but needs not, cede his or her mandate to the party or coalition on whose list s/he ran. The matter was further complicated when some of the blank SRS resignations were found and others mislaid.

The most lethal effect of the SRS split on the Assembly was its disproportionately high contribution to the blockade of the parliament in the latter half of 2008. The opposition nationalist parties had already been prone to obstructing the work of the parliament, preventing it from enacting all the laws required for Serbia to take a step closer to the EU and eventually join it. Endeavours to create the other prerequisites for the country's Euro-Atlantic integration and ensure favourable conditions for Serbian companies and citizens were also paralysed. The deputies of the traditional SRS joined in the obstruction by invoking the parliamentary Rules of Procedure and wasting endless time by attacking their erstwhile colleagues who had crossed over to the SNS. The obstructions, which had not ceased by the end of the year, have led to proposals to amend the Assembly Rules of Procedure.

Like in 2007, Kosovo remained the most dramatic and traumatic political issue in Serbia. It especially intensified after the Kosovo Assembly, not recognised by Serbia and dominated by Kosovo Albanians and their parties, passed a Declaration of Kosovo's independence on 17 February, proclaiming Kosovo an independent and sovereign state. Kosovo was soon recognised by a number of states, including the leading world powers such as the USA, France, the UK and Germany. Fifty-three states recognised Kosovo by the end of 2008. Serbia in response withdrew its ambassadors from these states but sent them back at the end of the year. The only exceptions were Macedonia and Montenegro, against which Serbia applied a stricter measure and declared their ambassadors in Belgrade *personae non gratae*. Experts criticised the decision, perceiving it as an emotional one given Serbia's erstwhile closeness with these two former Yugoslav republics. Macedonia and Montenegro were expected to but did not seek *agrements* for their new ambassadors to Belgrade by the end of the year.

The National Assembly immediately proclaimed the Kosovo Assembly Declaration of Independence null and void and the diplomats launched a fierce campaign against the international recognition of Kosovo, whose independence the authorities perceive as a violation of Serbia's sovereignty and territorial integrity. The most dramatic response to Kosovo's independence ensued already on 21 February, when a protest rally, attended by eminent public figures, was staged in Belgrade under Government auspices. The protest was accompanied by unrest during which the US Embassy was set on fire and other embassies were damaged. Over 200 people were injured and one person died in the unrest. Foreign diplomats complained that the police, allegedly with the tacit support of Koštunica's Government, had failed to take energetic measures to prevent and quell the incidents.

The new Government continued opposing the independence of Kosovo. The Minister of Foreign Affairs, Vuk Jeremić, launched a very intensive lobbying cam-

paign of all major international factors, including the Non-Aligned Movement, to halt the recognition of Kosovo's independence. Serbia's diplomacy scored its greatest success when the UN General Assembly on 8 October asked the International Court of Justice to issue an advisory opinion on whether Kosovo's declaration of independence was in accordance with international law and UNSC Resolution 1244 that ended the NATO air strikes against the then Federal Republic of Yugoslavia over the events in the Autonomous Province of Kosovo and Metohija. The ICJ had not responded to the request by end 2008, nor, indeed, was it expected to.

The developments in Kosovo were further complicated by measures taken to gradually cede civil administration in Kosovo to the EU. A new mission, EULEX, was established for that purpose. The Serbian Government initially vehemently opposed the establishment of EULEX but subsequently tried to find a compromise in the interest of the non-Albanian population in Kosovo and in accordance with the powers exercised by the United Nations Mission in Kosovo (UNMIK) pursuant to UNSCR 1244.

Serbia's foreign relations in 2008 remained hampered by its cooperation with the ICTY. The Serbian authorities employed different means to turn over to the ICTY several war crime indictees, notably former Bosnian Serb President Radovan Karadžić, one of the most wanted ICTY indictees. His arrest sparked protests masterminded by the then still united SRS. The protest staged in Belgrade on 29 July span out of control leaving many policemen injured; one protester later succumbed to his injuries.

Karadžić's spectacular arrest and extradition were not sufficient for the EU to find that Serbia has fulfilled the conditions to take a step closer to the EU. Although the EU and Serbia signed the Stabilisation and Association Agreement (SAA) on 29 April and the Serbian Assembly ratified the SAA on 9 September notwithstanding the opposition's resistance, the EU member-states were not unanimous in the view that the SAA should come into force. Some EU member states, notably The Netherlands, remained adamant that Serbia first had to extradite to the ICTY the remaining two refugees, especially former Bosnian Serb Army commander General Ratko Mladić accused of the genocide in Srebrenica. The Serbian Government spent the months following Karadžić's arrest persistently endeavouring to demonstrate that there is political will to cooperate with the ICTY but that finding and arresting Mladić are hampered by circumstances beyond its control. Serbia decided to begin unilaterally applying the Interim Trade Agreement with the EU as of January 2009, but failed to bring the EU round by end 2008. Many media interpret the persistence of The Netherlands and some other countries as a sign of their ill-will and inherited dislike of Serbia, while rightist politicians quote it as proof that Serbia does not belong in the EU at all. Such reactions and the lack of tangible progress led in 2008 to a fall in the traditionally great popular support to Serbia's EU integration, from 67% to 61%.

Serbia failed to fulfil all the conditions for facilitating the travel of its citizens to EU member states (for being included in the so-called White Schengen) due

to the paralysis of the parliament and the slow formation of the Government. The Assembly failed to pass all the required laws and the administration was unable to issue the necessary biometric documents to the citizens, wherefore the validity of the old passports, bearing the name of a non-existent state (Federal Republic of Yugoslavia), had to be extended until the end of 2009.

Several economic moves drawn in 2008 were inevitably imbued with a political flavour given the demands of the anti-European forces, which have been persistently advocating that Serbia move its focus from the EU to Russia. Back in January, Serbia and Russia signed an energy deal with great pomp at a ceremony attended by the then Rusian President Putin, Serbian President Tadić and the then Serbian Prime Minister Koštunica. The deal enables the construction of the South Stream gas pipeline through Serbia by the Russian state company Gazprom, its purchase of the Serbian state company Petroleum Industry of Serbia (NIS) at a favourable price and the modernisation of the underground natural gas storage at Banatski Dvor. The deal was sealed by a commercial contract signed on 24 December, under which Gazprom became the majority owner of NIS for 400 million Euros. The ceremony was attended by the new Russian President Dmitry Medvedev and President Tadić who simultaneously signed an "umbrella" political agreement. The arrangement was vehemently criticised by numerous Serbian economists, including some Government members. They are of the view that Serbia undersold 51% of NIS and that Russia's collateral obligations to build the pipeline and storage are merely political promises with no legal bearing.

All its flaws aside, the 2006 Constitution of Serbia commendably comprises a modern chapter on human rights. Not one political party has opposed such a proclamation or questioned the very idea of human rights or their protection in Serbia. Major obstacles, however, still remain standing, despite the political predilection. The Constitutional Court of Serbia, which ought to have 15 members, continued operating in 2008 without five members who were not elected by the Assembly until the end of the year. The reform of the judiciary has encountered major difficulties. The laws proposed by the Ministry of Justice have been opposed by some political parties and some professional judicial associations. The decisions of international human rights protection bodies, such as the European Court of Human Rights and the relevant UN committees, are enforced with great difficulty, if at all. All public opinion polls show that the judiciary commands little respect in Serbia, which is not surprising in light of the long proceedings, mild penal policy and inability to combat organised crime.

The culture of human rights, implying also the public's views on their protection and respect, is still burdened by extremist nationalism and a strong presence of racist and neo-Nazi organisations targeting especially Roma and persons belonging to some minorities or religious groups. Criminal proceedings against the members of such organisations appear half-hearted; they usually take a long time and the perpetrators receive mild penalties. Moreover, the public rarely learns whether the extremists convicted to jail have ever begun serving their sentences.

While extremist organisations mostly remained unregistered, even operating on neo-Fascist websites hosted on servers abroad, registered NGOs remained an object of odium of many media and some political parties. The greatest wrath befell those advocating human rights and championing peace back in the early nineties. They are still accused of being "anti-Serbian", "traitors" and of various other "sins". Especially perfidious are the insinuations that their officials are receiving financial support from abroad. This aversion has spread to all NGOs, even purely professional ones that have never focused on political issues. The Government that took office in 2008 has been more favourably disposed towards NGOs and cooperation with them. The re-established Human and Minority Rights Ministry has involved NGOs in its projects. Some other ministries have also drawn on the experience of the civil sector, but such cooperation still forms an exception rather than a rule. Unfortunately, the law on NGOs has not been adopted yet. The draft was withdrawn from the parliament at the end of the year and the NGOs continued operating under the obsolete regulations enacted in the early 1990s. The National Assembly has not shown the willingness to review civic initiatives submitted by NGOs and supported by the necessary number of signatures that have not received outright Government blessing.

Summary

Human Rights in Legislation

1. The state of human rights in Serbia and the state authorities' concern with their enjoyment and protection unfortunately remained strongly influenced and frequently overshadowed by the turbulent political events in 2008 as well. Kosovo's declaration of independence and debates on whether Serbia should pursue EU integration were undoubtedly the chief political events that marked the whole year. These two topics were the cause of the break-up of the coalition that ruled Serbia in early 2008, which led to the calling of early parliamentary elections held in May. All these developments, plus the presidential elections at the start of the year, brought legislative activities to a standstill in the first half of the year. Notwithstanding the great delays in the adoption of some very important laws, the only enactment the Assembly passed by July was a decision upholding the Government decision to declare null and void the unlawful enactments of the Kosovo Provisional Institutions of Self-Government on the unilateral declaration of independence.

2. The new ruling coalition declared expediting EU integration as one of its goals, which entails the adoption of the necessary laws. However, notwithstanding the need to make up for lost time, the work of the National Assembly was paralysed in the latter half of the year by constant obstruction by some opposition parties.

Back in 2007, the then Serbian Government endorsed a plan to adopt 51 laws to harmonise the national legislation with the EU *acquis*. However, only two (the Act on Travel Documents and the Asylum Act) were adopted by the time the new parliament was constituted in June 2008. As soon as the new Government was voted in, the Vice PM charged with EU integration and the Assembly Speaker stated that the Assembly faced an intensive period during which it would adopt the remaining 49 laws listed in the harmonisation plan. By the end of 2008, the Assembly adopted only 14 of the laws (seven so-called judiciary laws, the Public Procurement Act, the State Border Protection Act, the Aliens Act, the Act on the Anti-Corruption Agency, the Personal Data Protection Act, the Criminal Liability of Legal Persons Act). Serbia is yet to draft and enact the remaining laws and other legislation needed to fulfil the requirements set out in the so-called EU visa liberalisation roadmap and thus enable its nationals visa-free travel to the member-states applying the Schengen regime. These include at least the following three laws: a Prevention of Money Laundering and Funding of Terrorism Act, an Anti-Discrimination Act and an Act on International Legal Aid in Criminal Matters.

3. The National Assembly in late December 08 adopted a set of brand new laws related to the judiciary, notably: the Act on Organisation of Courts, the Act on

Seats and Jurisdictions of Courts and Public Prosecution Offices, the Act on Judges, the High Judicial Council Act, the State Prosecutors Council Act and the Public Prosecution Act. The Act on Misdemeanours was also partly amended.

All the new laws shall be enforced as of 1 January 2010. However, their provisions related to judicial election and appointments and organisational changes will be applied in 2009 to ensure the smooth operation of the judiciary as of 2010 notwithstanding the radical changes envisaged by the laws.

Even though the latest reform of the judiciary has not even commenced yet, it is already obvious that the greatest problem arises from the opportunity the authorities missed at the time the new Constitution was adopted, if not before, to conceive a new system that would mark discontinuity with the past and set clear, strict and transparent rules to ensure changes of the system and the replacement of incompetent and unconscientious judges, who had violated guaranteed human rights in the recent past. The authors of the Constitution and the judiciary laws have instead chosen a solution that bears the risk of casting new suspicions over the "general judicial re-election" process and the reform ending in failure.

Apart from the re-election of all judges that must be completed within a short period of time, by end November 2009, access to justice may prove to be most hampered by the drastic reduction in the number of courts and the rearrangement of the judiciary network in Serbia.

4. The Constitution introduced in Serbia's legal order the institute of constitutional appeal as a human rights protection mechanism. Ten of the fifteen judges were appointed by the end of 2007; under the Constitutional Act, the Constitutional Court may begin work if two-thirds of its members have been appointed. The Constitutional Court Rules of Procedure were adopted in February and the Constitutional Court began reviewing the constitutional appeals. 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, i.e. in 2010. Until then, this important authority shall continue operating with only 10 judges.

5. 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.

6. 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. Most of the applications Serbia's citizens filed with the European

Court of Human Rights relate to overly long proceedings. The Court reviewed 9 applications against Serbia in 2008, and, like in the previous years, in six cases found Serbia in violation of the right to a fair trial, due to long proceedings or the non-enforcement of final decisions. Apart from the breach of the right to a trial within a reasonable time, the Court in one case also established that Serbia had violated the right to an effective legal remedy because its law does not provide for a legal remedy that would help expedite proceedings.

7. National and international NGOs continued operating in an atmosphere of insecurity given that a law on associations of citizens was yet again not adopted in 2008. 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. The Draft was, however, withdrawn from parliament, to allow for the timely adoption of other laws.

8. Serbia has not yet 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, notwithstanding years-long extensive expert debates and repeated recommendations by international organisations that it do so. The competent ministries have agreed to jointly write a Prohibition of Discrimination Act. This decision was welcomed by the NGOs, which helped the authorities elaborate a 2003 NGO draft that was used as the basis for the Draft Act submitted to parliament in 2007. The Human and Minority Rights Minister announced that the law would be adopted in the first quarter of 2009.

9. The National Assembly adopted an Aliens Act in late October. The long obsolete Act on the Movement and Residence of Aliens of 1980 shall thus not be effective as of 1 April 2009, when the new Act comes into effect. The adoption of an Aliens Act is a requirement Serbia needs to fulfill on its road to the EU. The Assembly in October also enacted the Criminal Liability of Legal Persons Act and the Confiscation of Crime-Derived Property Act.

10. The Personal Data Protection Act, adopted by the National Assembly in November, shall be applied as of 1 January 2009. The Act regulates in detail the collection and processing of personal data and expands the powers of the Access to Information Commissioner who shall now be a Commissioner for Access to Information of Public Importance and Personal Data Protection. The chief provision that will enable successful monitoring of personal data protection is the one entitling the Commissioner to have insight in data being collected and the documents, enactments and offices of persons authorised to collect data. His role shall, however, be significantly restricted by Art. 45 (2) of the Act. With respect to the right to privacy, it should be noted that no headway was made in opening state security files in 2008. Serbia needs to pass a law on data classification as soon as possible to ensure com-

prehensive legal regulation of personal data protection. A draft law on data classification had not been submitted to parliament for adoption by the time this Report went into print. An NGO drafted such a law, but the Government has opted to write its own.

11. After a three-year vacuum, since the expiry of the previous collective agreement, the representatives of two representative trade unions (UGS Nezavisnost and the Alliance of Independent Trade Unions of Serbia) and of the Union of Employers signed a new General Collective Agreement in April 2008. Although a Decision expanding its effectiveness to all workers and all employers in the territory of Serbia as of 1 January 2009 was adopted in November, the employers and the workers' representatives agreed to put off its application for 6 months.

12. Serbia still has not ratified the UN Convention on Rights of Persons with Disabilities and its Optional Protocol, signed back in December 2007.

The Serbian Government has at long last submitted a Draft Act on the Professional Rehabilitation and Employment of Persons with Disabilities to the parliament for adoption. The draft is the result of a Protocol on Cooperation signed by the National Organisation for the Protection of Persons with Disabilities and representatives of political parties ahead of the 2008 general elections.

13. The Act on the Anti-Corruption Agency was adopted in 2008 and shall come into force on 1 January 2010. The Act on Prevention of Conflict of Interest in Discharge of Public Offices shall then cease to be applied and, thus, the Republican Conflict of Interests Committee shall cease to exist; its duties shall be taken over by the Agency. The new Act includes an important provision lacking in the provisions regulating the work of the Committee. Article 72 states that the failure to report property or submission of false data on property is an act of crime warranting between 6 months and five years of prison. This provision may significantly boost the Agency's efficiency.

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 2008. 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. So-called independent institutions also encountered problems in exercising their powers. One of the major problems these institutions face is that they lack the main prerequisites for work. Many of them lack even adequate office space and, consequently, cannot hire the staff they need. Another major problem is related to

the enforcement of decisions taken by independent bodies. Some of these institutions, like the Access to Information Commissioner Office or the Office of the Protector of Citizens were quite active notwithstanding, while others have rarely issued any public statements and their activities, if any, remain unknown to the general public.

The Access to Information Commissioner had only one-third of the staff he needed to fulfil his duties related to access to information. Given that he is also entrusted with personal data protection as of 2009, it is difficult to imagine how his Office will be able to perform all its duties with such meagre capacities.

3. The SRS split and the forming of the Serbian Progressive Party again brought to the fore the problematic and unclear constitutional and legislative provisions on ownership of deputy mandates and their legal fate following rifts in parties that won them at elections. Namely, the Constitution allows a deputy to irrevocably place his/her term of office at the disposal of the political party, at the proposal of which s/he has been elected deputy. This practically means that voters actually cannot know who they are voting for, because the parties can always replace a deputy by activating their so-called blank resignations. In practice, most parties insist that their deputies sign such resignations before assuming office.

4. The International Court of Justice declared on 18 November 2008 that it had the jurisdiction to deliberate Croatia's genocide lawsuit against Serbia. In its lawsuit, Croatia stated that the Belgrade authorities were liable for the "ethnic cleansing" of Croatian citizens as a "form of genocide" "(b)y directly controlling the activity of its armed forces, intelligence agents, and various paramilitary detachments, on the territory of the Republic of Croatia, in the Knin region, eastern and western Slavonia, and Dalmatia". As soon as the ICJ pronounced its judgment, Serbian MFA Vuk Jeremić said that Serbia would file a countersuit by which it would try to prove that Croatia committed the crime of genocide by ethnically cleansing Serbs in 1995.

5. The arrests and extradition of indictees Stojan Župljanin and Radovan Karadžić marked Serbia's headway in cooperation with the ICTY in 2008. Serbia is still obliged to arrest the remaining two fugitives, Ratko Mladić and Goran Hadžić. In proceedings before the ICTY, fifty-seven persons were to date were found guilty, cases against 13 were ceded to national courts and trials of 45 accused are under way (forty of whom are in ICTY detention); three accused are on provisional release and 2 are at large. Bearing in mind that the two indictees are still at large and that five trials have not opened yet and the objective reasons that led to delays in trials under way, it is quite unlikely that the ICTY will complete its work by end 2010.Most of the articles on the ICTY in the print media disputed the legitimacy and impartiality of the ICTY, especially after the acquittals of Haradinaj and Orić. Hardly any serious analysis of the work of the ICTY prosecutors or chambers on specific cases was published by the press. It mostly relayed the statements by politicians and state officials.

6. The War Crimes Prosecution Office has prosecuted 275 individuals since it was established. Of the 24 found guilty in the first instance, five were convicted by a final decision, 5 were acquitted; 91 of the 275 people have been indicted and 150 investigated. Only three judgments delivered by the War Crimes Chamber became final by end 2008. Eight trials opened in 2008, which marks a headway over the previous years, given that the Chamber opened 11 trials altogether by end 2007. The Prosecution Office filed 7 war crime indictments in 2008. Two were raised thanks to cooperation with the Croatian judiciary. Others are in a way a continuation of the trials already under way, the investigation of which was launched by the ICTY prosecutors, or of trials conducted before national courts. Evidence needed to file the new indictments has been obtained more easily in cooperation with the Croatian judicial authorities and police or during the presentation of evidence at the ongoing trials than through investigations in cooperation with the Serbian MIA. Media rarely follow war crime proceedings, especially those where Serbs are on trial.

7. Organised crime trials continued before the Serbian courts in 2008. The Supreme Court of Serbia began reviewing the appeals of the Organised Crime Chamber's first-instance verdict of Đinđić's assassins and passed its decision in December. At a closed session, the Supreme Court Judicial Panel decided to modify parts of the first-instance judgment pronounced by the Belgrade District Court Special Chamber and uphold the rest of it. With respect to the main defendant, Milorad Ulemek Legija, the Court modified the first-instance judgment, notably the legal qualification of the crime and the decision on the penalty. The Court qualified his crime as conspiracy to commit crimes against the constitutional order in relation to the crime of assassinating the topmost state representatives and convicted Ulemek to 40 years' imprisonment for this crime and 6 years' imprisonment for the attempted murder of Đinđić's former chief of security Milan Veruović. The Court also modified the sentence pronounced against the assassin, Zvezdan Jovanović, by qualifying his crime as the assassination of topmost state representatives and convicting him to 40 years' imprisonment, convicting him also to 8 years' imprisonment for attempted murder and another 3 years' imprisonment for the crime of conspiracy in hostile activity. Ulemek and Jovanović were each convicted to 40 years' imprisonment and may appeal the sentences given that they were handed down the maximum penalties. The appeals will be reviewed in third-instance proceedings before the Supreme Court. The Supreme Court found that there were no gross violations of the criminal procedure, as the appellants claimed, or any violations of criminal procedure that the Supreme Court reviews *ex officio*. It assessed as groundless allegations of erroneous or incomplete establishment of facts in the appeals. The Supreme Court sessions, held in the Belgrade Palace of Justice, were mostly unobstructed. No headway was made in revealing the political background of Đinđić's assassination in 2008.

The Special Organised Crime Court in Belgrade on 18 January 2008 found the members of the Zemun Clan headed by main defendant Milorad Ulemek guilty

of 15 murders, 3 abductions and terrorist attacks on the headquarters of the company Difens roud and DSS offices in Belgrade. The court found that the group was not only involved in criminal activities, but that it was politically motivated to attempt to cause dissent on Serbia's political stage as well. Apart from the prison sentences, seven Zemun Clan members were also ordered by the court to together repay 11.6 million Euros they had taken as ransom to release Milija Babović, Vuk Bajrušević and Suad Musić, whom they had abducted. This is one of the first verdicts in Serbia ordering the defendants to repay the money they gained through crime. The institute of witness collaborator played a very important role in this case. The prosecution, defendants and defence counsels appealed the judgment with the Supreme Court of Serbia in mid-November.

8. Discrimination remained a problem in 2008, *inter alia* due to the fact that a general anti-discrimination act still had not been adopted. Notwithstanding systemic shortcomings, the state authorities have assumed a more responsible attitude towards the problem. They have begun admitting that there is discrimination in various walks of life and, moreover, undertaking more specific steps to stifle it. The members of the Roma national minority and persons with disabilities are in the most precarious situation, especially with respect to access to education.

Numerous incidents were provoked in 2008 by members of a large number of neo-Nazi and clero-Fascist organisations. These organisations also actively promoted Nazi ideas in the year behind us. Anti-semitic incidents occurred in 2008 as well.

The police and judiciary still failed to react promptly to racist attacks and desecration of religious sites and gravestones. However, the state for the first time reacted to the expansion of neo-Nazism in 2008 when it banned the announced neo-Nazi rally in Belgrade and initiated the prohibition of National Formation for inciting racial and national hatred.

The Belgrade First Municipal Court found the former chief editor of the daily *Glas javnosti* Ivan Čorbić guilty of hate speech. Čorbić had published a bogus advertisement rife with hate speech and calling for the boycott of the Croatian supermarket Idea. This was the first verdict in the history of the Serbian judiciary establishing that a text constituted hate speech.

The status of religious minorities did not change much since 2007. The number of religiously motivated incidents had fallen, but they still occurred. The problem of registering religious communities not belonging to the group of "traditional churches and religious communities" has not been resolved yet. The conflict between the believers of the two clashing Islamic Communities intensified in 2008.

There is still gender discrimination in Serbia. The report on the position of women on the labour market shows that the participation rate of women in unemployment was 50% higher than of men. Women are again underrepresented in parliament. Only 54 of the 250 MPs are women.

The status of persons with disabilities remained precarious in 2008. They face many problems, from the impossibility to freely move, to problems in accessing education Serbia has nearly one million people with disabilities, of whom only 21% earn a living; the percentage of permanently employed persons with disabilities is much lower. Fortunately, the media have begun increasingly frequently reporting on their plight and alerting the public to their problems.

Persons of alternative sexual orientation were victims of numerous attacks in 2008 as well. The first conviction for threats against an activist of the Gay Straight Alliance was, however, a step in the right direction in 2008.

Serbia's nationals belonging to national minorities, above all ethnic Albanians, were exposed to intimidation and harassment after the Kosovo Assembly declared independence on 17 February. Of the 221 officially registered Kosovo-related incidents, 10 people were convicted and fined for misdemeanours. Many of the proceedings were halted for lack of evidence or instituted against "unidentified perpetrators".

Minorities were put in an unfavourable position when the Constitutional Court passed a Decision halting the implementation of the Republican Election Commission Instructions on the Implementation of the Act on the Election of Assembly Deputies, merely 13 days before the expiry of the deadline by which all parties had to submit their election lists for the May elections. Ten minority parties ran in the elections and three won seats in the Assembly. Deputies of two other minority parties ran on the DS-led For a European Serbia list. The Union of Roma of Serbia and the Roma Party, each of which had won one seat at the previous elections, did not make the threshold at the May 08 elections. Although the national legislation envisages the use of minority languages in parliament, only Serbian is used in the National Assembly in practice.

9. The prohibition of torture and other prohibited forms of ill-treatment were also violated in 2008. 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. Finally, Serbia still has a grave problem with respect to the situation in prisons and other penitentiaries and psychiatric institutions. The situation in the prisons is additionally exacerbated by lack of space and overcrowdedness. Furthermore, many persons sentenced to jail wait for years to actually be admitted to prison and serve their time. The non-existence of mechanisms for the independent monitoring of the situation in prisons is a separate but equally grave problem. NGOs focusing on human rights do not have access to such institutions and are unable to gain insight in the treatment of prisoners, an issue there is not enough information about.

10. The trend of increase in violations of the freedom of expression and of professional press standards, which began in 2004, continued in Serbia in 2008 as

well. The year was marked by problems related to media privatisation and the allocation of frequencies to radio and TV stations, an increase in the number of attacks and pressures on media and journalists and grave violations of professional standards.

11. Serbia made a step forward in combating human trafficking and smuggling in 2008, judging by reports of media, non-governmental and international organisations. Serbia is a source, transit, and destination country for women and girls trafficked transnationally and internally for the purpose of commercial sexual exploitation. There has been an increase in internal sex trafficking of Serbian women and girls. Children continue to be trafficked into forced labor or forced street begging. Chief challenges Serbia faces in combating human trafficking include inefficient judiciary, mild penal policy and the persisting problem of correctly identifying the victims. Serbia has been categorised as a Tier 2 country which has worked on suppressing human trafficking but needs to invest additional efforts and adopt new measures to that aim. The report states that continued to increase, comprising more than 75% of trafficking cases. The Report expresses concern that some.. Although the authors of the Report praise the efforts invested by the legislative and executive authorities to combat human trafficking, they also define the:

12. Although domestic violence is a criminal offence under Serbian law, research indicates that the victims are not adequately protected. 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.

13. 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. The conclusion of a new General Collective Agreement was a step in the right direction. The unemployment rate in Serbia remained high, although the number of unemployed fell since the beginning of the year. Poverty remained widespread. Abuse and harrasment in the workplace (mobbing) was widespread and gaining increasing public attention; the Serbian courts passed two judgments against perpetrators of mobbings in 2008. Social dissatisfaction remained strong, provoking strikes and protests.

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 legistation that was in force in 2008 but also comments laws that were to come into force in 2009 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 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

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 sections 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.

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 ratified international treaty actually is not in accordance with the Constitution. As per international treaties Serbia is yet to accede to, they cannot be ratified if they are not in compliance with the Constitution.

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.

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, paid little 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 judgments.

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 Committee reviewed the report in 2008 and rendered its opinions.[13] The UN Committee against Torture also reviewed Serbia's initial report and issued its recommendations in 2008.[14]

On 5 December, Serbia submitted to the UN Human Rights Council its Universal Periodic Review (UPR) of the state of human rights. The Working Group charged with the UPR has published its preliminary report[15] and the final report is to be adopted in early 2009.

Serbia also recognises the competence of the Committee against Torture to receive and consider individual communications and communications by states par-

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 See I.4.15.3.1.

14 See I.4.3.

15 A/HRC/WG.6/3/L.10.

ties 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.[16] On 22 June 2001, the 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.[17]

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.[18]

FRY in 2002 ratified the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women[19] 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.[20]

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,[21] but it will come into force only upon ratification by all the ECHR Contracting Parties.

SaM had placed 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.[22] 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

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

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

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

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

20 More in I.2.2.

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

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

for the withdrawal of the reservation.[23] The reservation regarding mandatory detention is also no longer in effect.[24]

The Decree on SaM's Agent before the European Court for Human Rights in Strasbourg was adopted in early 2005.[25] The Decree regulates the appointment and dismissal procedures and the powers and actions of the Agent. Slavoljub Carić was appointed Agent.[26]

The SaM Parliament on 26 December 2003 also ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[27] 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.[28] The Framework Convention for the Protection of National Minorities was ratified back in 1998 by the then FRY.[29]

The National Assembly in 2007 ratified the Convention on Police Cooperation in South East Europe,[30] the European Charter of Local Self-Government,[31] the Kyoto Protocol to the UN Framework Convention on Climate Change,[32] the Additional Protocol to the Criminal Law Convention on Corruption,[33] the Civil Law Convention on Corruption,[34] the Convention on Environmental Impact Assessment in a Transboundary Context,[35] Serbia's visa facilitation[36] and readmission[37] 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 Judgments, the Second Addi-

23 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.

24 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

tional 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.

Serbia in 2008 ratified the Additional Protocol to the CoE Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data regarding Supervisory Authorities and Transborder Data Flows.[38]

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 2010[39]. The old Criminal Procedure Code (hereinafter "the old CPC") thus remains in force.

38 *Sl. glasnik RS*, 98/08.

39 Act Amending the Criminal Procedure Code, *Sl. glasnik RS*, 122/08. The application of the CPC had already been put off once, until 31 December 2008, by the 2007 Act Amending the Criminal Procedure Code, *Sl. glasnik RS*, 49/07.

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

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

2.2. Constitutional Appeal

A constitutional appeal is a specific legal remedy, envisaged by the former FRY Constitution and the Montenegrin Constitution. The new Constitution introduces this remedy in Serbia's legal order for the first time. A constitutional appeal may be filed with the Constitutional Court against individual enactments or actions of state bodies or organisations exercising public authority and violating or denying human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have been exhausted or do not exist (Art. 170 of the Constitution). Article 170 does not mention protection of rights guaranteed under international treaties by constitutional appeal; this is in contravention of Article 18 (2) of the 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[40] adopted in November 2007. The Act does not include a provision ensuring protection before the Constitutional Court also of those human

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

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 needs not uphold (Art. 168 of the Constitution). The Constitution introduces the possibility of abstract control of constitutionality initiated by a motion for the review of the constitutionality of a law before it comes into effect; such an initiative must be launched by at least a one-third of the national deputies (Art. 169). These various procedures for abstractly controlling the constitutionality of legal statutes cannot *per se* be considered effective legal remedies for specific and individual human rights violations.

The jurisprudence of the former Federal Constitutional Court demonstrated that the institute of constitutional appeal envisaged by the FRY Constitution was wholly ineffective as the Court had dismissed constitutional appeals in case any other form of legal protection was formally envisaged by the law.[41] 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. The Court began reviewing constitutional appeals when its Rules of Procedure adopted on 28 February came into force[42] and rendered its first decisions on the constitutional appeals in 2008.

2.3. Ombudsperson[43]

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

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

42 *Sl. glasnik RS*, 24/08 and 27/08.

43 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 signifi-

of Vojvodina and at the local self-government level.[44] In addition to ombudspersons with general jurisdiction, an ombudsperson with special jurisdiction is to be established soon in Serbia as the Ministry of Labour, Employment and Social Policy submitted to the National Assembly a draft Act on the Protector of the Rights of the Child.

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.[45] 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.[46]

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.[47]

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cantly contribute to the effectiveness of another legal remedy (see *Leander v. Sweden*, ECtHR, App. No. 09248/81 (1987)).

44 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 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.

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

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

47 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 members or even of both the Administra-

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 the position of the new institute by devoting enough attention to the election of the first Protector.

Four Deputy Protectors of Citizens were at long last elected in October 2008.[48]

The work of the Protector of Citizens has been accompanied by problems similar to those other independent institutions in Serbia have been facing.[49] The problem of lack of office space remained unresolved until the end of the year. The offices in Milutin Milanković Street and those in the Palace of Serbia subsequently allocated by the Government cannot house even half of the Office staff envisaged by the systematisation enactment and the Serbian Assembly decision. The Ombudsman warned that this problem has significantly undermined his capacity to protect citizens to the extent and in the manner prescribed by the Constitution and the Protector of Citizens Act. (*B92*, 27 November)

The Protector of Citizens was very active in 2008. Around 4000 citizens and institutions asked for his assistance, and his Office received 1,330 complaints during the year[50]; he issued a large number of opinions and recommendations on various issues related to human rights and on four occasions proposed amendments to laws or draft laws.[51] Notwithstanding, the public at large appears to be unaware of his activities and thus the possibility to address their concerns to him. It is therefore necessary to more intensively promote the institution of Ombudsman; the campaign ought to be accompanied by strengthening his capacity to enable him to process a greater number of cases.

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

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tive 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.rs.

48 National Assembly Decision of 7 October 2008, http://www.parlament.sr.gov.yu/content/cir/akta/akta_detalji.asp?Id=373&t=O#a.

49 See I.2.4 for more on problems of independent institutions.

50 *B92* News, 8 December, www.b92.net.

51 The Ombudsman's opinions and recommendations, initiatives for legislative amendments and statements are available at www.zastitnik.gov.rs.

Province of Vojvodina[52] and the Vojvodina Statute.[53] At its 23 December 2002 session, the AP of Vojvodina Assembly adopted a Decision on the Provincial Ombudsperson[54] and on 24 September 2003 elected Petar Teofilović its first Provincial Ombudsman, who began processing complaints in mid-January 2004.[55] 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. Article 61 of the draft Vojvodina Statute is devoted to the institution of Ombudsman. Under the draft Statute, the Ombudsman shall be an independent and autonomous authority elected and dismissed by a two-thirds majority of the Vojvodina Assembly.

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.

2.3.3. Ombudspersons at the Local Level. – The Act on Local Self-Government entitles all municipalities to pass decisions on establishing municipal ombudspersons, but only a small number of municipalities have made use of the opportunity to date.

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 intro-

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

53 Article 21 (1.1).

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

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

duced 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. Other Independent Institutions[56]

A number of so-called independent institutions have been established in Serbia over the recent years. Although part of the state structure, these institutions are (or, at least, ought to be) independent from the other branches of government. They are of major relevance to establishing rule of law, fighting corruption and, therefore, the respect of human rights. However, their paradoxical and, in any event, vulnerable status risks turning them into the authorities' smokescreen – by having set up a large number of independent institutions, the authorities have demonstrated their alleged commitment to rule of law but have in real life neither allowed them to actually operate nor to enjoy the independence they need.

Independent institutions also play a direct or indirect role in the protection of human rights. The Access to Information and Personal Data Protection Commissioner and the Protector of Citizens are especially important in safeguarding human rights. However, the protection of human rights will thrive in the broader context if all independent institutions combating corruption and establishing rule of law, such

56 These institutions, as well as the institution of the Protector of Citizens, are not considered an "effective legal remedy" in terms of Art. 13 of the ECHR, but are reviewed here because they help improve the overall environment in which human rights are realised and even directly protect (some of) them.

as the State Audit Institution (SAI), the Conflict of Interests Committee, the Public Procurement Directorate, operate without obstruction.

One of the major problems these institutions face is that they lack the main prerequisites for work. To operate freely, they must have adequate funding. This is, however, where their vulnerability comes to the fore – although they should be independent in terms of funding, they wholly rely on the government for money. Despite its restrictive budget, the Government allocated them the same funds, or even more, in 2009 than it did in 2008.[57] Only the Access to Information and Personal Data Protection Commissioner, who had sought 115 million dinars, was given less than he had asked for – only 67 million dinars. This problem will be further exacerbated in view of the fact that the Commissioner shall be charged also with personal data protection, not only access to information, as of January 2009. It remains to be seen whether he shall be able to discharge his duties with such a restricted budget at all.[58]

Although some of these institutions were set up a number of years ago, many of them still lack even adequate office space. Lack of staff is another problem they face. According to its job systematisation, the Office of the Protector of Citizens ought to employ 68 people but has so far hired only 30. The Access to Information and Personal Data Protection Commissioner ought to have 21 staff but has operated with only 7 to date (*Blic*, 27 September). Moreover, given that recruitment of the officials of the institutions does not depend on the institutions but the Assembly and other state authorities, these officials are often appointed after long delays and in violation of the legal deadlines.

The managers of six independent bodies (the Protector of Citizens, the State Audit Institution, the Access to Information Commissioner, the Conflict of Interests Committee, the Public Procurement Directorate and the Commission for the Protection of the Rights) issued a joint statement in May in which they highlighted that they lacked the wherewithal to work, above all office space.[59] "The dependence on the executive authorities to provide the essential conditions and prerequisites for work has been jeopardising the necessary autonomy of the independent bodies," their statement said.

The State Audit Institution, charged with monitoring public finance and thus crucial for building public trust in the institutions, is one of the independent bodies

57 The Protector of Citizens, was, for instance, allocated more money than in 2008 and the State Audit Institution was allocated 40% more, i.e. four times more money than it spent in 2008 (*Beta*, 4 December).

58 See II.2.4.1.

59 The statement is in Serbian available at http://www.zastitnik.gov.rs/index.php/lang-sr/aktivnosti/saopstenja/74-2008-05-14-11-58-19/146-2008-06-06-13-59-11. These institutions (with the exception of the Conflict of Interests Committee Chairman Slobodan Beljanski) first issued a joint statement regarding this problem back in March; the statement may be accessed in Serbian at http://www.zastitnik.gov.rs/index.php/lang-sr/aktivnosti/saopstenja/74-2008-05-14-11-58-19/154-2008-06-09-07-49-52.

facing the above problems. First, the SAI Council members were appointed with a two-year delay; the Assembly adopted the SAI Rules of Procedure enabling the work of this authority in January 2009, although it should have done so over a year ago. SAI finally got its offices in late 2008, but, although it was to have hired 76 auditors by end March, it was staffed only by the chairman, secretary and two auditors. (*Danas*, 20 November)

Another major problem is related to the enforcement of decisions taken by independent bodies; these decisions are either non-binding or are to be enforced by the executive authorities, so that they depend on the executive in this respect as well. The Government, for instance, is duty bound to ensure the enforcement of Access to Information Commissioner decisions if need be, but has ignored this obligation to date (*Danas,* 20 November). The Conflict of Interests Committee is having a hard time discharging its duties, too; it can only issue recommendations and cannot ensure the respect of its decisions. In 2008, the Committee established that Dragan Marković Palma and Veroljub Stevanović were in conflict of interests as each simultaneously held the posts of Assembly deputy and mayor,[60] but the two decided to simply dismiss the Committee opinion. (*Danas,* 20 November)

Some state authorities went further than merely failing to provide the independent bodies with the prerequisites they need to operate and called for dismantling some of them. The Republican Legislation Secretariat, headed by Zoran Balinovac, for instance, proposed in late 2007 that the Ministry of Finance abolish the Public Procurement Directorate and the Commission for the Protection of Rights (*B92*, 1 December 2007). Although there has been no official feedback on the fate of the demand, this Government authority has apparently abandoned it after the change of government following the May 2008 elections. RATEL and the Telecommunication Ministry clashed in 2008 after the Ministry passed a decision by which it assumed the powers of this regulatory body[61]. The decision was not implemented because of the change at the helm of the Telecommunications Ministry after the May 2008 elections.

The Act on the Anti-Corruption Agency[62] was adopted in 2008 and shall come into force on 1 January 2010. The Act on Prevention of Conflict of Interest in Discharge of Public Offices shall then cease to be applied and, thus, the Republican Conflict of Interests Committee shall cease to exist; its duties shall be taken over by the Agency. The new Act includes an important provision lacking in the provisions regulating the work of the Committee. Article 72 states that the failure to report property or submission of false data on property is an act of crime warranting between 6 months and five years of prison. This provision may significantly boost the Agency's efficiency. However, a large number of officials have simply been ignoring the obligation to submit it data on their property and thus obstructing the work

60 The measures were pronounced at the Committee's 16th session on 12 September 2008.

61 *B92 News*, 13 June.

62 *Sl. glasnik RS*, 97/08.

of the Committee. The implementation of the Act will hopefully eliminate the problem. The Agency is to begin work in January 2010 but the Government has already earmarked funds for it in the 2009 budget, to ensure that the Agency is actually set up and prepared for 1 January 2009 and the implementation of the Act without delay. Problems with appointing the Agency members have, however, cropped up at the very beginning as several state authorities failed to nominate their candidates within the legal deadline.

The Anti-Corruption Council, established as an "expert advisory" body of the Government,[63] also needs to be mentioned in the context of fighting corruption. Although it formally lacks the presumption of independence, it has displayed an enviable level of integrity and independence in its work. Its reports and recommendations have, however, not been heeded even by the very authority that set it up.

Independent institutions can, unfortunately, undermine human rights by their activities as well. The Republican Telecommunications Agency (RATEL) Decision on Technical Conditions for Internet Web Subsystems, Units, Equipment, and Installation was a prime example of such conduct in 2008. Its adoption caused a public outcry given that its application would have jeopardised the right to privacy and the right to protection of data.[64] In their meeting with the Protector of Citizens, the RATEL representatives explained that it was necessary to specify the conditions under which authorised state bodies may conduct electronic surveillance. The Protector established that although the Technical Conditions would have achieved this purpose, they would have also allowed for abuse and violated the privacy of correspondence. He recommended that the Technical Conditions not be enforced until a law on the protection of personal data[65] is adopted and RATEL ultimately agreed to put its decision on hold.[66]

The Privatisation Agency also violated the right to protection of personal data by publishing in the newspapers lists of citizens not entitled to free shares. The lists gave their full names, the names of their parents and their personal identification numbers.[67] The Agency, however, announced that it would continue publishing the lists because it was of the view that it was obliged to do so by the law.[68]

2.4.1. Freedom of Access to Information of Public Importance. – Under Article 1 (2) of the Act on Free Access to Information of Public Importance, the Access

63 Decision Establishing the Anti-Corruption Council, *Sl. glasnik RS*, 59/01.

64 See the Commissioner's statements of 28 and 30 July at www.poverenik.org.yu, and the statement by the Protector of Citizens at http://www.zastitnik.gov.rs/index.php/lang-sr/aktivnosti/saopstenja/74-2008-05-14-11-58-19/189--q-q.

65 See the Recommendation by the Protector of Citizens at http://www.zastitnik.gov.rs/index.php/lang-sr/aktivnosti/misljenja-preporuke-i-stavovi/73-2008-05-14-11-58-03/186-2008-08-12-11-01-56.

66 *B92 News*, 22 August, www.b92.net.

67 See the Commissioner's statement of 23 December 2008 at www.poverenik.org.yu.

68 *B92 News*, 23 December, www.b92.net.

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, guaranteed also by Article 51 of the Constitution.

The Personal Data Protection Act[69] expanded the powers of the Commissioner for Access to Information of Public Importance who is now the Commissioner for Access to Information of Public Importance and Personal Data Protection. The Protector shall monitor the processing of personal data, and shall be entitled to review appeals and exercise other powers related to the collection, storage and protection of personal data (Art. 44). The law provides for successful monitoring by entitling the Commissioner to access and have insight in data that are collected and in the documentation, enactments and offices of persons authorised to collect data (Art. 45). The Commissioner's role is however restricted in the same Article by a provision stipulating that s/he shall not be allowed such insight in the event that insight would "seriously jeopardise the interests of national or public security, the defence of the country, or the actions aimed at preventing, discovering, investigating or prosecuting criminal offences, as long as the reasons for such restrictions exist". The restriction appears excessive, because the right of access is already limited to the Commissioner; moreover, it is difficult to imagine that the Commissioner (who is elected by the National Assemblly i.e. the state) could constitute a risk to e.g. national security or undermine criminal proceedings. The decision that there are reasons to restrict the Commissioner's rights is taken by the President of the Supreme Court of Cassation. However, under the Act, as many as 16 days may pass from the day the Court has been asked to render its opinion to the day the opinion is forwarded to the competent authority, which is much too long in this context and renders meaningless the Commissioner's right to have insight in the data.

It should be reiterated that the Commissioner's Office has not been fully staffed yet. The access to information Commissioner worked with only one-third of the associates he needs to fulfil duties related to access to information alone. It is difficult to imagine how a service of such small capacity will be able to take on duties related to data protection as well.

2.5. 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),[70] under which a party may file a request for a retrial before the national court in the

69 *Sl. glasnik RS*, 97/08.

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

event the ECtHR rendered a judgment against Serbia on an identical or similar legal dispute after the national court had rendered its final decision (Art. 422 (1.10)).

The new CPC (Art. 426 (1.6)) also allows for retrial a convicted person may benefit from if the ECtHR or another court established under an international treaty ratified by Serbia finds that human rights and fundamental freedoms had been violated during a criminal trial, that the sentence was based on such a violation and that the violation may be remedied by a retrial. In cases not requiring retrial, the new CPC allows for the filing of a request for the protection of legality (Art. 438 (2)).

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

The non-implementation of decisions taken by some other international bodies (Committee against Torture, Human Rights Committee) corroborates the necessity of amending 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.

The provision in the CPC is more comprehensive than the corresponding provision in the CPA as it allows for a retrial not only after an ECtHR judgment but also after a decision was rendered by "another court established under a ratified international treaty" (Art. 426 (1.6)). The CPC, however, also mentions only "court", whereby it leaves the recommendations of UN committees beyond the scope of this provision.

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),[71] 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

71 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.

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.

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.[72] 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.[73]

72 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.

73 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).

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

3.2. Derogation in "Time of Public Emergency"

3.2.1. General

The Constitution allows for derogations from human and minority rights guaranteed under the Constitution but only to the extent necessary upon the declaration of a state of war or state of emergency (Art. 202 (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)).[74]

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)).

74 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.

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.

3.2.2. State of War[75]

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.[76] 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[77]

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

75 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.

76 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).

77 A state of emergency was declared in Serbia in 2003, after the assassination of Prime Minister Zoran Đinđić, pursuant to 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.

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)).

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,[78] 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,[79] 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,

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

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

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 1, Protocol No. 12 to the ECHR:

(1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

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

4.1.1. General

Alongside the ICCPR, the ICESCR, the ECHR and Protocol 12 thereto, Serbia is also bound by the following international documents prohibiting discrimination: the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination against Women, ILO Convention No. 111 concerning Discrimination (Employment and Occupation)[80] and the UNESCO Convention against Discrimination in Education.[81]

The 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 Con-

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

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

stitution unfortunately cannot be qualified as an improvement over those in the HR Charter. The new Constitution lacks the temporal restriction of affirmative action measures, a criterion which is absolutely necessary for assessing the proportionality of these measures. Hopefully, this shortcoming will be overcome in court practice.

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

Discrimination is a criminal offence under the Criminal Code (Arts. 128 and 387). Many other laws also include anti-discriminatory provisions e.g. the Act on Churches and Religious Communities[82] (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 did not adopt a general anti-discrimination law in 2008. This law is needed both to create a more efficient mechanism to combat discrimination and to draw Serbia closer to the EU.[83] Two anti-discrimination laws had been drafted in 2007 and one was submitted for adoption to parliament. As all the submitted draft laws were withdrawn when the new National Assembly was constituted, there are currently no official anti-discrimination draft laws in the pipeline. The competent ministries have agreed to jointly write a Prohibition of Discrimination Act. This decision was welcomed by the NGOs, which helped the authorities elaborate a 2003 NGO draft that was used as the basis for the Draft Act submitted to parliament in 2007. The Human and Minority Rights Minister announced that the law would be adopted in the first quarter of 2009.

4.1.2. Draft Anti-Discrimination Act

The draft anti-discrimination law comprises a number of chapters. The first two define discrimination and list the characteristic forms of discriminatory conduct (direct and indirect discrimination, violation of the principle of equality in rights and duties, victimisation, conspiracy to commit discrimination, hate speech, harassment and humiliating treatment and grave forms of discrimination). It commendably lists hate speech – a widespread phenomenon in Serbia – as a form of discrimination.

The following chapter of the Draft focuses on specific cases of discrimination and actually anticipates the diverse forms of discrimination that may appear in practice.

The most important chapter of the Draft defines the mechanisms for protection from discriminatory treatment. It envisages the establishment of an Office of

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

83 Serbia must adopt a general anti-discrimination law in order to be placed on the so-called Schengen white list.

the Commissioner for the Protection of Equality. The Commissioner shall be elected to a five-year term in office from amongst candidates with a law degree, minimum 10-year experience in the legal protection of human rights and a spotless ethical and professional track record. The Commissioner shall receive and review complaints by citizens who believe that they were victims of discriminatory treatment, raise public awareness of civic rights and duties, conduct reconciliation proceedings, file suits over violations of the Prohibition of Discrimination Act and criminal and misdemeanour reports, notify the public of discrimination in practice, et al. The legislator's intention was to enable the Office to strengthen the status of discriminated citizens and afford them an additional form of legal protection, alongside court protection. The Draft also envisages court protection and lays down procedural rules which constitute a *lex specialis* vis-à-vis the general civil law regulations in the CPA. For instance, discrimination cases may be reviewed both by the court of general jurisdiction over the territory in which the defendant is resident of or headquartered in or by the court within whose territorial jurisdiction the plaintiff resides or is headquartered. The lawsuit may be filed by the injured party, the Commissioner or human rights organisations.[84] In the event only one person was exposed to discriminatory treatment, a lawsuit may be filed by the Commissioner or a human rights organisation only with the consent of the injured party. The plaintiff may demand: prohibition of the commission of an action that may amount to discrimination; prohibition of the further commission of such an action; court decision establishing that the defendant acted in a discriminatory manner; commission of an action eliminating the effects of discrimination; compensation of material and non-material damages and the publication of specific court judgments. The plaintiff may require a provisional measure during the proceedings or after them to eliminate the danger of violence or major irreparable damage. For a court to approve such a measure, the plaintiff must prove probable that such a measure is necessary to eliminate the danger of violence or major irreparable damage. The Human and Minority Rights Ministry shall monitor the application of the Act. The Commissioner shall draft annual and special reports and submit them to the National Assembly.

4.1.3. 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.[85] 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-

84 This is one of the greatest advantages of the Draft Law. Human rights NGOs have criticised the Act on Prevention of Discrimination of Persons with Disabilities for not allowing NGOs to file such lawsuits.

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

government bodies to undertake special measures to encourage equality of persons with disabilities (Arts. 32–38). Although the Act defines these measures only in the most general terms (as they need to be defined in much greater detail in each specific case), it entitles persons with disabilities to sue the competent institutions that have failed to introduce such measures.

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

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, signed by 44 states, came into force in 2008.[86] The Additional Protocol to the Convention was ratified by 26 states and it, too, has come into effect. Serbia has not yet ratified the Convention and the Protocol, wherefore their provisions still do not apply to Serbia.

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

86 The Convention had to be ratified by 20 states to come into effect. See www.un.org/disabilities, accessed on 28 December 08.

Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

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

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

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

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

Article 1, Second Optional Protocol to the ICCPR:

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

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

Article 2, ECHR:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

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

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

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

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

Protocol No. 6 to the ECHR:

Article 1

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

Article 2

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

Article 3

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

Protocol No. 13 to the ECHR:

Article 1

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

Article 2

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

Article 3

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

4.2.1. General

The right to life is guaranteed by all main international and regional human rights instruments applicable in Serbia. This right should not be interpreted narrowly.[87] 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.[88]

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.[89]

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.

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

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

89 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 SRJ (Međunarodni ugovori)*, 10/01).

Offences against the right to life are defined in the Criminal Code,[90] and are prosecuted by the state prosecutor ex officio. Those are above all offences against life or body (Arts. 113–127), crimes against humanity and other human rights protected by international law such as genocide (Art. 370), crimes against humanity (Art. 371), war crime against civilian population (Art. 372), illegal killing or wounding of enemy combatants (Art. 378) and incitement to a war of aggression (Art. 386). The Criminal Code also comprises groups of crimes which may pose a risk to human lives, such as crimes against human health, general safety, traffic safety, environment, etc.

In Article 119, the CC defines as punishable incitement to suicide and assisting a person to commit suicide, 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.[91]

Like the Charter before it, the 2006 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.[92] 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.[93] 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.[94] 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 it-

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

91 See *Report 2005*, I.4.2.1.

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

93 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).

94 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).

self 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.[95]

The Act on Police[96] 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 and only if the use of firearms is absolutely necessary to achieve one of the goals listed in Article 100.[97] It is not simple to protect certain people or facilities in real life and at the same time meet the test of "strict proportionality"[98] 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.[99]

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.[100] The Penal Sanctions Enforcement Act[101] (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).[102]

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

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

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

98 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).

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

100 See I.4.3.

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

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

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.[103]

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

4.2.4.1. Health Risks. – States 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.[104] 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 maternity leave, single parents of children under 7 and the elderly shall be provided from public revenues unless it is provided in some other manner in accordance with the law (Art. 68 (2)).[105]

4.2.4.2. Life in a Healthy Environment. – Article 74 of the Constitution guarantees everyone the right to a healthy environment and the right to timely and full information about the state of environment. It stipulates that everyone, especially the Republic of Serbia and the autonomous provinces, shall be accountable for the protection of environment and that everyone shall be obliged to preserve and improve the environment.

The following four "general" laws form the legislative framework for environmental protection in Serbia: the Act on Environmental Protection,[106] the Environmental Impact Assessment Act,[107] the Strategic Environmental Impact Assessment Act,[108] and the Integrated Pollution Prevention and Control Act.[109]

The Act on Environmental Protection 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 the event 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).

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

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

105 See I.4.18.

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

107 *Ibid.*

108 *Ibid.*

109 *Ibid.*

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)).

The Environmental Impact Assessment Act regulates the procedures for assessing the impact of projects that may have significant effects on the environment, the content of environmental impact assessment studies, the participation of stakeholders, organisations and the public, notification of other countries of projects that may impact on their environment, monitoring and other issues relevant to environmental impact assessment.

The Strategic Environmental Impact Assessment Act regulates the conditions, methods and procedures for assessing the impact of plans and programmes on the environment and the improvement of sustainable development. Such assessments are conducted for all plans and programmes in the field of spatial and urban planning or use of land, agriculture, forestry, fishery, energy, industry, transportation, waste and water management, telecommunications, tourism, preservation of natural habitats and of wild flora and fauna.

The Integrated Pollution Prevention and Control Act lays down the conditions and procedures for issuing integrated licences for activities and facilities that may negatively affect human health, the environment or material goods, types of activities and facilities, monitoring and other issues that may be relevant for pollution control and prevention. The Act lays down the procedure for issuing integrated licences both for the existing and future facilities and the monitoring procedure.

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 Act on Environmental Protection). The Access to Information Act also binds public authorities to make publicly accessible information related to the state of the environment. Under the Act, the public shall always have a justified interest to know information regarding a threat to i.e. protection of public health and the environment (Art. 4); such information must be made accessible within 48 hours (Art. 16). 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 Act Ratifying the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) has been submitted to parliament for adoption.[110] The

110 The Aarhus Convention was adopted at the Fourth Ministerial Conference within the UN Economic Commission for Europe Environment in Europe process on 25 June 1998. It came into force on 30 October 2001. Its integral text is accessible at http://www.unece.org/env/pp/.

contracting parties shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of the Convention.

To ensure that the public is promptly and adequately informed of environmental issues, Serbia needs to adopt bylaws integrating the provisions of the following EU directives in the national legal order: Directive 2003/4/EC on public access to environmental information, Directive 91/692/EEC on standardising and rationalising reports on the implementation of certain directives relating to the environment and the directive establishing the European Environment Agency and the European Environment Information and Observation Network (EIONET).

Under the Kyoto Protocol, ratified by the National Assembly in 2007,[111] Serbia, like other developing countries, is not under a commitment to achieve a quantified greenhouse gas (GHG) emission reduction. Serbia has, however, undertaken the general commitments related to the elaboration and periodic submission of the national inventories of GHG emissions to the Convention bodies; cooperation in formulating measures to mitigate the effects of climate change and facilitate adequate adaptation to climate change; cooperation in transfer of technologies, research, systematic observation and exchange of data; protection and enhancement of sinks and reservoirs of greenhouse gases; cooperation in the protection of areas stricken by desertification and floods and in the protection of water resources; inclusion of climate change impact assessments in relevant national strategies; cooperation in education, training and public awareness campaigns.

A number of draft laws relevant to the environment that must be adopted if Serbia is to join the EU were submitted to parliament in late July 2008.[112] The state has, however, failed to enact strategic documents and action plans needed for implementing the environmental protection reforms. The National Programme for Integration with the EU[113] presented by the Serbian EU Integration Office in October 2008, sets out the short, medium and long term environmental goals. The goals related to legislative reform include stepping up the harmonisation of national laws with the EU *acquis*, the implementation of the laws, in particular those regulating environmental impact, the adoption and implementation of a national environmental protection strategy and commencing the implementation of the Kyoto Protocol.

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

111 Act Ratifying the Kyoto Protocol to the UN Framework Convention on Climate Change, *Sl. glasnik* 88/07.

112 The list of laws in the parliament pipeline are available at http://www.parlament.sr.gov.yu/content/lat/akta/predzakoni.asp.

113 The National Programme for Integration with the EU is available at: http://web.uzzpro.gov.rs/kzpeu/dokumenti/npi/npi_october2008_en.pdf.

installations (Art. 263) and 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.[114] ECtHR confirmed that an embryo/foetus may have the status of a human being in terms of protection of human dignity, but not the status of an individual enjoying protection under Article 2 of the ECHR.

Abortion is regulated by the Act on Abortion in Medical Facilities.[115] Under the Act, abortion may be performed only at the request of the woman,[116] 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.[117]

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.

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114 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)). 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.

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

116 Under the 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).

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

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 an efficient system of supervising prison and detention units. SaM ratified the Protocol in December 2005.[118]

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,[119] 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.[120]

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),[121] 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.

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

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

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

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

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

4.3.2. Criminal Law

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

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

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

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

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

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

Ill-treatment inflicted by a private person is also criminalised through the following criminal offences: incitement of national, racial or religious hatred, dissent

or intolerance (Art. 317); genocide (Art. 370), war crimes (Arts. 371–374), brutal treatment of the wounded, sick or prisoners of war (Art. 381), grave bodily injury (Art. 121), 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 maltreatment 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 under Serbian criminal legislation. Moreover, the legislator clearly envisaged penalties for attempted unlawful deprivation of liberty (Art. 132 (5)). The legislator, however, did not incriminate attempted extortion of statements, attempted ill-treatment or attempted torture in Art. 137 of the Criminal Code. 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 probation 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[122] 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

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

of convicts, failed to prescribe any penalties for public officials violating the law, mandatory periodic supervision and reporting.

The PSEA envisages that the penal sanction is enforced in a manner guaranteeing the respect of the dignity of the person it is enforced against and prescribes explicit prohibition and punishment of treatment by which a person against whom the sanction is enforced is subjected to any form of torture, abuse, humiliation or experiments, as well as punishment of disproportionate use of force in the enforcement of the sanction (Art. 6). The Act envisages the prohibition of discrimination of prisoners and entitles them to protection of their fundamental rights guaranteed by the Constitution, *ratified international documents, generally accepted rules of international law* and this Act (Arts. 7 and 8).[123]

A new Rulebook on Measures for Maintaining Order and Security in Penitentiaries was adopted in late November 2006[124] 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[125] and is explicitly prescribed by Article 3 of the Convention against Torture.[126] A similar provision is found in Article 33 of the Convention Relating to the Status of Refugees.[127] This right has been reconfirmed by the ECtHR on a number of occasions as well. The ECtHR applied the same principle also to deportation.[128]

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 provi-

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

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

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

126 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.

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

128 See *Report 2005,* I.4.3.3.

sions 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 a security measure of expelling an alien from Serbia 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.

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.[129]

Use of force by the police is regulated in greater detail by the Regulations on Circumstances and Manner of Use of Means of Coercion[130] which will remain in force until the regulations adopted on the basis of the Act on Police are adopted. The Regulations envisage that when using force, an officer will "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 that the officer 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[131] was eliminated by a provision prescribing the obligation to review the as-

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

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

131 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).

sertions 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[132] 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.

4.3.5. Report on Torture in Serbia and the Committee against Torture Recommendations

In accordance with its obligations under the Convention against Torture, Serbia submitted its initial report to the UN Committee against Torture in late October 2008. The Belgrade NGO International Aid Network (IAN) set up a coalition of NGOs across Serbia in September 08 to draft a shadow report on violations of the prohibition of torture and inhuman treatment (hereinafter Shadow Report), which was submitted to the Committee against Torture in Geneva in November 2008.

4.3.5.1. Committee Against Torture Recommendations.[133] – The Committee welcomed the adoption of the Constitution in 2006 and the new laws which more or less directly prohibit torture (Criminal Code, Act on Protector of Citizens, Criminal Procedure Code, Asylum Act) and Serbia's ratification of international conventions and protocols prohibiting torture.

Although it noted the criminalisation of torture in the Criminal Code, the Committee expressed concern that legislation was not yet fully harmonised with the Convention and that the penalties established in the Criminal Code were not proportionate to the gravity of the crime.

The Committee noted that the rights of detainees to access a lawyer of their own choice, to access an examination by an independent doctor within 24 hours of detention and to contact their families were often violated and recommended that the state ensure the respect of the fundamental rights of detainees in practice. It also highlighted that the state needed to establish adequate protocols for its medical professions to systematically report on corporal and psychological injuries of persons subjected to torture.

The Committee expressed concern the Protector of Citizens has not yet been provided with the conditions ensuring full independence and the capacity to operate effectively.

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

133 http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.SRB.CO.2.pdf.

The Committee was especially concerned about the independence of the judiciary, the efficiency of the proceedings and the judges' qualifications to try cases of torture and ill-treatment.

Given the lack of information regarding proceedings for redressing victims of torture and their rehabilitation, the Committee concluded that the state had to provide victims of torture with redress and fair and adequate compensation and define adequate rehabilitation programmes. The importance the Committee attaches to compensation and rehabilitation is explicit in its ensuing recommendation to the state to provide in its next periodic report information about any undertaken measures.

4.3.6. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – the Istanbul Protocol[134]

In cooperation with the NGO Redress,[135] and at the initiative of the International Rehabilitation Council for Torture Victims (IRCT)[136], the World Medical Association (WMA)[137], the Human Rights Foundation of Turkey (HRFT) and the US Physicians for Human Rights, (PHR USA[138]), the BCHR prepared a manual "Action against Torture – a Practical Guide to the Istanbul Protocol for Lawyers in Serbia". The Prevention of Torture through Documentation project, within which the Guide was drafted, aims at improving cooperation amongst medical, legal and human rights practitioners to facilitate the identification and documentation of the crimes of torture and inhuman treatment and their adjudication.

The definition of torture in the Istanbul Protocol embraces the standards laid down in the UN Convention against Torture. One of the chief ideas in the Protocol is the effective investigation and documentation of torture to ensure that the perpetrators are brought to justice and adequately punished.

The Protocol underlines the important role of legal practitioners in communication with the victims of torture. They must be aware of how torture can be medically documented and to recognise the physical and psychological symptoms of torture. They can also contribute by pressuring state institutions to accept standards on documenting and prosecuting the crimes of torture. Legal practitioners must also have clear guidelines on redress claims and must bear in mind the corporal and psychological effects of torture when drafting such claims.

134 http://www.unhchr.ch/pdf/8istprot.pdf.

135 http://www.redress.org/

136 http://www.irct.org/

137 http://www.wma.net/e/

138 http://physiciansforhumanrights.org/

Under the Istanbul Protocol, the state has the following main obligations:

1. Prevention of torture – the state is duty-bound to take legislative, administrative and judicial measures and ensure general measures to protect persons deprived of liberty from torture;
2. Responsibility for torture – the state is duty-bound to effectively investigate allegations of torture and launch criminal proceedings against the reported perpetrators;
3. Redress – the state must provide victims of torture with adequate legal remedies and compensation.

4.3.6.1. Obligation to Effectively Investigate Torture Claims. – Under the Protocol, an investigation must be conducted even in the absence of express complaints, if there are only indications that torture was committed. An investigation shall be deemed effective if it was launched without delay, if it was impartial and if all facts were investigated thoroughly.

The greatest problem plaguing investigations of torture in Serbia is the lack of awareness of the importance of medical evidence, which is treated like any other evidence. The CPC merely includes provisions on expert testimonies on injuries, but has no specific provision on medical documentation relevant in torture-related proceedings (Art. 129). Problems may arise in the event of the existence of controversial medical evidence in the case file, e.g. if the injured party, accompanied by the police, reported to the first-aid medical centre immediately after the torture and was diagnosed with light bodily injuries but subsequently consulted another doctor who established s/he had suffered grave bodily injuries. There are no legal provisions that can address such situations. All the parties to the proceedings can do is ask for additional expertise and rely on the discretion of the court, which also takes into account other relevant evidence.

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.[139] By ratifying these treaties, the state assumed the

139 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

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.[140]

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.[141]

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.[142]

The Serbian Constitution explicitly prohibits slavery, keeping persons in conditions akin to slavery and all forms of trafficking in persons (Art. 26 (1 and 2)). 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).[143]

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

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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).

140 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.

141 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.

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

143 See *Report 2005,* I.4.4.2.1.

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.[144]

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.[145]

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 (one of the more frequent forms of exploiting human trafficking victims) 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 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.[146] 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.[147]

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144 See *Report 2005,* I.4.4.2.1.

145 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).

146 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.

147 See http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta02/EREC1545.htm.

The National Assembly in October passed the Aliens Act[148] which states in Art. 28 that a victim of transborder human trafficking shall be approved temporary residence without needing to provide specific evidence (required of other aliens seeking temporary residence in Para 1 of the Article), if such approval is in the interest of criminal proceedings instituted over human trafficking. The Act does not specify whether the victims shall enjoy these benefits if criminal proceedings have not been instituted or if the victim does not wish to or is unable to participate in them. This provision provides less protection than the 2004 Instructions[149], adopted on the basis of the prior Act on Movement and Residence of Aliens.

Para 5 of Article 28 of the Aliens Act prescribes that the alien in para 5 of the Article shall be provided with adequate accommodation, nutrition and basic living conditions if necessary. The provision is deficient inasmuch as Para 5 does not mention aliens or any other persons. It can be interpreted so as to mean that accomodation and nutrition will be provided to a foreign victim of human trafficking, mentioned in Para 4, not Para 5 of the Article. A literal interpretation of the provision would, however, preclude the fulfilment of the state's obligations to provide accommodation, food and basic living conditions.

Serbia's legislation, including the new Aliens Act, does not comprise provisions regulating the safe return of a victim of transborder human trafficking to his/her country of origin nor specifying who would be charged with the task.

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.[150] The Strategy was not operationalised by a national action plan by the end of the year.[151]

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

148 *Sl. glasnik RS*, 97/08.

149 The Serbian Minister of the Interior adopted Instructions on conditions for approving temporary residence to foreign nationals – victims of human trafficking. Under the Instructions, a human trafficking victim may be approved up to three-month temporary residence for humanitarian reasons to provide the victim protection and assistance in recovery and enable her/his return to her/his state of origin or of prior residence; 6-month temporary residence may be approved to foreign victims of human trafficking who agreed to cooperate with the authorities in uncovering the crimes and their perpetrators and one-year temporary residence permits may be issued to victims actively participating in the court proceedings in the capacity of witness or injured party or if so required to ensure their personal safety (See *Report 2004,* I.4.4.3).

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

151 The lack of regulations coordinating efforts in combating human trafficking is evident at the strategic level. Without an action plan, the Strategy itself cannot improve the quality of cooperation between the competent institutions and organisations nor boost the effects of activities taken in the fields of prevention, education, analysis and initiatives for amending legislation, monitoring the implementation of strategic documents, collection of statistical data, research and reporting.

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.[152] The national criminal legislation needs to comprehensively regulate this issue in accordance with contemporary international standards.[153]

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,[154] 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).[155]

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

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

154 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.

155 See *Report 2005,* I.4.4.3.1.

The Act on the Protection of Participants in Criminal Proceedings,[156] 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.[157]

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 more adequate protection of human trafficking victims in court proceedings and facilitate their overall status.

4.4.3.2. Confiscation of Crime Proceeds and Redress of Victims. – On 16 May 2005, SaM signed the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.[158] The Assembly of Serbia had not ratified this Convention by the end of 2007.

However, the National Assembly in October 08 commendably passed the Criminal Liability of Legal Persons Act[159] and the Confiscation of Crime-Derived Property Act[160]. Under the CCDPA, proceeds form the sale of irrevocably confiscated property shall be paid into the state coffers; 80% will be allocated to the listed law enforcement authorities and 20% for funding "social, health, educational and other institutions in accordance with a Government enactment" (Art. 49 (2)). The provisions of this law will not however be applied in the event the property gained by crimes related to human trafficking or the value of the object of the crime do not exceed 1.5 million dinars (Art. 2 (2)). The restriction can be justified by the costs of the proceedings but is problematic in light of the fact that the state has until recently failed to allocate any resources to fund preventive and protection measures in its fight against human trafficking.[161]

4.4.4. Forced Labour

Forced or compulsory labour encompasses every work done under threat or punishment.[162] According to Article 6 (1) of the ICESCR, persons who do not work

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

157 See *Report 2005,* I.4.4.3.1.

158 http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=198&CM=7&DF=1/31/2009&CL=ENG.

159 *Sl. glasnik RS*, 97/08.

160 CCDPA, *Sl. glasnik RS*, 97/08.

161 Serbian law does not envisage the existence of a special fund for redressing victims of human trafficking. Hotline, legal aid and reintegration services provided by NGOs are not funded from the state budget.

162 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)).

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 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[163] ruled that convict labour that did not contain elements of rehabilitation was not in accordance with Article 4 (2) of the ECHR. In the provisions on work obligation of convicts, the PSEA (Arts. 86–100),[164] 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[165] 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,[166] only if it is purely military in character (Art. 2 (2.a) Convention ILO No. 29 on compulsory labour).

The Act on Defence[167] 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 interna-

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

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

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

166 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)).

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

tional 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.[168]

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 keeping with Article 11 (2) of the ILO Convention No. 29 on Forced Labour, which stipulates that only persons above 18 and under 45 years of age may be subjected to compulsory labour.

In terms of the usual civic obligations, free legal aid is prescribed by national legislation in Article 17 (2), Federal Act on Attorneys,[169] which is in keeping with the standard set in Article 8 (3c (iv)) of the ICCPR.[170]

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

168 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.

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

170 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)).

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 judgment.

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;

(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[171] in mid-2007, the National Assembly put off until 31 December 2008 the enforcement of the Criminal Procedure Code (hereinafter CPC)[172] passed in mid-2006. Unfortunately, not even the eighteen-month delay was enough to muster the technical, material and expert capacities for the implementation of the Code or to draft a new CPC announced by the MoJ two years ago. In its last working day in 2008, the National Assembly yet again amended the transitional provisions of the CPC, putting off its enforcement until 31 December 2010.[173] This postponement has extended 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[174] 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.

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.[175]

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.[176] 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).

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

172 *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.

173 Act Amending the Criminal Procedure Code, *Sl. glasnik RS,* 122/08.

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

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

176 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).

The ICCPR requirement that arrest and detention be lawful and its prohibition of arbitrariness do not only relate to criminal proceedings but also to 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 person deprived of liberty at the time of detention suffices for him/her to understand the reasons for which s/he has been deprived of liberty.[177]

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,[178] began on 1 January 2007. As per the right to liberty and security of person,

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

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

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.[179] 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.

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

179 A state administration authority may ask the court to order this measure (Art. 166 (2)).

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.[180] "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.[181]

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.[182]

During the pre-trial proceedings, authorised police officers can deprive a person of liberty if there are reasons for ordering his or her custody, but nevertheless have the obligation to promptly bring this person before an investigating judge. If 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 place of arrest (Art. 262 (3)).

The Constitution prescribes that detention may last for maximum three months on the basis of a decision by competent first instance court and that it may 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 may be extended another two months at most. The Supreme Court's judicial panel (in cases of criminal offences carrying minimum 5 years in prison) may extend

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

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

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

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.[183] The Human Rights Committee took the stand that judicial control must be provided immediately, not after the decision by the second-instance administrative body.[184]

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)[185] 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 may issue a decision ordering that a person against whom the proceedings are conducted for deprivation of civil capacity be placed in an appropriate medical institution 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 placement may have harmful consequences to the person's health (Art. 38 (3)). A complaint against such a court decision may 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).[186] 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

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

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

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

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

the case".[187] 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.).

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.[188] 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 segre-

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

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

gated 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."

4.6. 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

The National Assembly in late December 08 adopted a set of brand new laws related to the judiciary, notably: the Act on Organisation of Courts, the Act on Seats and Jurisdictions of Courts and Public Prosecution Offices, the Act on Judges, the High Judicial Council Act, the State Prosecutors Council Act and the Public Prosecution Act.[189] The Act on Misdemeanours has also been partly amended.

189 All the laws were published in *Sl. glasnik RS,* 116/08.

All the new laws shall be enforced as of 1 January 2010. However, their provisions related to judicial election and appointments and organisational changes will be applied in 2009 to ensure the smooth operation of the judiciary as of 2010 notwithstanding the radical changes envisaged by the laws.

The new system to be established once these laws come into effect will show whether the legislator's approach can improve the unacceptable state of Serbia's judiciary. The many challenges lying ahead may bring into danger some of the principles safeguarding the right to a fair trial and other human rights, the realisation of which is directly linked to the functioning of the judicial system.

Even though the latest reform of the judiciary has not even commenced yet, it is already obvious that the greatest problem arises from the opportunity the authorities missed at the time the new Constitution was adopted, if not before, to conceive a new system that would mark discontinuity with the past and set clear, strict and transparent rules to ensure changes of the system and the replacement of incompetent and unconscientious judges, who had violated guaranteed human rights in the recent past. The authors of the Constitution and the judiciary laws have instead chosen a solution that bears the risk of casting new suspicions over the "general judicial re-election" process and the reform ending in failure. The Venice Commission, whose experts commented the drafts of some of the new laws, also noted a series of weaknesses in the compromise provisions.[190]

Apart from the re-election of all judges that must be completed within a short period of time, by end November 2009, access to justice may prove to be most hampered by the drastic reduction in the number of courts and the rearrangement of the judiciary network in Serbia. Under the Act on Seats and Jurisdictions of Court and Public Prosecution Offices, Serbia shall have 34 basic courts, 26 higher courts, four appellate courts (in Belgrade, Niš, Novi Sad and Kragujevac), 16 commercial courts, an Administrative Court (with three departments, in Niš, Novi Sad and Kragujevac) and the Supreme Court of Cassation. Under the Act, cases may be adjudicated in the so-called judicial units which will be established in the municipalities that had municipal courts until now but will not have basic courts in the future (there are 104 such municipalities).

Serbia has courts of general jurisdiction and specialised courts. Under the new Constitution, the Supreme Court of Cassation shall be the highest court in Serbia (Art. 143 (3)).

The new Act on the Organisation of Courts gives courts new names and different jurisdictions than the existing ones have. As of 2010, the courts of general jurisdiction shall comprise basic, higher and appellate courts and the Supreme Court of Cassation. Specialised courts shall include commercial courts, the Commercial Appellate Court, misdemeanour courts, the Higher Misdemeanour Court and the Administrative Court (Art. 11).

190 *Opinion on the Draft Laws on Judges and on the Organisation of Courts of the Republic of Serbia,* adopted by the Venice Commission (Venice, 14–15 March 2008), CDL AD(2008)007.

Basic courts will essentially take over the jurisdiction of the municipal courts. The jurisdiction of the new higher courts will, however, differ from that of the present district courts. As opposed to the existing district courts, the higher courts will not review appeals of basic court decisions, with the exception of some specific decisions in proceedings. For instance, higher courts will review appeals of: basic court decisions on measures ensuring the presence of the defendants in court and in summary criminal proceedings, of decisions in civil disputes, of verdicts in small claims, enforcement and non-litigation disputes. Higher courts will also conduct proceedings related to the extradition of indicted and convicted persons, enforce criminal judgments of foreign courts, recognise and enforce foreign court and arbitration-related decisions not in the jurisdiction of other courts, rule on conflict of jurisdictions between basic courts within their territorial jurisdiction and perform other tasks set forth by the law (Art. 23).

The Act on Organisation of Courts defines the appellate court as a second-instance court. It shall rule on appeals of higher court decisions, basic court criminal judgments not within the jurisdiction of higher courts, basic court judgments in civil disputes unless such appeals are reviewed by higher courts. The Appellate Court shall also rule on conflict of jurisdictions of lower courts within its territorial jurisdiction in matters not within the jurisdiction of a higher court, on the transfer of jurisdictions of basic and higher courts in the event they are prevented from or cannot act on a legal matter, and shall perform other tasks set forth by the law (Art. 24).

This Act finally regulates more precisely the jurisdiction of the Supreme Court of Cassation, introduced in Serbia for the first time by the 2006 Constitution. The Supreme Court of Cassation shall have contentious and non-contentious jurisdiction (Arts. 30 and 31). Within its contentious jurisdiction, the Court shall rule on extraordinary legal remedies against decisions taken by Serbian courts and other matters envisaged by the law, on conflict of jurisdictions between courts unless such decisions are within the jurisdiction of another court, and on transfer of jurisdiction to another court to facilitate proceedings or for other important reasons (Art. 30). Within its non-contentious jurisdiction, the Court shall take legal positions to ensure uniform application of the law, review the application of the law and other regulations and the work of courts; appoint Constitutional Court judges, render opinions on the candidates for the post of Supreme Court of Cassation President and exercise other powers envisaged by the law (Art. 31).

Organised crime, war crime and high technology crime proceedings are conducted before special departments of the Belgrade District Court.[191]

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 ap-

191 See *Report 2005*, I.4.6.1.1.

pearance 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.[192] 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.[193]

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 who 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".[194]

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

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

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

194 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.

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 of the judges who had compromised themselves with the previous regime, they should have been taken to task 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.[195] 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.[196] 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.[197] 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.[198]

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

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

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

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

198 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.

of retirement, by dismissal or non-appointment on permanent tenure (Art. 148 (1)). 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.[199] The new Act on Judges gives a more precise list of grounds for dismissal than its predecessor. A judge shall be dismissed in the event s/he has been convicted to a prison sentence of minimum 6 months or a punishable offence rendering him/her unworthy of judgeship, if s/he has discharged his/her duties incompetently or committed a grave disciplinary offence (Art. 62). Incompetence shall denote insufficiently successful discharge of judicial duties, if a judge's performance is appraised as "unsatisfactory" in accordance with the criteria for evaluating the performance of judges (Art. 63). Anyone may file an initiative for the dismissal of a judge. The dismissal procedure shall be launched at the proposal filed by the court president, the president of the immediately higher court, the President of the Supreme Court of Cassation, the minister of justice, the authorities charged with evaluating the work of judges or the Disciplinary Commission. The High Judicial Council shall establish whether there are reasons for dismissal (Art. 64). The provision explicitly listing that "anyone" may file an initiative for the dismissal of a judge may prove not to be a good solution.

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 18 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 may be exempted from a proceeding. These reasons focus on conflict of interest or regard his/her 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 ab-

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

sence of other forums for recourse. The complaint is submitted to the High Personnel Council.[200]

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,[201] 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 formulation "involvement in political activities" is much too general and leaves ample room for interpretation and, thus, abuse.

Under the new Act on Judges, a judge may not hold office in legislative or executive bodies, public services or provincial or municipal authorities. A judge may not be a member of a political party nor act politically in any other way; engage in any paid public or private work or provide legal services or advice for a fee. A judge may be a member of the Republican, provincial or municipal election commission. Other functions, engagements and activities contrary to the dignity and independence of a judge or damaging the reputation of the court shall also be incompatible with judgeship. The High Judicial Council shall determine which actions are contrary to the dignity and independence of a judge or damaging the reputation of the court on the basis of the Ethics Code. In cases specified by the law, a judge may engage in educational or scientific activities in judicial training institutions during working hours (Art. 30).

4.6.2.8. Right to Case Assignment on a Random Basis. – In keeping with the Recommendation of the CoE Committee of Ministers,[202] the Act on Judges 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. No one may establish judicial panels or assign cases disregarding the work schedule or the order in which they were filed (Art. 24). In accordance with the Court Rules of Procedure, a case may be taken from a judge only in case of prolonged absence or in the event a final disciplinary sanction has been pronounced against him or her for committing a disciplinary offence of unjustified dilatoriness (Art. 25 (2)).

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

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

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

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 judgment 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.[203]

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.[204] 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.[205]

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.[206] 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.

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

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

205 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.

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

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 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

Delivering a judgment within reasonable time is one of the key elements of the right to a fair trail. Assessment of whether a proceeding was completed within reasonable time takes into account the complexity of the case, the conduct of the defendant i.e. party in the proceeding (whether the party in the proceeding caused the delay) and the interest of the submitter that the proceeding is completed as soon as possible. Expedition is especially expected in criminal proceedings, but also in civil proceedings on child custody, employment disputes, disputes regarding physical injury and, in general, in cases where speed is of the essence, as, for instance, if a person infected by the HIV by blood transfusion has instituted proceedings seeking compensation of damages.[207]

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)). Article 10 of the CPA 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

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

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 Act[208] and the Act on Mediation[209] regulating peaceful settlement of other forms of disputes, will also help address problems regarding trials within reasonable time. The purpose of these laws is to enable parties to resolve their disputes in an informal procedure, without going to court and costing less money and much less time. The parties themselves agree on the settlement in negotiations mediated by a third, neutral person. The legislators drafted the law with the intention of reducing the number of cases taken to court to help increase judicial efficiency.

4.6.5. Public Character of Hearings and Judgments

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 judgments.

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.[210]

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

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

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

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);[211] 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 to protect morals 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 judgment must always be pronounced publicly, notwithstanding whether the public was excluded from the proceeding (Art. 381 (4) CPC and Art. 340 (3) CPA). 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.[212] The CPC and CPA prescribe that the panel decision whether to state the reasons for the judgment 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 judgment (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 pun-

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

212 Apart from the Convention, which does not envisage exceptions to public pronouncement of judgments, 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 judgment 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.

ishment and the maximum penalty is 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.[213]

Under national regulations, administrative proceedings are held in closed sessions and are only exceptionally public (Art. 32 Act on Administrative Proceedings).[214] 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[215]

The ECtHR has in its practice set certain criteria by which it can be determined whether a charge is "criminal".[216] 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.[217] Determination of a charge as criminal also depends on the nature of the offence and the severity of the penalty.[218]

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

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

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

215 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.

216 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.

217 *Ibid.*, para. 81.

218 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.

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[219] 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 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,[220] 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.

219 *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.

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

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 an adequate 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.[221] 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 of 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 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 tried *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.[222] 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)).

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

222 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).

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 the 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 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.[223]

The 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.

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

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.

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 reliable) (Art. 119 (5)).

Apart from the protection afforded by the CPC, the Act on the Protection of Participants in Criminal Proceedings[224] 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)).

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 judgment 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)).[225] Also, the judgment 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).

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

225 See I.4.3.

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 an 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 judgment by false confession or in another manner, unless under duress exerted by a person employed in a state authority (Art. 533).

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 judgment, or when criminal proceedings have been terminated by final decision or the charges have been dropped by final judgment" (Art. 6 (1)). Besides, it is prohibited to render decisions that are less favourable for the defend-

ant 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[226] 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 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 new laws come into effect, wherefore the Constitutional Court will have to work without them for the time being.

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

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

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 activities 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 in-

dividual. 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.[227] According to the jurisprudence of this Court, privacy encompasses, inter alia, the physical and the moral integrity of a person, sexual orientation,[228] relationships with other people, including both business and professional relationships.[229]

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).

4.7.2. Personal Data – Access and Collection

4.7.2.1. General Regulations. – The collection, storage and use of personal data[230] and the possibility of an individual to access data are protected by Article 8 of the ECHR.[231]

The CoE Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, which Serbia has also ratified,[232] is the first binding international instrument on the protection of personal data. Parties to the Convention are obliged to undertake the necessary measures to ensure the legal protection of fundamental human rights with regard to the automatic processing of personal data.

The Serbian Assembly in November 08 adopted the Act Ratifying the Additional Protocol to the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data regarding Supervisory Authorities and Transborder Data Flows.[233] The Protocol provides for the establishment of supervisory authorities in the contracting states and regulates in detail the transborder flow of data to recipients not within the jurisdiction of the parties to the Convention.

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)).

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

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

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

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

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

232 *Sl. list SRJ (Međunarodni ugovori)*, 1/92 and *Sl. list SCG,* 11/05.

233 *Sl. glasnik RS (Međunarodni ugovori),* 98//08.

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 new Personal Data Protection Act[234], adopted by the National Assembly in November 2008, shall be applied as of 1 January 2009.[235] The Act elaborates in detail the conditions for collecting and processing personal data. It satisfies the requirement that the purpose of collecting data must be specified in advance and clearly. Citizens are entitled to be informed of, have insight in and a copy of collected data. The restrictions of the above right in the new Act relate to the abuse of or threats to the public or personal interests of the person they regard (Art. 23). After having insight in the data, the person they regard is entitled to require their amendment, updating or deletion, or that they no longer be processed if the purpose or manner of processing is unspecified or illicit, or if the data being collected are not commensurate to the purpose or incorrect (Art. 22).

The Act expands the remit of the Access to Information Commissioner, who was to become the Access to Information and Personal Data Protection Commissioner as of January 2009. The Commissioner shall monitor the process of personal data processing, be entitled to take decisions in appeal proceedings and exercise other duties related to the collection, keeping and protection of personal data (Art. 44). The chief provision that will enable successful monitoring of personal data protection is the one entitling the Commissioner to have insight in data being collected and the documents, enactments and offices of persons authorised to collect data (Art. 45). The Commissioner, however, shall not be entitled to such insight in the event that insight would "seriously jeopardise the interests of national or public security, the defence of the country, or the actions aimed at preventing, discovering, investigating or prosecuting criminal offences, as long as the reasons for such restrictions exist". The President of the Supreme Court of Cassation shall decide whether there are reasons for restricting the Commissioner's right to insight.

The Police Act[236] allows the police to collect, process and use personal data and in general envisages the application of the principle of proportionality (Art. 75).[237]

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,

234 *Sl. glasnik RS*, 97/08.

235 See *Report 2007*, I.4.7 for details on the old Data Protection Act, which was in force throughout 2008.

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

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

although it does not punish, requests to citizens to submit proof of prior convictions or a clean record (Art. 102).

The Labour Act[238] for the first time regulates the processing of and access to employee personal data that are kept by the employer. The Act prohibits employers from requiring of the job applicant to provide data which are not directly relevant to the job s/he has applied for.[239]

The Tax Procedure and Tax Administration Act[240] guarantees the tax payers the right to privacy and prescribes that all information about a tax payer is confidential, apart from strictly prescribed exceptions.[241]

The State Administration Act[242] 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).[243] 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.[244]

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 that it shall be exercised "in compliance with the law", which means that the provisions of the Personal Data Protection Act 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

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

239 More in *Report 2005,* I 4.7.2.1.

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

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

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

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

244 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).

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,[245] and, a week later, the Decree amending the previous one.[246] The Constitutional Court of the Republic of Serbia declared both decrees unconstitutional.[247] 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.[248]

4.7.2.3. Powers of the State Security Services. – The Act on Security Services[249] 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[250] and the Act on the Security and Information Agency[251] 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[252] shall be set up and will, *inter alia*, ensure the implementation of 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 (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.

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

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

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

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

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

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

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

252 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).

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[253] 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, and 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 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.

253 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.

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.[254]

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.[255]

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.[256]

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

The search of an apartment in order to apprehend the perpetrator of a criminal offence or to find evidence of an offence or objects of relevance to the criminal proceedings under way is allowed (Art. 77). The CPC envisages greater restrictions on the search of attorney's offices. These premises may be searched only in relation to a specific proceeding, file or document (Art. 77 (2)). The search must be ordered by the court by a reasoned warrant in writing. 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

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

255 See *Rotaru v. Romania*, App. No. 28341/¬95 (2000).

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

material may not be violated.[257] The person whom the search warrant regards may request the presence of a legal counsel or defence counsel.[258]

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,[259] 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 territory of the former Yugoslavia since 1 January 1991 and listed in the ICTY Statute.[260] 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).

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

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

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

260 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.

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,[261] telex,[262] 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[263] 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).[264]

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 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 may in the interest of Serbia's security issue an order based on a prior court decision

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

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

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

264 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)

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).[265] 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 may be enforced for a maximum of six months, and may 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.[266]

Under Article 55 of the Telecommunications Act,[267] any activity or use of equipment threatening or interfering with the privacy and confidentiality of messages transmitted via telecommunications networks shall be prohibited, except in case consent has been obtained from customers, or in case these activities are performed in compliance with the law or a court order issued in accordance with the law. The Republican Telecommunications Agency (RATEL) adopted a document entitled Decision on Technical Conditions for Internet Web Subsystems, Units, Equipment, and Installation, i.e. a rulebook on authorised Internet supervision. The rulebook is a technical manual for Internet providers, who are duty-bound to allow the competent authorities to monitor electronic data and communication. By providing authorised state organs with technical conditions to intercept electronic mail, IP phone traffic and other forms of Internet communication and other activities of Internet users, the rulebook provides also for ample opportunity to abuse the users' personal data, especially in the absence of a law regulating personal data protection. After public pressures, notably the recommendation issued by the Protector of Citizens,[268] the rulebook was placed *ad acta* until the enforcement of the new Personal Data Protection Act.

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.[269] It comprises a series of relationships, such as marriage, children, parent-child relationships,[270] and unmarried couples living with their children.[271] Even the possibility of establishing a family life may be sufficient

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

266 *Ibid.*

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

268 http://www.zastitnik.gov.rs/attachments/186_2008.08.06.Preporuka%20-%20RATEL.doc.

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

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

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

to invoke protection under Article 8.[272] Other relationships that have been found to be protected by Article 8 include relationships between brothers and sisters, uncles/aunts and nieces/nephews,[273] parents and adopted children, grandparents and grandchildren.[274] 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.[275]

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

Article 63 of the Constitution guarantees the right to freely decide whether to have children or not. The fact that this right is guaranteed "to all" is disputable. The question arises how one can guarantee this right to the prospective father, 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[276] 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).

The Criminal Code penalises whoever relates or disseminates information of a person's family circumstances that may harm his or her honour or reputation (Art. 172).

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

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

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

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

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

4.7.6. Sexual Autonomy

Sexual autonomy is also covered by Article 8 of the ECHR.[277] 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,[278] and relatively difficult to justify when it concerns consensual intercourse between adults.[279]

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

4.8. Freedom of Thought, Conscience and Religion

Article 18, ICCPR:

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

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

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

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

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.

277 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].

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

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

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.[280] 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 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,[281] while Article 45 guarantees the right to conscientious objection.[282]

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[283] and the Act on Restitution of Property to Churches and Religious Communities.[284] The Rulebook on the Content and Keeping of the Register of Churches and Religious Communities[285] 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

280 See I.4.8.2.
281 See I.4.8.3.
282 See I.4.8.5.
283 *Sl. glasnik RS*, 36/06.
284 *Sl. glasnik RS*, 46/06.
285 *Sl. glasnik RS*, 64/06.

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.[286] 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.[287] Human rights and public order can be violated in the field of material law as well.[288] The scope of Article 7 (2) remains uncertain as the law does not specify which ecclesiastical court decisions need to be enforced by the state. Finally, the law does not set out a procedure under which the religious communities are to seek the assistance of state bodies in the enforcement of their court decisions nor how the state bodies are to provide such assistance.

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

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286 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.

287 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*).

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

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[289] and the republican Act on Legal Status of Religious Communities.[290] 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.[291] Any interpretation that would deprive these organisations of the right to perform religious activities would be in contravention of the Constitution and international practice.

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

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

291 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.

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 problematic as the Act allows administrative authorities to assess the quality of religious teaching and goals, which is absolutely impermissible from the viewpoint of freedom of thought and religion. Under Article 20 (4) of the Act, a religious community's application may be rejected if the state finds its religious teaching or goals are inadequate. The 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 that 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[292] and Article 24 of the Act on Secondary Education[293] allow only traditional churches and religious communities to hold religious instruction in public schools. These provisions seriously violate the principle of equality of religious communities.

4.8.4. Religious Instruction

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

The Act on Amendments and Changes to the Act on Elementary Schools[294] and the Act on Amendments and Changes to the Act on Secondary Schools[295] 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.

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

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

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

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

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.[296] 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 for conscientious objection in their legal systems.[297]

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

The Act on the Army of Serbia[298] 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[299] 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[300] 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

296 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.

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

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

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

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

on Articles 9 and 14 of the Convention that even twice as long civilian service can be justified.[301]

The Yugoslav Army Act regulates the conditions under which the right to conscientious objection may be enjoyed (Arts. 296–300).[302]

Amendments to the Decree on Military Service[303] 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 is supposed to implement.[304]

4.8.6. Restitution of Property of Religious Organisations[305]

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

The right to restitution is afforded churches and religious communities, i.e. their legal successors in accordance with the valid enactments of churches and religious communities. If this provision is interpreted in accordance with the Act on Churches and Religious Communities, then this right is limited only to registered churches and religious communities in view of the fact that only they have the status of legal persons i.e. may exercise the right to property. The interpretation of this provision leads to the conclusion that if a religious organisation fails to re-register pursuant to the provisions in the Act on Churches and Religious Communities, its property will primarily 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.

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

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

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

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

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

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 interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

4.9.1. General

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

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

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

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

All the highest legal enactments in Serbia include separate provisions on freedom of the press and other media. Freedom of the press is guaranteed; publication of newspapers is possible without prior authorisation and subject to registration (Art. 50 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[306] governs the right to public information, as well as the right to express opinion and the rights and obligations of all stakeholders in the process. This right particularly encompasses freedom to express opinion, freedom to gather, publish and disseminate ideas, information and opinions, freedom to print and distribute newspapers, freedom to produce and broadcast radio and television programmes, freedom to receive ideas, information and opinions, as well as the freedom to establish legal entities engaged in public information (Art. 1). The Act forbids censorship and indirect ways of restricting the freedom of expression, promotes information about issues of public interest, protects the interests of national and ethnic minorities and persons with special needs, treats equally foreign and national legal and natural persons, forbids monopoly in the field of establishing and maintaining public information services and narrows the field of privacy for the holders of state and public functions (Arts. 2–10).[307]

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

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

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

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,[308] 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[309] 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.[310]

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 (Republican Telecommunications Agency – RATEL) 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 may 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).

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

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

310 Detailed analysis available in *Report 2004,* I.4.9.3.

Political parties, as well as organisations and legal persons established by them may not 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 may be revoked before expiry of validity.[311] In such a case, the Agency conducts a procedure in which the broadcaster concerned must be given an opportunity to state his case and be present at the session debating the revocation of the licence, after which a reasoned decision is made. The broadcaster has the right to appeal the decision, as well as the right to initiate a judicial review and administrative proceeding against the Agency decision on the 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.[312]

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.[313] 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,[314] provisions on advertising and sponsorship, adapted to the intention to preserve independence, impartiality and variety of the media scene.

311 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.

312 See *Report 2004*, I.4.9.

313 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.

314 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.

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.[315]

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.[316] 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.[317] The ECtHR affirmed the view in its judgment in the case Lepojić v. Serbia.[318] In late November 2008, the Supreme Court Criminal Division adopted a legal interpretation introducing into the local legislation some elements of the ECtHR jurisprudence related to the freedom of expression. The Court states that "the margins of acceptable criticism are broader with respect to public figures vis-à-vis ordinary citizens. As opposed to ordinary citizens who do not bear the attribute of public, public figures are inevitably and consciously exposed to close scrutiny of their every action and of every word they utter both on part of the journalists and the public in general, wherefore they must exhibit a greater degree of tolerance."[319]

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

316 See *Report 2000*, II.2.8.1.

317 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).

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

319 The Supreme Court of Serbia Criminal Division statement of 18 December 2009 is available in Serbian at: http://www.vrhovni.sud.srbija.yu.

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.[320]

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.[321] 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.[322]

Serbian CC prescribes punishment both for "stating" and "spreading false rumours". In the case of *Thoma v. Luxemburg*,[323] the ECtHR found that a journalist must not be held responsible for quoting or conveying the text.

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

Article 20, ICCPR:

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

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

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

Article 317 of the CC explicitly bans incitement to national, racial and religious hate, dissension or intolerance (almost identically as the old Code). However,

320 See *Prager and Oberschlick v. Austria.*

321 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).

322 See *Lingens v. Austria.*

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

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.

Article 386 of the new CC sets a harsher prison sentence of minimum 2 and maximum 12 years for incitement to and instigation of a war of aggression. 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.

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). Liability is excluded if such information is a part of a scientific or journalistic work and (1) was published without intent to incite to discrimination, hatred or violence, as a part of an objective journalistic report or (2) intends to critically review such occurrences (Art. 40).

The Broadcasting Act provides for the jurisdiction of the Republican Broadcasting Agency 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)[324] 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[325] ethnic hatred or intolerance (such conduct towards specific groups is incriminated by the Criminal

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

325 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.

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.

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[326] 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".[327] The Act on Assembly of Citizens uses the term "public gathering".

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

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

The Constitution does not mention the "disruption of public traffic" as grounds for restricting the right to public assembly that had been envisaged in the 1990 Serbian Constitution and still is in the Serbian Act on Assembly of Citizens,[328] wherefore the constitutionality of this legal provision is brought into question.

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)).[329]

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

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

327 See *Report 2005,* I.4.10.

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

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

'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."[330]

The Serbian Act states that public gatherings may be held 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.[331]

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.[332]

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.[333] 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.[334]

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330 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.

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

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

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

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

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,[335] 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[336]) (Art. 11 (1)). The organisers must be informed of the ban at least 12 hours before the gathering is scheduled to start. An appeal against the decision is possible but does not stay its execution, and the final decision may be challenged by instituting administrative proceedings.

The police authorities may *temporarily* prohibit a public assembly if it is aimed at a forcible overthrow of the constitutional order, violation of the territorial integrity of Serbia, violation of human rights, or incitement of racial, religious or ethnic intolerance and hate (Art. 9 (1)). The organisers must be notified of the ban at least 12 hours before the gathering is due to start. The difference between such a provisional ban and the permanent ban envisaged by Article 11 is that the former can be pronounced permanent only by a court decision. If the police authorities seek to impose a permanent ban, they must file a request to that effect with the competent district court within 12 hours, and the court has 24 hours from the receipt of the request to hand down its decision. The organiser may appeal to the Serbian Supreme Court within 24 hours of receiving the court's decision, and the Supreme Court must rule within 24 hours of receiving the appeal (Art. 10).

It is unclear why the law provides better legal protection by prescribing time periods and the involvement of courts in the case of the provisional ban envisaged by Article 9, while in the case of a permanent ban under Article 11 the organiser is directed to institute administrative proceedings. The preferable solution would be to apply the better legal protection under Article 9 in both cases, especially since the

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

336 The same grounds were envisaged by the 1990 Constitution.

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,[337] amended in September 2007,[338] 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 contravention 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,[339] 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.

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

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

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

This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this Article shall authorise States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in that Convention.

Article 11, ECHR:

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

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

4.11.1. General

Article 55 of the Constitution of Serbia guarantees the freedom of political, trade union and all other forms of association. The Constitution also guarantees the right not to join any association. It in this way affords protection from forcible association, in accordance with the ECtHR view that states must guarantee everyone the right not to associate with others i.e. not to join an association.[340]

Serbia has two laws: the Act on Social Organisations and Citizens' Associations[341] (hereinafter ASO) regulating the establishment and activities of social organisations and citizens' associations, and the Act on Political Organisations.[342]

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

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

341 *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.

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

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.[343] 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.

The long awaited Draft Act on Associations was withdrawn from the parliament on 17 December, this time for lack of time for debate and to allow for the adoption of other laws before the new year. The fact that laws related to human rights are always easily pulled off the agenda can only cause concern.

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[344]). 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

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

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

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 the organisation has been banned; and d) if it is established that the organisation ceased operating (except for political organisations).

Decisions on banning political organisations are taken by the Supreme Court, at the proposal of the Public Prosecutor (Art. 12 (5) Serbian Act on Political Organisations). An appeal may be lodged against a decision of the Supreme Court; an appeal will be decided on by the chamber of the same court (Art. 13 (6)). As only the Constitutional Court may reach a decision to ban an association under the Constitution, this provision is not in compliance with the new Constitution of Serbia.

4.11.3. Association of Aliens

The right of aliens to association is not completely denied by statute. The ASO allows such associations on condition that their aims are not political, trade union or similar. Aliens' associations are subject to a regimen laid down by the Federal Act on Movement and Residence of Aliens. Article 68 (1) states that "associations of aliens are established on the basis of permissions issued by the administrative body competent for internal affairs." The same provision is laid down in the ASO (Art. 69 (2)). Furthermore, both acts define precisely that this right is enjoyed only by aliens who reside in the country, taking into account the special conditions required for that by the Act on Movement and Residence of Aliens (Arts. 31–60).[345]

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 rejecting a request for approval required for establishing an association of aliens, or a decision banning the work of an association of aliens. No administrative litigation is envisaged in case the government brings a decision to reject the 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.

345 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.

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.[346] 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[347] explicitly envisages in Article 4 that administrative authorities may not dissolve or suspend trade union organisations.[348]

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 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.

346 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.

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

348 See 4.18.5.

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*,[349] however, the European Court of Human Rights ruled in 1999 that prohibiting police officers from belonging to political parties and taking part in political activities was not in contravention of Article 10 (freedom of expression) and Article 11 (freedom of association) of the ECHR. In view of this judgment, 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.[350] The Commission considered that states should have a large measure of freedom in judging what measures are required to defend their national security.[351]

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).

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

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

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

Article 47 of the Serbian Act on the Public Prosecutor's Office[352] and Article 27 of the Act on Judges envisage that a judge, a public prosecutor and his deputy may not 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.

4.12.1. General

Right to property guaranteed by Article 1 of Protocol 1 to the ECHR 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.[353]

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,

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

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

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.[354]

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[355] regulates the restriction and deprivation of the right to real property constituting the most serious forms of interference in the peaceful enjoyment of property. Under the law, the Serbian government determines the existence of public interest by a decision. These individual decisions may be contested in an administrative dispute. It would be justified to ask whether the competent state bodies deciding on expropriation 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.

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 of this order is heard by the Serbian Ministry of Finance (Art. 29 (5)).

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

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

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.[356]

Article 36 of the Expropriation Act does not provide for any time limit within which the previous owner of the expropriated real property may 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,[357] differentiating between public and non-public construction land and 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.[358]

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

The Act on Assets Owned by the Republic of Serbia[359] 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 requir-

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

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

358 See *Report 2007*, 4.12.3.

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

ing 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.

4.12.4. Construction of Additional Floors and Condominiums

This matter is regulated by the Act on Maintenance of Condominiums,[360] 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.

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.[361] 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 2008. A symbolic step towards denationalisation was, however, made in 2005 by the adoption of the Act on Registration of Ar-

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

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

rogated Property.[362] 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.[363] 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.[364]

Under the Act, churches and religious communities shall regain the real estate they had owned, notably farmland, forestland, urban building land, residential and business premises, apartments and offices, movable property of cultural, historical or artistic importance.[365]

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.[366]

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 Ser-

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

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

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

365 See *Report 2007,* I.4.12.5.

366 See *Report 2007,* I.4.12.5.

bian 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[367] regulates for the most part the manner in which the institute will gradually disappear from the Serbian legal system.[368]

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,[369] 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[370] and the Local Self-Government Act[371]) provides local governments and the Autonomous Province of Vojvodina with greater competencies in ensuring minority rights.[372]

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

368 See *Report 2006,* I.4.12.5.

369 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.

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

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

372 See *Report 2005*, I.4.13.1.

The 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 ought to be taken as a framework law[373] and that specific areas of minority protection be regulated in greater detail by separate laws.

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,[374] 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[375] (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 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.

373 See *Report 2005*, I.4.13.1.

374 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).

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

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.[376]

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 added). 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 education[377] prohibit all activities and any incitement to activities endangering or disparaging groups or individuals on grounds of race, ethnicity, language, religion or sex, or political convictions. The laws prescribe fines for perpetrators of these activities.

376 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.

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

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.[378] 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.[379] Article 16 of the Personal Data Protection Act[380] defines data related to ethnic affiliation, race, language, religion as "particularly sensitive data". Such data may be processed only with the written consent of the person they regard; the consent shall specify the designation of the data being processed, the purpose of the processing, and the manner of use (Art. 17). 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.[381]

The Constitution explicitly allows autonomous provinces to guarantee additional rights (79 (2)). Article 80 (1) allows persons belonging to national minorities to establish educational and cultural associations funded on a voluntary basis with a view to preserving and developing national and cultural specificities. Under Article 13 (2) of the Framework Convention, the exercise of this right does not entail any financial obligation for the states. Under the Act on the Protection of Minorities, the state is to provide such assistance in accordance with its funding abilities. Under this Act, the state is to ensure public service broadcasts of cultural content in the

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

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

380 *Sl. glasnik*, 97/08.

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

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[382] 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[383] but their powers are not defined precisely. Under the Constitution, a law shall regulate the manner of appointment of national council members. Given

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

383 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-

that such a law has not been passed yet, the national council members have to date been appointed in accordance with the Rules on the Method of Operation of Assemblies of Electors for the Election of National Councils of National Minorities adopted simultaneously with the Act on the Protection of Minorities. Under the Rules, the initial council members shall be elected at the electors' assembly under the D'Hondt system. Fifteen national councils have been appointed in this manner, but the terms in office of 12 of them have expired in the meantime. They have nonetheless continued working and receiving state funding.

The Human and Minority Rights Ministry has drafted an Act on National Councils of National Minorities (hereinafter: National Councils' Act) which is to be submitted to parliament for adoption in early 2009. The law is to regulate the powers and the procedures for the appointment and funding of national councils and the composition and the powers of the Republic of Serbia Council for National Minorities.

Under the draft, this law shall regulate the powers of the national councils related to culture, education, informing and the official use of language and script. These powers have been defined narrowly and mostly entitle the councils to submit proposals and render opinions. Systemic laws (Broadcasting Act, Public Information Act, Education Act) regulating the above areas need to be amended if the national councils are to be provided with broader powers.

Under the draft law, a national council "shall initiate the decision-making procedure related to the protection of individual and collective rights of the national minority before the Constitutional Court, the Protector of Citizens, the Provincial or local Ombudspersons and other competent authorities" and "adopt views, launch initiatives and undertake measures regarding all issues directly related to the position, identity and rights of the national minority" (Art. 10).

The law allows for the direct election of national councils. It envisages the forming of lists of persons belonging to national minorities, on which the citizens will enter their names on a voluntary basis, by stating their affiliation to a national minority. For direct national council elections, at least 50% of persons belonging to a minority according to the last census minus 20% must enter their names on the list. If these conditions are not met, the national minority shall appoint its council members by applying the elector election system. The status of elector shall be granted a member of a national minority who has collected 100 signatures or been appointed elector by the national minority organisation or association.

Under the draft law, the Republic of Serbia Council for National Minorities shall be established to "preserve, promote and protect national, ethnic, religious, linguistic and cultural specificities of persons belonging to national minorities with a view to the realisation of their rights." The Council shall comprise the Prime Min-

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

ister (who shall chair the Council), the minister charged with human and minority rights, the education, culture, justice, police and religions ministers, the minister charged with local administration and local self-government and the chairmen of the national councils.

The 2009 Budget Act allocated 366 million dinars for the Human and Minority Rights Ministry, of which 200 million are earmarked for funding national councils.

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.

4.13.9. Use of Language. – Article 10 of the Constitution sets out that the Serbian language and Cyrillic script shall be officially in use in the Republic of Serbia while the official use of other languages and scripts shall be regulated by law based on the Constitution. Article 79 of the Constitution specifies the right of persons belonging to national minorities to preserve their specificities, which entail the right to use their own languages and scripts.

The official use of languages and scripts is regulated by the Act on the Official Use of Languages and Scripts.[384] Under Article 11 of the Act, "municipalities inhabited by persons belonging to nationalities shall establish when languages of nationalities shall also be officially in use in their territories". The Article further specifies that the municipalities and autonomous provinces shall lay down in their statutes which languages shall be officially used in the municipalities i.e. the provincial bodies. The official use of languages and scripts in the Autonomous Province of Vojvodina, inhabited by the greatest number of minorities, is regulated also by the Decision on the detailed regulation of specific issues related to the official use of languages and scripts of national minorities in the AP of Vojvodina.[385]

Article 6 of the AP of Vojvodina Statute[386] sets out that alongside Serbo-Croatian and the Cyrillic script and the Latin alphabet, in a manner stipulated by the law, Hungarian, Slovak, Romanian and Ruthenian languages and scripts and the languages and scripts of other nationalities shall be used in the work of the Vojvodina authorities (Assembly, Executive Council and the provincial administration) pursuant to the law.[387]

384 *Sl. glasnik RS*, 45/91, 53/93, 67/93, 67/93, 48/94 i 101/05.

385 *Sl. list APV*, 8/03, 9 /03.

386 *Sl. list APV*, 17/91.

387 Act on the Official Use of Languages and Scripts, *Sl. glasnik RS*, 45/91, 53/93, 67/93, 67/93, 48/94 and 101/05.

The Official Journal of the Autonomous Province of Vojvodina is published in all languages and scripts in official use in accordance with the Vojvodina Statute (Serbian, Hungarian, Slovak, Romanian and Ruthenian)..

The Vojvodina Assembly Rules of Procedure[388] set out that the Croatian language and alphabet shall also be used alongside the listed languages. The Assembly has a Translations Service providing for translations and interpretations from Serbian into these languages and vice versa.

Municipal and city statutes lay down the languages and scripts in official use in the territory of the respective municipality or city. They may specify the official use of a language or script only in a specific settlement as well.

In Vojvodina, the Serbian language and Cyrillic script are officially in all its municipalities and the cities of Novi Sad, Pančevo, Sombor, Sremska Mitrovica, Subotica and Zrenjanin. The Latin alphabet is officially used in 25 local self government units in the province. Only Serbian and the Cyrillic Script are in use in nine municipalities, while 33 municipalities officially use also one or more languages and scripts of national minorities (Hungarian is officially used in 27, Slovak in 11, Romanian in 8 and Ruthenian in 6 municipalities). The Croatian language and script are officially in use in Subotica, while the Czech language and script are officially used in the municipality of Bela Crkva. The municipalities of Beočin, Vršac, Kikinda, Stara Pazova, Apatin and Sremska Mitrovica statutes prescribe the use of specific minority languages and scripts in specific settlements.[389]

Article 18 of the Act Establishing Particular Jurisdiction of the Autonomous Province of Vojvodina[390] stipulates that the Autonomous Province shall via its authorities regulate in detail the official use of languages and scripts of national minorities in Vojvodina, supervise the implementation of regulations on those issues and monitor the application of the law, as a delegated duty and in accordance with the law regulating the official use of languages and scripts.

Apart from languages officially used in the territory of AP Vojvodina, Albanian, Bosniak and Bulgarian are in official use in several other Serbian municipalities.

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;

388 *Sl. list APV*, 23/02 and 30/04.

389 http://www.puma.vojvodina.sr.gov.yu/mapa.php.

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

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 3, Protocol No. 1 to the ECHR:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

4.14.1. General

The Constitution proclaims the sovereignty of the people, and that suffrage is universal and equal (Arts. 2 and 52). Every able-bodied citizen of age shall be entitled to vote and to be elected (Art. 52 (1)). In addition, the Constitution guarantees all citizens the right to participate in the administration of public affairs, to employment in public services and to hold public office under equal conditions (Art. 53).

4.14.2. Participation in the Conduct of Public Affairs

The Constitution gives concrete principal guarantees of direct democracy and prescribes the popular initiative for adoption of legislation and for 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 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.[391] ICCPR also acknowledges the rights of citizens to participate in the conduct of public affairs and to have access, on general terms of equality, to public service in their country. These rights may be restricted. The ICCPR insists the restrictions cannot be unreasonable, while the ECtHR found that the right of a citizen to be elected may be subjected to qualification requirements as long as they are not discriminatory.[392]

391 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.

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

The National Assembly on 30 May 2003 adopted the Responsibility for Human Rights Violations Act,[393] 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.[394]

The Serbian Assembly in 2004 enacted the Act on Prevention of Conflict of Interest in Discharge of Public Offices.[395] 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)).[396] 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.[397] 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.[398] 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.[399] 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)).

393 *Sl. glasnik RS*, 58/03 and 61/03.

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

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

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

397 *Sl. glasnik RS*, 72/03 and 75/03.

398 More in *Report 2005,* I.4.14.2.1.

399 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)[400]; Art. 6 Local Elections Act (LEA)[401]; Art. 2 Act on the Election of the President of the Republic;[402] 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 one 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).[403] 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

400 *Sl. glasnik RS*, 35/00, 57/03 and 18/04.

401 *Sl. glasnik RS*, 129/07. This Act and the Act on the Election of the President of the Republic were adopted after the break-up of Serbia and Montenegro, wherefore they give the right to vote to those enjoying the status of Serbian citizen.

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

403 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.

abuse. It cannot be expected of citizens to tour all municipalities and check every municipal election roll.[404] The Serbian Act on the Election of Assembly Deputies partly resolves the problem – it introduced monitoring of voting by prescribing the marking of voters' fingers with a special spray and that the voters sign the election roll (Art. 68 (3 and 4)).

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)[405] 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

404 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.

405 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).

in the electoral district.[406] Half of the deputies in the Vojvodina Assembly are elected under a proportional and half under the majority election system (Art. 5 (3) DEVD).

Election laws contain various solutions with regard to the distribution of seats that have been won by the individual election lists. Different solutions with regard to the distribution of seats result in the different ways of exercising the passive right to vote at various election levels. At parliamentary elections the submitters of the election lists can distribute the seats won to the candidates of their own choosing (Art. 84 (1) AEAD). The new Local Elections Act does not include the provision contained in the previous law, under which one third of mandates was distributed according to the order on the list, whereas the remaining mandates were distributed in accordance with the decision of the bearer of the list. 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.[407]

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.[408] 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.[409] 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 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,[410] and guarantees of a fair trial

406 The election threshold of 5% does not apply to national minority political parties (Art. 81 AEAD; Art. 40 LEA and Art. 74 DEVD).

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

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

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

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

are not applied to the procedures following the revision of legality of the conduct of elections.[411]

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 52 LEA[412]). 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. 52 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 district courts in the case of local elections (Art. 54 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. The 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. 54 (4) 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,[413] 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

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

412 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).

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

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.

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, nota-

bly the Family Act.[414] 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 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[415] and has led to a number of problems in practice.

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,[416] 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).

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

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

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

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 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).[417] ECtHR practice and its rulings on marriages of homosexuals and transsexuals are not uniform.[418] 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*,[419] 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.[420]

4.15.3. Special Protection of the Child

4.15.3.1. General. – 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).

417 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)).

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

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

420 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.

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).[421] In July 2002, FRY ratified two optional protocols to the Convention on the Rights of the Child. These are: the Optional Protocol on the Sale of Children, the Child Prostitution and Child Pornography and the Protocol on Participation of Children in Armed Conflicts.[422] The Family Act endorses and is based on all the main principles enshrined in the Convention on the Rights of the Child.

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 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 for the 1992–2005 period. The Report was presented to the Committee on 4 February 2008. Although the state Report largely relies on NGO reports, these organisations were not consulted on the content of the Report.[423]

In June 2008, the Committee adopted its Concluding Observations highlighting both the positive and negative aspects related to the respect of child rights in Serbia.[424]

The Committee welcomed the inclusion of provisions on the rights of the child in the Constitution, the adoption of laws related to the protection of minors (the Family Act and the Juvenile Justice Act) and the establishment of the Council for the Rights of the Child. It also expressed its satisfaction that the Council for the Rights of the Child adopted the National Action Plan defining the plans and priorities until the year 2015 and providing for monitoring of progress.

The Committee issued Serbia recommendations regarding *inter alia* the implementation of the National Action Plan, the functioning of the Office of the Protector of Citizens, the establishment of the Protector of Children and the need to coordinate the work of various government bodies and strengthen the role of the Council for the Rights of the Child. The Committee also noted the need to ensure a specific budget allocation for the implementation of the economic, social and cultural rights of children, to the maximum extent of available resources and, where

421 *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 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.

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

423 See *Report on the State of the Rights of the Child in Serbia*, Child Rights Centre, www.cpd.org.rs.

424 CRC/C/SRB/CO/1.

needed, within the framework of international cooperation. The Committee welcomed the opening of a toll-free natonal helpline for children in Serbia, but noted that it had to work seven days a week and that awareness of its existence amongst children needed to be increased.

The Committee highlighted the problem of *de facto* discrimination of children belonging to vulnerable groups in practice (Roma children, children with special needs, children of returnees, children belonging to minorities, children without birth certificates). These children face discrimination, especially with respect to access to education and health care.

The Committee expressed serious concern about the treatment of children with special needs in some social care institutions. It is apprehensive that the treatment of children in some of the institutions may amount to ill-treatment or even torture.

The Committee expressed concern over the lack of foster families and issued recommendations regarding adoption of children.

The Committee was especially concerned by the fact that corporal punishment in the family remained lawful, wherefore a large number of domestic violence cases went unreported and the provisions on domestic violence, which the Committee welcomed, were not being applied.

The Committee also issued recommendations with respect to health care and education, child labour, the status of „street children", the sexual exploitation and trafficking of children and the implementation of special standards in criminal proceedings against children.

The Family Act endorses and is based on all the main principles enshrined in the Convention on the Rights of the Child. The fact was recognised by the Committee, which, however, expressed concern that the overall legislation has not yet been fully harmonised with the Convention.

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.[425]

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.[426]

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

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

426 See *Report 2006*, I.4.15.3.1.

material or using children for pornography. The CC envisages two crimes related to trafficking in humans,[427] 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).[428]

The Yugoslav Army Act[429] 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. Draft Act on the Protector of the Rights of the Child. – The Government of Serbia on 14 December 2007 submitted to the Assembly the Draft Act on the Protector of the Rights of the Child. 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).

The Act was not adopted by the end of 2008. Tamara Lukšić Orlandić was in the meantime appointed Deputy Protector of Citizens for the rights of the child within the Office of the Protector of Citizens.

427 See I.4.4.

428 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.

429 *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.

4.15.3.3. "Measures of Protection ... Required by the Status of Minors". – Under Article 24 (1) of the ICCPR, "every child shall have without any discrimination ... the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." Besides prohibiting discrimination in general, the Constitution of Serbia in Article 64 stipulates that children born out of wedlock shall have the same rights as legitimate children. This provision exists also in the FA (Art. 6 (4)).

The Family Act regulates the parent-child relationships, notably the family status of the child, determination of paternity and maternity (Arts. 42–59) and elaborates the rights of children under parental care (Arts. 59–66). The rights of the child are elaborated in Chapter 3 of the Act, independently of parental rights and duties detailed in other provisions. The rights of the child comprise: right to know who his/her parents are, the right to live with his/her parents, the right to personal relationships, the rights to development and education and right to opinion. These 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).[430]

4.15.3.4. Protection of Minors in Criminal Law and Procedure. – A Juvenile Justice Act enacted in 2005[431] 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.

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430 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.

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

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 NGO report on the rights of the child submitted to the Committee for the Rights of the Child noted the problem arising with respect to specific disciplinary measures, especially those institutional in character – their duration is relatively indeterminate given that the law specifies only the minimum and maximum duration of such measures.

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.[432] 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).[433]

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.[434]

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).

4.15.3.5. 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

432 See *Report* 2006, I.4.15.3.3.

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

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

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).[435]

Having a name (first and last names) is the right of every individual. The name of a child is chosen by both parents and is entered into the Register of Births within two months of birth. Under the Serbian FA,[436] 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[437] adopted within the CoE, sets the basic principles, rules and recommendations concerning citizenship.[438] Serbia has

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

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

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

438 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 applica-

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,[439] and of the Act Amending the Serbian Citizenship Act[440] 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 Explanatory Note 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.[441] 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 Act also defines who is considered a national of Serbia in the new circumstances. The terms "SaM State Union" and "SaM citizenship" were deleted from the valid Act, like the other 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

ble 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 nor dissolution of a marriage between a national of a state party and an alien shall automatically affect the nationality of the other spouse (Art. 4). The rules of a state party on nationality shall not contain distinctions or include any practice which amounts to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin; a state is also prohibited from discriminatory treatment of its nationals notwithstanding whether they are nationals by birth or acquired its nationality subsequently (Art. 5).

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

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

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

with provisions on granting citizenship to children born in another country i.e. whose one parent is a foreigner. Furthermore, the Act also no longer needs to include special provisions on acquisition of Serbian citizenship by Montenegrin nationals or termination of Serbian citizenship due to acquisition of Montenegrin citizenship. These amendments 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 Constitution does not guarantee the right to citizenship, an attitude which is commonplace and generally accepted. The 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".

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.

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 had previously been envisaged by the 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 Citizenship Act prescribes that citizenship may be acquired by: origin, birth, naturalisation and international agreements (Art. 6).[442]

The Act Amending the Citizenship Act adopted in 2007 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.[443] 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 Ser-

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

443 See I.4.16.1.

bia 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* Serbian citizenship under the same conditions (para. 3). 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.[444]

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.[445] The 2007 Act Amending the Citizenship Act scrapped the acquisition of the other member-state's citizenship (Art. 10 (1)) as grounds for termination of citizenship and thus Article 35 setting out when citizenship can be terminated on these grounds (Art. 13).

444 Official talks on dual citizenship and the Dual Citizenship Agreement between Serbia and Montenegro officially began in late September 08 (www.danas.co.rs, 1 October). The two states' Interior Ministers and experts held several meetings on the issue until the end of the reporting period.

Of the former SFRY countries, Serbia has a Dual Citizenship Agreement with Bosnia-Herzegovina, concluded in 2002 by the then FRY.

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

The Ministry of Internal Affairs shall be charged with the procedure of conferring and terminating citizenship and the applications will be reviewed urgently (Art. 38).[446]

The 2007 amendments also reformulated the provision in Article 51 (Provisional Articles) of the Serbian Citizenship Act under which citizens of Serbia comprised 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. Article 51 now reads: "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,[447] by adding a provision, under which all Montenegrin citizens, who had been registered as residents of Serbia, shall be deemed citizens of Serbia within the meaning of the Act on condition that they submit written statements declaring they consider themselves citizens of Serbia and apply for entry in the Serbian citizenship registry (Art. 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.[448]

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.

446 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.

447 Under this Article, an SFRY citizen, who had the citizenship of another former-SFRY republic or state created in the territory of the ex-SFRY on the day this Act came into effect, shall be considered a citizen of Serbia if s/he has fulfilled the following three conditions: has been registered as a permanent resident for at least 9 years registered residence in Serbia and has submitted an application for entry in the Serbian citizenship registry and a written statement declaring s/he considers himself or herself a national of Serbia. Under Article 52, persons fulfilling these requirements acquire Serbian citizenship *ex lege*, i.e. only applications of persons who have not fulfilled the legal requirements are reviewed or decided on.

448 See Act Amending the Citizenship Act, Draft, Explanatory Note, Part III, www.srbija.sr.gov.yu, accessed on 20 December.

3. The above-mentioned rights shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 2, Protocol No. 4 to the ECHR:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in para. 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Article 3

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

2. No one shall be deprived of the right to enter the territory of the state of which he is a national.

Article 4

Collective expulsion of aliens is prohibited.

Article 1, Protocol No. 7 to the ECHR:

1. An alien lawfully resident in the territory of a State shall not be expelled there from except in pursuance of a decision reached in accordance with law and shall be allowed:

(a) to submit reasons against his expulsion,

(b) to have his case reviewed, and

(c) be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under para. 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

4.17.1. General

Under the 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)). 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.

The Constitution leaves the detailed regulation of the entry and residence of aliens in the Republic of Serbia to the law. The Serbian Assembly adopted the Aliens Act in late October.[449] Most provisions of the still valid 1980 Act on the Movement and Residence of Aliens[450] on the matter regulated by the new law shall cease the be effective on 1 April 2009, when the new Aliens Act takes effect (Arts. 90 and 92). The 1980 Act was obsolete on the whole, both with respect to the terms it used and solutions. Although the 1980 law had been amended a number of times after the FRY and SaM were established, the new provisions did not essentially change the concept of the law; it still used the old terms and laid down the powers of long defunct institutions. Parts of it were restrictive. It had in specific cases ceded affairs related to the movement and residence of aliens to internal affairs authorities, giving them excessively broad guidelines for making decisions.

Moreover, as underlined in the Explanatory Note, the provisions in the 1980 law were not compatible with the standards regulating alien issues in the European Union and the latest trends accepted and applied in democratic systems. The proposer of the law also stated that the Republic of Serbia as an independent state needed to regulate the entry, movement and residence of aliens in its territory in accordance with the new Constitution. Apart from the need to harmonise the law with the Constitution, the proposer also stressed that the adoption of the new regulations was a requirement Serbia needed to fulfil to take a step closer to the EU; this is why, while drafting the law, its authors fully respected both the Schengen Agreement and the Convention implementing the Schengen Agreement, thus laying legal grounds for cooperation amongst internal affairs authorities.[451]

The new Aliens Act regulates the conditions for the entry, movement and residence of aliens in the Republic of Serbia, and the powers and duties of the state administration thereto (Art. 1). The Act shall not apply to aliens granted asylum in Serbia unless otherwise specified by the law, to aliens enjoying privileges and immunity under international law insofar as they are exempted from specific provisions of the Aliens Act by virtue of such privileges and immunities, and aliens with the status of refugees. Provisions of the 1954 Convention on the Status of Stateless Persons[452] shall apply to persons without citizenship in the event they are more favourable than those of the Aliens Act (Art. 2).

449 *Sl. glasnik RS*, 97/08.

450 *Sl. list SFRJ*, 56/80, 53/85, 30/89, 26/90 and 53/91; *Sl. list SRJ*, 24/94, 28/96 and 68/02; *Sl. list SCG*, 12/05 and *Sl. glasnik RS*, 101/05 and 109/07.

451 See Draft Aliens Act, Explanatory Note, Part II, www.srbija.gov.rs, accessed on 10 January 2009.

452 *Sl. list FNRJ (Dodatak)*, 9/59.

An alien may enter and stay in Serbia under the conditions set forth by the Act with a valid travel document in which a visa or residence permit has been entered unless otherwise specified by the law or an international agreement (Art. 4). The movement or residence of an alien in a specific part of Serbia shall be prohibited or limited if so required to protect public order or security of Serbia and its citizens or pursuant to international agreements (Art. 5).

Article 10 of the Act lists which types of entry of foreign nationals into Serbia shall be deemed unlawful. Article 11 lists when an alien shall be denied entry into Serbia. Apart from the lack of a valid travel document and visa, if a visa is necessary (Art. 11 (1.1), the Article lists seven other grounds for denying an alien entry into the country. The Government shall prescribe in detail when the border police shall have the discretion to deny entry. The last provision provides an exception inasmuch as it allows the border police to deny an alien entry into Serbia if there are reasonable grounds to suspect that the alien will not stay in Serbia for the declared purposes (Art. 11 (1.8)). The border police thus have full discretion to determine whether there is reasonable suspicion about the purpose of the alien's stay in Serbia.

The Aliens Act further states that an alien may leave Serbia freely, but lists conditions under which the border police may temporarily prohibit an alien from departing the country (Art. 13)

Article 28 lists the conditions an alien needs to fulfil to be issued a temporary residence permit. Foreign citizens, who are victims of human trafficking, need not fulfil these conditions in the event their temporary residence is in the interest of conducting criminal proceedings and there are no obstacles in terms of Art. 11 (1.6 and 1.8). If an alien does not have enough money to support himself or herself, s/he shall be provided with adequate accommodation, nutrition and basic living conditions (Art. 28 (5)).

The Act lists grounds for denying an alien further residence in or entry into Serbia (Art. 35) and grounds for terminating residence (Art. 36).

Article 37 sets out the conditions under which an alien may be approved permanent residence in Serbia, specifying that the detailed requirements shall be laid down by the minister charged with internal affairs (Art. 37 (9)). Article 39 lists the grounds on which a permanent residence request may be denied.

State authorities and legal and natural persons are duty bound to promptly notify the competent authorities of aliens unlawfully residing in Serbia or fulfilling grounds for termination of residence (Art. 45).

Article 75 lays down the obligation of legal and natural persons providing accommodation to aliens for a fee and those visited by aliens to report their presence to the competent authorities within 24 hours. The Act also sets out the aliens' obligations related to registration of temporary and permanent residence, change of address and residence and departure. In agreement with the Internal Affairs Minis-

ter, the Foreign Affairs Minister may decide that specific aliens are not duty-bound to register their residence (Art. 75 (4)).

The Constitution provides that foreign citizens may 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))

Article 47 of the new Aliens Act prescribes somewhat lesser protection of aliens facing expulsion from Serbia as it does not comprise the last grounds listed in the Constitution – serious violations of rights guaranteed by the Constitution. The Article further states that the prohibition of expulsion shall not pertain to aliens reasonably suspected of endangering Serbia's security or convicted of a grave crime by a final decision and thereby constituting a threat to public order. Notwithstanding this provision, however, an alien may not be expelled to a territory where there is a risk that s/he may be subjected to torture, inhuman or humiliating treatment or punishment.

Article 58 of the Aliens Act sets out that the competent authorities conducting the expulsion proceedings shall take into account the specific situation of an alien falling within the category of persons with special needs, such as minors, persons fully or partly deprived of working ability, children separated from their parents or guardians, persons with disabilities, the elderly, pregnant women, single parents and their underage children, or persons who had been exposed to torture, rape or other grave forms of psychological, physical or sexual violence. Under the Act, when undertaking official actions with respect to these persons, the competent authorities are duty bound to act in accordance with regulations on the status of persons with special needs and with international agreements.

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 probation (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 not mention fear of persecution on grounds of colour as grounds for granting asylum.

4.17.2.2. Legal Framework. – The implementation of the long-awaited Asylum Act began in 2008. The Act was adopted in November 2007 and was to have been applied as of 1 April 2008 to allow the authorities to prepare well for the application of the law, notably to adopt the necessary subsidiary legislation and set up the institutions foreseen by the Act. The blockade of the political institutions, however, led to delays. Most by-laws were finally adopted, albeit some after the 1 April deadline. There were also problems in forming the Asylum Office and Asylum Commission. The Asylum Office was set up on time, but there were some problems in recruiting staff and the Office practically has only one member of staff. The members of the Asylum Commission were appointed with a small delay (in April), but the Commission initially existed only on paper. The Commission members met in August and passed their Rules of Procedure, which enabled them to begin work at last.

The Asylum Centre, where asylum seekers are accommodated, had been set up on time, but thanks to the UNHCR, which had initially been in charge of the Centre. The Centre, which was to have been formally handed over to the Serbian authorities when the Asylum Law came into effect, was transferred formally into the jurisdiction of the state at the end of 2008.

Although the adoption of the 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 de-

nied 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.

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.

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[453] and that the first-instance procedure shall last until a first-instance decision is reached.

453 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

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[454] 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).[455] 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

prescribed deadline, the party shall have the right to appeal as if its application had been rejected".

454 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).

455 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.

supported by the person granted asylum. The whole concept of "family member" ought, however, to be interpreted more broadly and definitely include close relatives 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.[456] 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

456 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 " (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)).

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 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 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,[457] which came into effect in April 2008 (Art. 57), replacing the Act on Travel Documents of Yugoslav Citizens.[458] 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.[459]

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 certifi-

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

458 *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.

459 Apart from the new Aliens Act (see I.4.17.1), the National Assembly also adopted the State Border Protection Act in October 2008, *Sl. glasnik RS*, 97/08.

cates[460] issued by Serbia's diplomatic or consular office in the country in which the national of Serbia has found himself (Art. 17).

Serbia's citizens travelling abroad no longer need to pay exit taxes[461] 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.[462]

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.[463] 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 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

460 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).

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

462 See Explanatory Note, Draft Act on Travel Documents, www.srbija.sr.gov.yu, accessed on 15 December 2007.

463 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).

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 Explanatory Note, unfortunately, fails to clarify the reasons for this provision or list the international documents the law is referring to.

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).

The Act amending the Act on Travel Documents[464], adopted in late December, extended from 31 December 2008 to 31 December 2009 the validity of the travel documents (ordinary, diplomatic and official passports) issued in accordance with the old regulations (Art. 53 of the Act on Travel Documents).[465]

The 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)).[466]

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.[467]

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464 *Sl. glasnik RS*, 116/08.

465 In his explanation of the amendment, the legislator stated that there were objective difficulties in fulfilling the technical requirements for the publication of the new forms of these travel documents since the beginning of the application of the new Act and that they had led to delays in the issuance of these passports on the new forms, thus rendering impossible the replacement of the old passports within the prescribed deadline. See the Act Amending the Act on Travel Documents, Explanatory Note, Part II, www.srbija.gov.rs, accessed 10 January 2009.

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

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

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 fulfil the conditions in force for entry to, presence 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.[468]

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. A draft Act Ratifying the European Social Charter adopted within the Council of Europe has been submitted to the National Assembly for adoption. In its 2006 report on Serbia's fulfilment of its CoE commitments, 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.[469]

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

468 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.

469 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.[470]

The Draft Act Ratifying the revised European Social Charter envisages the protection of social and economic rights, such as housing, movement of persons, work and labour-related relations, health and education, social protection, i.e. the enjoyment of all these rights in a lawful and non-discriminatory manner. The Act embraces nearly the whole text of the Charter, placing reservations on specific articles. The Draft comprises all nine "hard-core articles" of the Charter in their integrity and fulfils the minimum commitments envisaged by the Charter with respect to the total number of articles and paragraphs that must be ratified – under the Charter, a contracting party must ratify minimum 16 articles or 63 numbered paragraphs. The Act states that Serbia shall not ratify specific provisions: in Article 2 related to the right to just working conditions, Article 6 establishing the right to collective bargaining, Article 10 on the right to appropriate facilities for vocational training, Article 17 protecting the right of children and young people to appropriate social, legal and economic protection and Article 19 regulating the right of migrant workers and their families to protection and assistance.

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 train-

470 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.

ing 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[471] 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.[472]

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.[473]

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 enactments 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.[474]

Employment is regulated in detail by the Employment and Unemployment Insurance Act.[475] 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

471 See I.4.4.5.

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

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

474 See I.4.18.5.

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

other issues the Committee for Economic, Social and Cultural Rights qualified in its practice as relevant to Article 6 of the Covenant.[476]

4.18.3. Right to Just and Favourable Conditions of Work

Article 7 of the ICESCR:

> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
>
> (a) Remuneration which provides all workers, as a minimum, with:
>
> (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
>
> (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
>
> (b) Safe and healthy working conditions;
>
> (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
>
> (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

4.18.3.1. Fair Wages and Equal Remuneration for Work. – According to hitherto Committee practice, the obligation to provide fair wages above all implies establishment of a system for fixing minimum wages. Fairness in this context implies fixing wages in keeping with the real social value of each specific job. When it deliberated the ensuring of a 'decent living' of the workers and their families, the Committee established that this provision needed to be 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.[477] 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.[478]

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

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

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

The Committee has so far viewed the principle of equal remuneration for a job of equal value mostly from the viewpoint of prohibition of discrimination.

Serbia is a signatory of the ILO Minimum Wage Fixing Convention (No. 131) and the ILO Equal Remuneration Convention (No. 100). Serbia has not yet ratified ILO Minimum Wage-Fixing Machinery Convention (No. 26) and the ILO Minimum Wage Fixing Machinery (Agriculture) Convention (No. 99).

The Serbian Constitution guarantees the right of workers to fair remuneration for their work (Art. 60 (4)). It does not include a provision explicitly prescribing equal remuneration for work of equal value.

The Labour Act prescribes that an appropriate wage shall be fixed in keeping with the law, a general enactment or an employment contract and that an employee shall be guaranteed equal wage for the same work or work of the same value and says that the employment contract violating this principle shall be deemed invalid. The Act defines work of the same value as work requiring the same qualifications, working ability, responsibility and physical and intellectual work.

With a view to ensuring financial and social security of employees, the Labour Act envisages the right of employees to minimum wages (the so-called right to guaranteed wages under previous regulations). Conditions for fixing the minimum wage are to be defined by the General Collective Agreement. The minimum wage is fixed by a decision of the Social Economic Council of Serbia (Art. 112 Labour Act).[479]

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[480] and by the 2005 Labour Act.[481]

4.18.3.2. Promotion at Work. – Article 7 (c) on equal promotion opportunities is closely related to Article 2 of the ICESCR 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.[482] 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.[483] 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).

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

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

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

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

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

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. The prohibition of discrimination of workers is also laid down in the Labour Act (Arts. 18–21) but Serbian law needs to explicitly prohibit discrimination on grounds of gender.

4.18.3.3. Occupational Safety. – Serbia has ratified all chief ILO conventions on occupational safety and compensation for work-related accidents or professional diseases, health care and occupational health services.

Two ILO conventions on occupational safety¸ notably Convention 187 on a Promotional Framework for Occupational Safety and Health[484] and Convention 167 on Safety and Health in Construction[485], have been submitted to the Serbian parliament for adoption. Convention 187 binds all members to formulate a national policy to promote improvement of occupational safety and health (Art. 3), to establish, maintain, progressively develop and periodically review a national system for occupational safety and health in consultation with the most representative organisations of employers and workers (Art. 4), and to implement, monitor, evaluate and periodically review a national programme on occupational safety and health in consultation with the most representative organisations of employers and workers (Art. 5). ILO Convention 167 regulates in great detail various issues related to all activities in construction and binds members to enact legal regulations ensuring the application of the Convention provisions. The ratification and effective implementation of this Convention is very important given the many accidents experienced by construction workers in Serbia.[486]

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.[487]

The Act on Health and Safety at Work[488] strives to adjust the safety at work regulations to the new business conditions marked by an increasing number of small

484 The integral text of the Convention is available in Serbian at http://www.parlament.sr.gov.yu/content/lat/akta/akta_detalji.asp?Id=707&t=P#

485 The integral text of the Convention is available in Serbian at http://www.parlament.sr.gov.yu/content/lat/akta/akta_detalji.asp?Id=702&t=P#

486 See e.g. *Report 2007,* II 2.14.2.

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

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

and medium sized enterprises, which are unable to set up large services to manage safety at work.[489]

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.[490]

The Act on Companies[491] 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).

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).[492]

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

490 Chapter XI Health and Safety at Work Act.

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

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

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.[493]

4.18.4. Trade Union Freedoms

Article 8 of the ICESCR:

> 1. The States Parties to the present Covenant undertake to ensure:
>
> (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
>
> (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
>
> (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
>
> (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.
>
> 2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
>
> 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

4.18.4.1. Freedom to Form Trade Unions. – Freedom to form trade unions is the only trade union right guaranteed by all three general human rights protection instruments Serbia has ratified – ICCPR (Art. 22), ECHR (Art. 11) and ICESCR (Art. 8). The right to form trade unions is 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

493 *Ibid.*

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.[494] 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.[495]

Serbia is a signatory of the following ILO Conventions: Right of Association (Agriculture) (No. 11),[496] Freedom of Association and Protection of the Right to Organise (No. 87), Right to Organise and Collective Bargaining (No. 98),[497] and on Workers' Representatives (No. 135). Serbia never signed the ILO Rural Workers' Organisations Convention (No. 141), the Labour Relations (Public Service) Convention (No. 151) or the Collective Bargaining Convention (No. 154).

Article 55 of the Constitution guarantees the freedom to associate in trade unions. Under para. 2 of the Article, persons establishing trade unions need not obtain prior consent and trade unions shall be set up by entry in a register kept by the competent state authority in accordance with the law. Only the Constitutional Court may prohibit the work of an association, including a trade union, in instances explicitly enumerated in para. 4 of the Article. The realisation of the freedom of organisation in trade unions is regulated in greater detail by the Labour Act, laws regulating association of citizens and bylaws. Article 6 of the Labour Act defines a trade union as an autonomous, democratic and independent organisation of employees which they associate in of their own free will to represent, advocate, promote and protect their professional, labour, economic, social, cultural and *other individual and collective interests*. Article 206 guarantees the employees freedom of organisation in trade unions.

Under the Labour Act, trade unions do not need approval for registration in the register kept by the ministry charged with labour affairs. This provision is not in contravention of the practice of the Committee for Economic, Social and Cultural Rights or other human right protection bodies as long as the registration requirements and procedure do not significantly hinder the registration of trade unions. This particularly pertains to the minimal number of members a trade union needs in order to register, and state influence during the establishing of a trade union.[498] The practice of the ILO Committee on Freedom of Association (CFA) is of particular

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

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

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

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

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

relevance to this issue.[499] In Serbia, the trade union registration procedure is regulated by the Rules on Entry of Trade Union Organisations in the Register.[500]

Article 4 of the ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise explicitly prohibits the dissolution and suspension of work of a trade union by the administrative authorities. According to the CFA, this is the most extreme form of interference in the independent operations of trade unions by public authorities. Under Article 7 of the Rules on Entry of Trade Union Organisations in the Register, a trade union organisation shall be deleted from the register, *inter alia*, pursuant to a legally binding decision prohibiting the work of the trade union (Art. 7 (2) of the Rules). Under Article 67 of the Act on Social Organisations and Citizens' Associations, the decision to ban the work of a trade union is reached by *a municipal administration body* charged with internal affairs, which is in contravention of international obligations. A decision prohibiting the work of a trade union need not be reasoned and an appeal of the decision does not stay its enforcement. There is no court protection against the final decision in an administrative dispute, i.e. there is no effective legal remedy.

The freedom of association in trade unions of police and other civil servants is not explicitly addressed by the Constitution. Under Article 55 (5) of the Constitution, specific categories of civil servants (judges and prosecutors, police and army staff and the Ombudsman) are prohibited from membership in political organisations. As the Constitution does not include a provision prohibiting their association in trade unions, it should be interpreted so as to imply that these categories of employees are constitutionally guaranteed the right to association in trade unions.

4.18.4.2. Protection of Workers' Representatives. – The ILO in 1971 adopted Convention 135 on Workers' Representatives. The need for giving this category of employees special status arises from the sensitivity of their position.

The Labour Act in 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

499 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.

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

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.[501]

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.[502] However, the right to strike does not only imply halting work solely to address economic or social problems caused by unfavourable working conditions or similar issues that may be resolved by collective employer-employee negotiations. According to ILO practice, the right to strike also implies the right of employees to halt work demanding new solutions to be found to improve the economic or social policy in the state.[503] 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.[504]

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[505] the right to strike is limited by the obligation of the 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,

501 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).

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

503 *Ibid.*, para. 479.

504 *Ibid.*, para. 486.

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

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.[506]

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 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

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

guaranteed rights, it can be concluded that employees in state administration and members of the police in Serbia have the right to strike.

The Strike Act 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.

4.18.4.4. General Collective Agreement. – The main goal of collective bargaining between the representatives of the workers and the representatives of the employers is to find the best solutions regarding the rights, duties and responsibilities of both the workers and the employers. Workers may not be offered fewer rights or less favourable working conditions in individual labour contracts than those afforded by collective agreements. After a three-year vacuum, since the expiry of the previous collective agreement, the representatives of two representative trade unions (UGS Nezavisnost and the Alliance of Independent Trade Unions of Serbia) and of the Union of Employers signed a new General Collective Agreement in April 2008. The Agreement bound only employers who are members of the Union of Employers. The Labour and Social Policy Minister in November passed a Decision expanding its effectiveness to all workers and all employers in the territory of Serbia as of 1 January 2009. However, because of the bad shape of Serbia's economy and the world economic crisis, the employers and the workers' representatives agreed to put off the application of the Decision for 6 months.

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.[507]

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

507 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.

and obliges the state to establish various types of social insurance funds. Article 70 of the Constitution specifically guarantees the right to pension insurance.

Social security comprises pension, disability, health and unemployment insurance. The issues are regulated by a number of laws.

Social insurance against old age and disability is regulated by the Pension and Disability Insurance Act.[508]

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[509] 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.[510]

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[511] 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 moved up the age limit but reduced the required duration of service. Under Article 69, these provisions shall be gradually introduced in the 2008–2011 period; in 2008, an insured person became eligible for an old-age pension at the age of 63 and six months (men) i.e. 58 years and six months (women) and at least 19 years 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.[512]

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

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

510 See *Report 2006,* I.4.18.5.

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

512 See I.4.18.10.2.

A disabled person has the right to a disability pension and other rights on the basis of his remaining ability to work, the right to retraining or acquiring additional qualifications, the right to be assigned to an appropriate full-time job, and the right to financial benefits. In order to provide at least minimum means of living for those who have only a few years of employment and/or received very low wages when they worked, the Act on Pension and Disability Insurance (Arts. 25 and 26) prescribes the lowest old age and disability pensions.

In the event of death of a person covered by the compulsory insurance scheme, a recipient of an old age or disability pension or of a person who was employed for at 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).[513]

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 derived from the state public revenues. 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 es-

513 See *Report 2006*, I.4.18.5.

tablishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Serbia is the signatory of the Convention on the Rights of the Child, the Optional Protocol to the Convention on Sale of Children, Child Prostitution and Pornography, and the ILO Conventions on Maternity Protection (No. 3); Medical Examination of Young Persons (Sea) (No. 16), Underground Work (Women) (No. 45), Night Work (Women) (Revised) (No. 89), Night Work of Young Persons (Industry) (Revised), (No. 90), Maternity Protection (Revised) (No. 103), Minimum Age (No. 138), Workers with Family Responsibilities (No. 156) and Worst Forms of Child Labour (No. 182).

Article 66 of the Constitution guarantees special protection to the family and the child, mothers and single parents. In para. 2, it guarantees support and protection to mothers before and after childbirth and, in para. 3, it guarantees special protection to children without parental care and children with physical or mental disabilities. The Constitution prohibits employment of children under 15; minors over 15 are prohibited from performing jobs that may adversely affect their health or morals. Article 64 of the Constitution is devoted to the rights of the child.

The Labour Act does not afford special protection to employed women, except in case of pregnancy, whereby the international obligations under specific ILO Conventions are violated. Although formally groundless in legal terms, this is not inconsistent with the European trends to equate treatment of men and women at work.[514] 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

514 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.

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).

Maternity leave is a fundamental right of working women.[515]

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 affords 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.[516]

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.

515 See *Report 2006*, I.4.18.6.

516 *Ibid.*

4.18.7.1. Right to Housing. – According to the Committee for Economic, Social and Cultural Rights, the right to housing is of central importance for the enjoyment of all economic, social and cultural rights.[517] 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'.[518] This right should be viewed as an individual's right to "live somewhere in security, peace and dignity".[519] 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.[520]

The Housing Act[521] 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 shall take measures to create favourable conditions for housing construction and shall ensure 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 entail 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.[522] 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.[523]

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

518 *Ibid*., para. 7.

519 *Ibid.*

520 *Ibid.*, para. 8.

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

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

523 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

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.[524]

Draft Social Housing Act. – The Serbian Government has submitted to parliament a Draft Social Housing Act, which regulates state support to households which cannot afford housing at market rates due to social, economic or other reasons. The Act envisages the adoption of a National Social Housing Strategy, local housing strategies and other bylaws regulating the procedure for allocating apartments to socially vulnerable groups at affordable rents which will respect the principle of real cost coverage (i.e. will factor in construction, ongoing and investment maintenance, taxes et al). The tenants of such flats shall not be entitled to buy them. The new social housing system is to devote special attention to refugees.

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,[525] all the more as the realisation of this right is prerequisite for the realisation of the very right to live.[526]

The Act on the Safety of Foodstuffs and Objects in General Use[527] 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 by the Act on Supervision of the Safety of Foodstuffs and Objects in General Use[528] 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.

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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).

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

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

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

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

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

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;

(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.[529] The right to physical and mental health also comprises access to health care services without discrimination.[530]

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[531] and the Health Protection Act.[532]

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.[533] In late 2008, the Assembly passed the Act on Freezing and Writing Off

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

530 *Ibid*., para. 12.

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

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

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

Overdue Compulsory Health Insurance Contributions,[534] which allows for freezing the obligation to pay overdue compulsory health insurance contributions and for writing off debts arising from the non-payment of due compulsory health insurance contributions. These debts shall be frozen until 2012.

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.[535] Health protection in the above cases may be fully covered from 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.).[536]

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 has the fundamental right to access 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.[537] The Act allows the patient to himself decide who will

534 *Sl. glasnik RS*, 102/08.

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

536 See Article 50 of the Medical Insurance Act.

537 See I.4.18.11.

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 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[538] 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.[539] The amendments abolished special Councils – for Education, Professional Training, Harmonisation of Stands on Education – and set up a National Education Council. The composition of this new Council is disputable, especially the provision prescribing that one Council member shall be appointed from amongst the ranks of the Serbian Orthodox Church and another from amongst the ranks of all other "traditional religious communities and churches" (Art. 11 (3, items 7 and 8)). The provision under which only one member from amongst the ranks of all national minorities is appointed to the 42-member National Council also gives rise to concern. Mandatory education is again reduced to eight years and the teaching licences have been abolished. Provisions allowing pupils to master the curriculum and pass a grade more easily were also abolished (Art. 101 (2, 4, 8 and 9)). Concern also arises over the provisions that replaced the ethnically neutral provisions in the initial Act.[540]

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

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

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

In addition, the Act on Amendments to the Act on Elementary Schools[541] and the Act on Amendments to the Act on Secondary Schools[542] were passed in 2002.

Changes and amendments mainly refer to the status, organisation, plan and programme of religious education and 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[543]). The intention of the legislator was to create a partnership and harmonised opinions of those groups that have a natural interest in participating in education. One of the powers of the school board is to nominate school principals based on the prior opinion of the teachers' council. The current practice (after the amendments came into force) shows that the opinions of the teachers' councils have mostly been disregarded in the nomination of school principals.[544]

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).[545] These prohibitions are supported by appropriate pro-

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

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

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

544 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 a 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.

545 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)).

tection 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 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 a 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.[546] The Act, drafted for several years, introduces a large number of new and modern provisions. In its introductory provisions, it says that higher education is of special relevance to the Republic of Serbia and part of international, notably European education, science and arts (Art. 2). Higher education is based *inter alia* on the principles of academic freedoms, autonomy, respect of human rights and civil liberties, including prohibition of all forms of discrimination, participation of students in management and decision making, especially on issues of relevance to quality of instruction (Art. 4). The Act explicitly prescribes the equality of higher education institutions notwithstanding their ownership i.e. who their founders are (Art. 4, para. 1, item 9). In several provisions, the Act especially insists on prohibition of discrimination. The most explicit prohibition of discrimination is found in Article 8 (1), under which:

> All persons with secondary education, notwithstanding their race, colour of skin, gender, sexual orientation, ethnic, national or social origin, language, religion, political or other convictions, status acquired by birth, existence of a sensory or motoric disability or financial status shall 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.[547] 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

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

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

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.[548] The Conference of Universities of Serbia Assembly in late December 2007 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.[549]

The National Assembly passed the Act Amending the Higher Education Act and thus changed the criteria which the students have to fulfil to exercise their right to free higher education..[550]

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.[551] 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.

Serbia signed the UN Convention on the Rights of Persons with Disabilities in December 2007 as well as its Optional Protocol but did not ratify either by end 2008. 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 came into force on 3 May 2008 after it was ratified by 20 states. The Convention has to date been signed by 137 and ratified by 45 states. The Optional Protocol to the Convention, which lays down the procedure for submitting individual communications to the Committee on the Rights of Persons with Disabilities upon the exhaustion of national legal remedies and gives the Committee spe-

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

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

550 *Sl. glasnik RS*, 97/08.

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

cial powers with respect to the systematic violations of rights enshrined in the Convention, has been signed by 81 and ratified by 25 states.[552]

According to the National Organisation for the Protection of Persons with Disabilities, Serbia must amend or enact new laws, notably the Public Procurement, Serbian Sign Language and Health Protection Acts, in order to ratify the UN Convention. The election of a Deputy Protector of Citizens charged with gender equality and protection of persons with disabilities has strengthened the Ombudsman's role in protecting persons with disabilities. To ensure the most effective protection of persons with disabilities, the Act on Protector of Citizens needs to be amended to allow for the election of a Deputy Protector who will focus exclusively on the rights of persons with disabilities. The Act now prescribes that the Protector shall have four deputies specialising in five fields.

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 disabled are also regulated by the Serbian Employment and Unemployment Insurance Act,[553] the Social Welfare Act[554] and the Act on Professional Training and Employment of Disabled Persons.[555] 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.[556] The 2005 amendments[557] 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[558] prescribes that persons with disabilities shall be given priority in employment and professional orientation programmes, employment preparations and educational programmes. The state

552 See the list of countries that ratified the Convention at: http://www.un.org/disabilities/countries.asp?id=166.

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

554 *Sl. glasnik RS*, 36/91, 79/91, 33/93, 53/93, 67/93, 46/94, 48/94, 52/96 and 29/01.

555 *Sl. glasnik RS*, 25/96 and 101/05.

556 See *Report 2006*, I.4.18.10.1.

557 Amendments to the Act setting fines for commercial offences and misdemeanours (*Sl. glasnik RS*, 101/05), Article 83.

558 *Sl. glasnik RS*, 35/97, 39/97, 52/97, 22/98, 8/00, 29/00, 49/01 and 28/02.

budget subsidises 80% of the average net wage of an employee with a disability during the first 12 months of employment.

The Serbian Government has at long last submitted a Draft Act on the Professional Rehabilitation and Employment of Persons with Disabilities to the parliament for adoption.[559] The draft is the result of a Protocol on Cooperation signed by the National Organisation for the Protection of Persons with Disabilities and representatives of political parties ahead of the 2008 general elections. Under the draft law, conditions will be created for the equitable participation of persons with disabilities in the labour market. The Act defines the possibilities for determining working ability and professional rehabilitation and introduces a quota system, under which every company employing more than 20 people will have to hire one person with disabilities; companies with over 50 employees will have to hire two persons with disabilities and companies with more workers will have to employ one person with disabilities per every 50 employees (Art. 24).

To promote the status of persons with disabilities, Serbia must operationalise the 2007–2015 Strategy for Improving the Status of Persons with Disabilities and apply the two-year Action Plans to ensure its implementation in practice. It also needs to adopt and apply a set of priority laws: a general law on associations, a special law on organisations of persons with disabilities, the Act on the Professional Rehabilitation and Employment of Persons with Disabilities, a law on the social protection and social security of citizens, a law on social protection services and amendments to the laws on primary and secondary education.

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).[560] 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 (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.)

559 http://www.parlament.sr.gov.yu/content/cir/akta/akta_detalji.asp?Id=719&t=P#

560 See *Report 2006*, I.4.18.10.2.

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. – Twenty-one dailies were published in Serbia in 2008. Two of them went under in the meantime. Their total circulation was roughly estimated at 800,000. Of the existing 19 dailies, two focus on economy, two on sports and five on regional issues.

BCHR associates had for the 2008 Report perused the following dailies: *Blic*, *Večernje novosti*, *Danas*, *Kurir* and *Politika*, and the weeklies *Vreme* and *NIN*. Authors of the report also used the items on the *BETA* and *FONET* wires and *B92*'s website news.

A total of 11,979 articles were read in preparation of the 2008 Report, nearly twice as many as in 2007 (when 6,820 articles were perused). The increase in the number of articles cannot be attributed to a greater concern for human rights, but to Kosovo's declaration of independence and the events that ensued, the presidential, parliamentary, provincial and local elections and the lengthy negotiations on the parliamentary and government majority.

Kosovo-related articles accounted for the greatest number of the analysed articles in 2008 (22.96%). In percentages, more articles had been devoted to Kosovo in 2007 (28.65%), but there were actually 800 more newspaper reports on the issue in 2008.

Political rights were the second most frequent topic in the perused articles (20.56% in 2008 over 13.53% in 2007).

The ICTY was the third most frequent topic of the articles BCHR associates monitored for this Report. This topic has been warranting less and less attention since 2005, when it accounted for 29% of the perused news reports. Articles on the ICTY accounted for 14.08% of the texts (as opposed to 18.45% in 2007), which corroborates the relatively rapid decline of public interest in the topic.

There was a major increase in the number of articles on the right to a fair trial (7.16% in 2008 over 4.16% in 2007) due to stepped up efforts to combat organ-

ised crime. It must, however, be noted that the number of completed organised crime trials is small, verging on the symbolic.

The number of articles on social and economic rights also recorded an increase, albeit to a lesser degree (5.70% in 2008 over 4.29% in 2007).

Articles on the freedom of information also recorded a rise over 2007 (5.70% over 4.29%) due to the increase in the number of attacks on journalists and pressures on media. There was also a rise in the number of articles on discrimination (4.01% over 3.55% in 2007), but not because of a drastic increase in the consistently high number of discrimination cases. The BCHR had previously analysed discrimination within the chapter on minority rights, which recorded the greatest fall over 2007 (from 2.03% in 2007 to 0.25% in 2008). The decline corroborates the rule governing the local press – the more the rights of Serbs in Kosovo or elsewhere are jeopardised, the lesser the interest in the rights and problems of minorities in Serbia.

There was a slight increase in the number of articles on the right to life (from 5.29% in 2007 to 5.55% in 2008), but fewer articles on the prohibition of torture (from 2.97% in 2007 to 1.73% in 2008) and on the prohibition of slavery and smuggling of humans (from 1.56% in 2007 to 0.56% in 2008). The decrease is not the consequence of fewer violations of these human rights, but of the readership's weariness with them and its greater interest in the major political issues and problems such as Kosovo or the painstaking and long talks on the forming of the parliament and government. The share of articles on the right to freedom of conscience and religion has remained the same in 2008 (1.94%).

The overview of the newspaper reports leads to the conclusion that the state of human rights in Serbia deteriorated in 2008 over 2007.

Some political parties used the Kosovo-related events and specific ICTY decisions to resuscitate the patriot/traitor division to such an extent that even Serbian President Boris Tadić felt called upon to sharply condemn them in public.

The rhetoric and the authorities' relatively tolerant attitude towards human rights violations have led to the failure of the media to draw the public's attention to the deteriorating situation. Moreover, many of those who had violated human rights have not borne the consequences of their actions because of the traditionally inefficient police and judiciary. Like in 2007, the politically neutral domestic violence cases were the only exception. Tabloid journalism thrived on such incidents in 2008, frequently violating the rights of the most vulnerable parties – the victims.

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 Rights Centre, Transparency Serbia, 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.

2. Selected Topics

2.1. Functioning of Institutions

2.1.1. Elections

Presidential Elections. – Elections for the President of Serbia were held on 20 January. In the 3 February 2008 run off, Democratic Party (DS) President Boris Tadić beat Serbian Radical Party (SRS) Deputy President Tomislav Nikolić. Tadić won 50.31% (2,304,467 votes) and Nikolić won 47.97% (2,197,155 votes) (Republican Election Commission (REC) statement, 12 February).

Parliamentary and Provincial Elections. – It became obvious after the presidential elections that the crisis in the then ruling coalition and Kosovo's declaration of independence on 17 February would ultimately lead to early parliamentary elections. They were finally called in mid-March and held on 11 May 2008. According to REC's data, of the 6,749,688 voters registered in the election rolls, more than 4.14 million of them went to the polls on 11 May.

Of the 250 seats in the National Assembly, the DS-led coalition List for European Serbia (ZES) won 102, the SRS won 78, the Democratic Party of Serbia-New Serbia (DSS/NS) coalition list won 30 seats. The coalition of the Socialist Party of Serbia, Party of United Pensioners and United Serbia (SPS/PUPS/JS) won 20 and the Liberal Democratic Party (LDP) won 13 seats. The coalition of ethnic Hungarian parties won 4, the Ugljanin-led Bosniak List for European Sandžak won 2 and the Coalition of Preševo Valley Albanians one seat. The Assembly was constituted when the new deputies' mandates were confirmed on 11 June 2008.

The complicated talks on a political majority that would vote in a new government were launched as soon as the preliminary results were announced. The Government was finally formed on 7 July 2008. Prime Minister Designate Mirko Cvetković's Cabinet was voted in by the 127 deputies of the new ruling coalition comprising the following parties: DS, G17+ SPS, JS, PUPS, SPO, SDP, LSV, the Bosniak List for European Sandžak and the ethnic Hungarian League of Vojvodina Hungarians (SVM). With 24 ministers with portfolio, one minister without portfo-

lio, one Deputy PM and three Vice Prime Ministers, Cvetković's Cabinet is one of the bulkiest in Europe.

Provincial elections in Vojvodina were held simultaneously with the parliamentary elections, on 11 May. Of the 120 seats in the Provincial Assembly, the DS-led List for European Vojvodina won 64, the SRS won 25 and the ethnic Hungarian coalition won 9 seats. The Together for Vojvodina and DSS-NS coalitions won six seats each. The SPS/PUPS coalition won 5 mandates, LDP won 1, while 4 seats went to independent candidates.

2.1.2. Functioning of Political Institutions

Harmonisation with the EU Acquis. –Serbia's EU accession was the central theme of the 11 May election campaign. The parties urging integration won the majority at the elections and formed the Government. This is why it is important to review Serbia's progress in harmonising its legislation with the EU *acquis* and analyse the speed at which Serbian institutions have been fulfilling their obligations both under national legislation and with respect to ratified international instruments.

Back in 2007, the then Serbian Government endorsed a plan to adopt 51 laws to harmonise the national legislation with the EU *acquis*. However, only two (the Act on Travel Documents and the Asylum Act) were adopted by the time the new parliament was constituted in June 2008.

As soon as the new Government was voted in, the Vice PM charged with EU integration and the Assembly Speaker stated that the Assembly faced an intensive period during which it would adopt the remaining 49 laws listed in the harmonisation plan. By the end of 2008, the Assembly adopted only 14 of the laws (seven so-called judiciary laws, the Public Procurement Act, the State Border Protection Act, the Aliens Act, the Act on the Anti-Corruption Agency, the Personal Data Protection Act, the Criminal Liability of Legal Persons Act). All the laws submitted to the Assembly by the Government or its majority in parliament have been passed. The Assembly is, however, yet to enact more than 30 laws, many of which had not even been submitted to parliament by the end of the reporting period.

Serbia is yet to draft and enact the remaining laws and other legislation needed to fulfil the requirements set out in the so-called EU visa liberalisation roadmap and thus enable its nationals visa-free travel to the member-states applying the Schengen regime. These include at least the following three laws: a Prevention of Money Laundering and Funding of Terrorism Act, an Anti-Discrimination Act and an Act on International Legal Aid in Criminal Matters.

In its report on Serbia's progress in 2008, the European Commission seriously criticised Serbia for its lack of progress in tackling money laundering. In September, the Government submitted to parliament and then withdrew the draft Prevention of Money Laundering and Funding of Terrorism Act. The course of the

session at which the draft was withdrawn illustrates well the lack of commitment to EU integration and the oversights impeding the already slow process of EU accession. The session agenda initially included 27 items, but the Government used its parliamentary majority to strike 13 items off the agenda; quite a few of the withdrawn draft laws were not resubmitted for adoption by the end of the reporting period.

The Act on International Legal Aid in Criminal Matters has not been drafted yet nor submitted to parliament.

Serbian Radical Party Split. – The Serbian Radical Party (SRS) split in two in early September 2008. The political conflict culminated after SRS Deputy President Tomislav Nikolić publicly disagreed with some members of the party leadership that has remained loyal to the political methodology of Vojislav Šešelj, still the official SRS President. The rift ended with the ouster of Nikolić and his allies from the SRS. The two factions publicly clashed over SRS' opposition to the ratification of the Stabilisation and Association Agreement. By the end of the year, 21 SRS deputies crossed over to Nikolić's new Forward Serbia caucus. Nikolić in the meantime formed his own Serbian Progressive Party.

The SRS split again brought to the fore the problematic and unclear constitutional and legislative provisions on ownership of deputy mandates and their legal fate following rifts in parties that won them at elections. In its previous reports, the BCHR commented the provision in Article 102 of the Constitution of Serbia allowing a deputy to irrevocably place his/her term of office at the disposal of the political party, at the proposal of which s/he has been elected deputy[561]. With the exception of the LDP, this "freedom" has in practice become an obligation the deputies must fulfil if their party is to allocate them a seat in the Assembly in the first place.

The activation of a signed statement (blank resignation) has so far usually been accepted as grounds for the Assembly Administrative Committee to conclude that a deputy's mandate has been terminated, but there have been exceptions to this practice. A new problem cropped up when Nikolić, with whom the SRS blank resignations had been deposited, was ousted from the SRS and established his own caucus. Given that Nikolić refused to return the blank resignations to the SRS, the Administrative Committee was unable to review any motions for terminating his allies' mandates.

2.1.3. General State of the Judiciary

Numerous problems continued plaguing the judiciary throughout 2008. The work of courts was burdened by delays in harmonising the laws with the 2006 Constitution, huge backlogs and allegations of serious corruption.

561 *Report 2007*, I.4.14.5.3.

Most of the year passed in calling, holding and interpreting election results, leaving very little time, space and will to effect practical changes in the judicial system. The Supreme Court of Serbia in mid-March warned that the National Assembly had not reviewed any of the 106 official motions for relieving from duty judges and prosecutors. During its autumn session, the parliament dealt with merely part of this huge backlog that had accumulated over the past three years. The Supreme Court also warned that 200 judicial posts remained vacant. (*BETA,* 15 March)

Notwithstanding numerous media reports on the work of the judiciary, neither legal experts nor the general public have obviously seriously analysed the essential problems plaguing this branch of authority. Assessments of the work of courts mostly boiled down to reiterating the correct albeit oft reiterated criticisms of their dilatoriness, inefficiency and the low public trust they command.

Public trust in the judiciary was very low at the beginning of the year and it was widely perceived as extremely corrupt. A Transparency Serbia survey conducted in late 2007 showed that Serbia's citizens thought the judiciary and health system were the most corrupt, preceded only by political parties. The judiciary scored 3.8 on a scale of 1 to 5 (5 standing for extremely corrupt) (*B92,* 7 December 2007). The Protector of Citizens has also on a number of occasions reiterated that most of the complaints his Office received from citizens regarded the work of the judiciary.

In its Serbia 2008 Progress Report, the European Commission noted the major problems the Serbian judiciary was facing, which significantly hamper the fulfilment of commitments undertaken in the EU accession process. The EC underlined that laws establishing clear and objective criteria for the re-election of judges have not yet been adopted and that the provisions in the Act on the Implementation of the Constitution lacked clarity and transparency. The Progress Report also notes that "Overall, there has been progress on adopting legislation to implement the new constitutional framework. However, further reforms are needed to ensure that the constitutional provisions, notably on the judiciary, are implemented in line with European standards. This is one of the key priorities of the European Partnership."

The EC explicitly qualifies as a "serious cause for concern" the significant backlog in civil, criminal and commercial cases and the delays in enforcing judicial decisions. "In the absence of efficient court management systems and of legislation streamlining procedures, the Serbian judiciary has been unable to reduce the number of pending cases or average length of proceedings."

According to data published in September 2008, the overall low efficiency of the courts is maintained by the uneven workload of courts and judges, one of the greatest problems in the organisation of the judiciary. The President of the Belgrade District Court noted that in some courts, one judge adjudicated as many as 78 cases every month while a judge in another court adjudicated an average of 2.5 cases per month. (*BETA,* 4 September)

2.1.4. ECtHR Judgments

Around 1,800 applications against Serbia have been filed with the European Court of Human Rights (ECtHR) to date.[562] In 2008, the ECtHR rendered 9 judgments on applications against Serbia. Most concerned the right to a trial within a reasonable time and the state's failure to ensure to enforcement of final decisions. Apart from finding violations of Article 6, the ECtHR established in its judgments against Serbia in 2008, that Serbia had violated the right to peaceful enjoyment of property (in three cases), the rights to liberty and security and to an effective legal remedy.

Vrenčev v. Serbia.[563] – The applicant claimed violations of a number of rights the ECHR guarantees persons deprived of liberty. The problem arose due to confusion about the applicant's real address, which is why he did not receive summons to hearings. As soon as the applicant found out that proceedings had been instituted against him, he reported to the police which arrested him.

The applicant invoked a violation of Art. 5 (1) of the ECHR claiming he was placed under custody unlawfully, but the ECtHR found that his detention was not unlawful because the District Court could not be perceived as having wrongly concluded that the applicant was avoiding to appear in court given that the local authorities were unable to find him

The applicant also claimed a violation of Art. 5 (3) of the ECHR because 20 days had passed before he was brought before a judge, who ordered his release. The ECtHR concluded the applicant's right under Art. 5 (3) to be promptly brought before a judge had been violated. The ECtHR also found another violation of this provision – that the detention was a measure disproportionate to the gravity of the crime the applicant was accused of.

The applicant also claimed violation of Art. 5 (4) because he was not heard in the proceedings before the Supreme Court and because these proceedings were not rapid enough within the meaning of the Article because over 4 days had passed from the day he appealed until the day the Supreme Court rendered its decision and another two days by the time his legal counsel was served the decision, which is in contravention of the 48-hour deadline set forth in Article 143 of the CPC. The ECtHR found a breach of Art. 5 (4).

The applicant also claimed he did not have an "enforceable right to compensation" provided for by Art. 5 (5) of the Convention. The ECtHR agreed and found Serbia in breach of that right as well.

562 EC Progress Report 2008 ec.europa.eu/enlargement/pdf/press_corner/key-documents/reports_nov_2008/serbia_progress_report_en.pdf.

563 App. No. 2361/05.

Kačapor et al v. Serbia. – This case originated from six separate applications.[564] All applicants had worked for the same company and complained that they had not been paid the compensation or the accompanying contributions they had been entitled to during forced leave. The applicants won all the proceedings before national courts but the decisions were not enforced i.e. they were not paid the arrears. Due to the state's failure to ensure the enforcement of judgments, the ECtHR found a violation of the right to a fair trial in Art. 6 (1) of the Convention, established that the non-enforcement of the court decisions in these cases constituted interference in the right to peaceful enjoyment of possessions enshrined in Art. 1 of Protocol 1 to the ECHR and found a breach of that Article as well.

Vlahović v. Serbia.[565] – The applicant also complained of the state's failure to ensure the enforcement of a court decision in his favour. This case, too, concerned the payment of arrears to the applicant by a socially-owned firm that was later privatised. The ECtHR found a violation of Art. 6 (1) and Article 1 of Protocol 1 like in the *Kačapor et al v. Serbia* case, which it invoked in its judgment.

Kostić v. Serbia.[566] – The applicant claimed violation of the right to peaceful enjoyment of property arising from the applicant's dispute with a person going by the initials of M. P., with whom he co-owned a house and five other facilities in Belgrade. The dispute broke out because MP was carrying out construction work on the co-owned house that had not been approved by the construction licence and led to damage of the applicant's property over time. The applicants had for years sought the enforcement of the demolition order, wherefore the ECtHR found a violation of Article 1 of Protocol 1.

The ECtHR recalled that the state was obliged to apply all available legal means to ensure the enforcement of final administrative decisions and invoked its judgment in the *Ilić v. Serbia* case.[567]

Cvetković v. Serbia.[568] – The applicant in essence complained about the duration and fairness of the proceedings he instituted after he was declared redundant by his former employer. The ECtHR found that the proceedings in this case did not satisfy the standard of "reasonable time" and that the state had violated Art. 6 (1) of the Convention. The proceedings took 17 years altogether, 13 years before the ECHR was ratified (as of which moment the ECtHR could accept applications against Serbia) plus another 4 years. The ECtHR also stressed that the incessant retrials of one and the same case may be indication of serious flaws in the state's judicial system.

564 App. Nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 i 3046/06.

565 App. No. 42619/04.

566 App. No. 41760/04.

567 App. No. 30132/04, paras 74. and 75.

568 App. No. 17271/04.

The ECtHR also found a breach of the right to an effective legal remedy enshrined in Article 13 of the ECHR, because the applicant did not have at his disposal a legal remedy that would enable him to expedite the proceedings or obtain compensation for the past delay.

Stanković v. Serbia.[569] – This is another case in which the ECtHR found a violation of Art. 6 (1) because the applicant was not ensured a trial within a reasonable time given that it took the national courts six years to complete proceedings on this relatively simple dispute.

Čeh v. Serbia.[570] – The ECtHR established that the state had violated the right to a trial within a reasonable time guaranteed by Art. 6 (1) of the ECHR in this case, which originated from a dispute over tenancy rights.

Bulović v. Serbia.[571] – The ECtHR established that the applicant's "right to a hearing" in Art. 6 (1) of the ECHR had been essentially violated by the state's failure to effectively conduct enforcement proceedings.

Damnjanović v. Serbia.[572] – The applicant complained that she was not able to exercise her parental rights because the decision giving her custody over her children had not been enforced. The ECtHR concluded that the state had undertaken the necessary steps to enforce the decision but that the children were not placed in the custody of the applicant because they themselves opposed it. The ECtHR found no violation of Arts. 6 (1) and 8 of the ECHR in this case.

2.1.5. Rehabilitation

A number of trials under the 2006 Rehabilitation Act[573] were held in 2008 to reverse verdicts against individuals deprived of their lives, political and civil rights because of their political convictions.

The Belgrade District Court passed a decision upholding the motion to rehabilitate Grigorije Božović, a pre-WWII writer and *Politika* reporter. Božović had been sentenced to death and was stripped of his civic honours and his property in 1944 in secret proceedings before the Belgrade City Command Military Court and immediately executed, on 1/2 January 1945. (*Politika*, 19 May, p. 7)

The Šabac District Court upheld the motion to rehabilitate eminent lawyer and writer Slobodan Isaković. The Court established that the members of the Yugoslav Army killed Isaković in Zvornik, without even trying or convicting him first. (*Večernje novosti,* 6 July, p. 18)

569 App. No. 29907/05.
570 App. No. 9906/04.
571 App. No. 14145/04.
572 App. No. 5222/07.
573 *Sl. glasnik RS*, 33/06.

A motion to rehabilitate Prince Pavle Karadjordjević was filed with the Belgrade District Court. The Yugoslav communist authorities had deprived Prince Pavle of all his rights and confiscated his property and a state commission proclaimed him a war criminal. (*Blic*, 12 July, p. 4)

2.2. Transitional Justice – Confronting the Past

The arrests of Radovan Karadžić and Stojan Župljanin, indicted for war crimes in Bosnia by the ICTY, were the events that marked Serbia's confrontation with the past in 2008. The ICTY's acquittal of indictees Ramush Haradinaj and Naser Orić also drew a lot of attention in Serbia. Another important event was the decision of the International Court of Justice, which declared it had jurisdiction to deliberate the Croatian genocide lawsuit against Serbia. Serbia, in turn, said it would file a countersuit against Croatia. There was moderate headway in war crime trials before Serbian courts, mostly thanks to the good cooperation between the Serbian War Crimes Prosecution Office and the Croatian judiciary.[574] Little was, however, done to promote the institutional mechanisms needed to establish the truth about the past. The Act on the Responsibility for Violations of Human Rights remained a dead letter, while the initiatives for confronting the past were neither institutionalised nor provoked interest amongst state institutions. As per reparations, they boiled down to damage claim proceedings initiated by the Humanitarian Law Centre, but the small sums awarded by the courts can be perceived as providing the victims with additional humiliation rather than satisfaction.[575]

2.2.1. International Court of Justice Judgment[576]

The International Court of Justice (ICJ), the principal judicial organ of the United Nations, declared on 18 November 2008 that it had the jurisdiction to deliberate Croatia's genocide lawsuit against Serbia.

In July 1999, Croatia sued the then Federal Republic of Yugoslavia for violating the Convention on the Prevention and Punishment of the Crime of Genocide. In its lawsuit, Croatia stated that the Belgrade authorities were liable for the "ethnic cleansing" of Croatian citizens as a "form of genocide" "(b)y directly controlling the activity of its armed forces, intelligence agents, and various paramilitary detachments, on the territory of the Republic of Croatia, in the Knin region, eastern and western Slavonia, and Dalmatia" which resulted in "large numbers of Croatian citizens being displaced, killed, tortured, or illegally detained, as well as extensive

574 More in II.2.2.5.

575 More on these proceedings at www.hlc-rdc.org.

576 The ICJ decision is available at www.icj-cij.org, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Preliminary Objections, 18/11/2008.

property destruction". Croatia asked the ICJ to find Serbia guilty of violating the Convention, order it to bring to justice all the perpetrators of the crimes, to return to Croatia seized items of cultural property and pay reparation in a sum to be determined by the ICJ.

Although, as the ICJ stated, the status of the FRY in the UN was "uncertain and controversial" in the 1992–2000 period, the ICJ concluded that the Belgrade authorities had accepted the jurisdiction of the ICJ in the nineties by responding to the Bosnia and Croatia genocide lawsuits and by filing a lawsuit against NATO member-states. By its declaration to the UNGA in April 1992, the FRY announced it would assume all SFRY's international obligations arising from membership in international organisations and conventions, including the Convention on the Prevention and Punishment of the Crime of Genocide, whereby, in the view of the ICJ, the jurisdiction of the ICJ for proceedings launched from 1992 to 2000 was clearly established.

With respect to the objections Serbia filed, the ICJ stated that Serbia's objection that acts committed before the FRY was established on 27 April 1992 cannot be ascribed to Serbia" does not possess, in the circumstances of the case, an exclusively preliminary character" and would be addressed in the merits stage, as would its objection that Croatia's demand that Serbia bring all persons suspected of war crimes to trial was beyond the jurisdiction of the ICJ and inadmissible.

As soon as the ICJ pronounced its judgment, Serbian MFA Vuk Jeremić said that Serbia would file a countersuit by which it would try to prove that Croatia committed the crime of genocide by ethnically cleansing Croatian Serbs in 1995.[577]

2.2.2. International Criminal Tribunal for the Former Yugoslavia

2.2.2.1. Introduction

The International Criminal Tribunal for the Former Yugoslavia (ICTY)[578] 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

577 MFA Jeremic's statement on *RTS* prime time evening news, 18 November 2008.

578 For basic data on the ICTY and chronology, see I. Bandović (ed.), *The Activity of ICTY and National War Crimes Judiciary*, Belgrade Centre for Human Rights, 2005.

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.[579]

Pursuant to UNSCR 1503, the ICTY is to complete its work by 2010 and the Prosecutor was to complete all investigations and issue any new indictments by the end of 2004. The ICTY's completion strategy includes several elements. First, the ICTY will try only the most senior perpetrators, who are suspected of being the most responsible for crimes committed in the former Yugoslavia and whom the states are the least capable of bringing to justice due to internal political problems. ICTY Rules of Procedure and Evidence were amended for that purpose. Rule 28 specifies that an indictment that does not meet the standard of seniority shall not be assigned to an ICTY Trial Chamber. Second, the ICTY may refer a certain number of cases to local courts in keeping with Rule 11*bis*; cases may be referred to a court in a state on whose territory the crime was committed, a state in which the indictee was arrested or another state willing and adequately prepared to accept such a case on condition that the indictee is guaranteed a fair trial and cannot be sentenced to death. The Tribunal and the Office of the Prosecutor are actively helping in building the capacities of national courts to conduct war crime trials.

In their reports on the work of the ICTY, submitted to the UNSC in December, ICTY President Patrick Robinson[580] and ICTY Chief Prosecutor Serge Brammertz[581] highlighted three critical points in the operation of the Tribunal. The first and greatest problem arises from the fact that two indictees (Ratko Mladić and Goran Hadžić) are still out of the Tribunal's reach. The second relates to access to archives and submission of documents and the third to access to witnesses and problems in their protection.

Bearing in mind that the two indictees are still at large and that five trials have not opened yet (the cases of *V. Đorđević – IT-05-87/1, R. Karadžić – IT-95-5/18-I, J. Stanišić and Franko Simatović – IT–03-69, Z. Tolimir – IT-05-88/2, S. Župljanin and M. Stanišić – IT-08-91-PT)* and the objective reasons that led to delays in trials under way, it is quite unlikely that the ICTY will complete its work by end 2010. In his address to the UNSC on 12 December, Robinson said that while all efforts were being made to complete all trials as quickly and efficiently as possible, it now appeared overly optimistic to claim that all appeals could be concluded during 2011 and it was likely that a small number would spill over to 2012. He said that this estimate was clearly also subject to a number of factors that could impinge on the expeditious

579 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.

580 Patrick Robinson replaced Fausto Pocar at the post of ICTY President on 17 November.

581 Transcripts of both addresses to the UN Security Council are available at www.icty.org.

completion of trials and appeals such as illness of the accused, as well as failure of witnesses to appear and other similar unforeseen circumstances.

The ICTY has to date indicted 161 persons for gross violations of international humanitarian law. Fifty-seven were found guilty, cases against 13 were ceded to national courts and trials of 45 accused are under way (forty of whom are in ICTY detention); three accused are on provisional release and 2 are at large.

Five persons were being prosecuted by the ICTY for contempt of court at the time this report went into print. The most interesting is the case of former prosecution spokesperson Florence Hartmann, for disclosing information relating to confidential decisions of the Tribunal's Appeals Chamber in the case of Slobodan Milošević.

2.2.2.2. ICTY Judgments Delivered in 2008[582]

Haradinaj et al (IT-04-84). – The ICTY Trial Chamber on 3 April acquitted former Kosovo Liberation Army (KLA) commander Ramush Haradinaj, who had been indicted for crimes against humanity and violations of the laws and customs of war in the March-September 1998 period. Haradinaj, who commanded the KLA in the Dukaqjin operational zone comprising Peć (Peja), Dečani (Decan), Đakovica (Gjakove) and parts of the Istok and Klina municipalities, former commander of the special unit known as Black Eagles subordinated to Haradinaj Idriz Balaj, and former member of the KLA General Headquarters in Jablanica, the Djakovica Municipality, Lahi Brahimaj, had been indicted for participating in a "joint criminal enterprise" whose aim was to consolidate the KLA's total control over Dukagjin area in north-western Kosovo by the unlawful removal, mistreatment and murder of Serbian, Roma, Albanian and other civilians who were perceived to have been collaborating with Serbian forces or did not support the KLA.

Haradinaj and Balaj were acquitted on all 37 counts, while Brahimaj was found guilty on two counts of cruel treatment and torture he personally committed and sentenced to six years' imprisonment. The Trial Chamber found that, based on evidence presented, it was not satisfied beyond reasonable doubt that there was a joint criminal enterprise with the objective of targeting the civilians and that therefore the three accused could not have participated in it and dismissed these charges against Haradinaj, Balaj and Brahimaj. The Chamber stated that the Prosecution proved that the KLA members committed crimes (murders, cruel treatment, torture and rape), but that, apart from the two counts (of which the Chamber found Brahimaj guilty), it had failed to prove the involvement and responsibility of the indictees beyond reasonable doubt.

As he read out the judgment, Chamber Judge Alphons Orie highlighted the "significant difficulties" encountered by the Chamber in securing testimony of a large number of witnesses. "The Chamber gained a strong impression that the trial

582 ICTY judgments are accessible at http://www.un.org/icty/bhs/frames/cases.htm.

was being held in an atmosphere where witnesses felt unsafe". Judge Orie also qualified the security situation in Kosovo as "unstable" and "particularly unfavourable to witnesses". The judgment[583] stated that the "(T)he difficulty in obtaining evidence was a prominent feature of this trial and a few witnesses who were expected to give evidence on central aspects of the case were never heard." The prosecution also highlighted the problems with witnesses in its appeal and asked for a retrial.

The judgment provoked a lot of dissatisfaction in the Serbian public and prompted immediate reactions from the then Prime Minister Vojislav Koštunica (*Politika*, 4 April, p. A5) and leaders of all parliamentary parties, some of whom demanded Serbia cease all cooperation with the ICTY.[584] Before the judgment was pronounced, Serbian President Boris Tadić said the acquittal of the indictees would constitute "major injustice and undermine the credibility of the International Tribunal" (*Politika*, 4 April, p. A5). Serbian War Crimes Prosecutor Vladimir Vukčević stated that the ICTY was "ripe for retirement" and said he would offer the ICTY Prosecution Office the help of his office in the appeals procedure. He assessed that the witness protection programme "experienced a debacle in Kosovo" and criticised the ICTY for provisionally releasing Haradinaj. (*Danas*, 4 April, p. 1)

Naser Orić (IT-03-68). – The ICTY Appeals Chamber acquitted former commander of the Moslem forces in Srebrenica of charges related to the crimes against Serbs in Srebrenica and its vicinity in the1992–1995 period. In the first-instance judgment, pronounced in the summer of 2006, the Trial Chamber found him guilty of violating the laws and customs of war and sentenced him to two years in jail for failing to prevent crimes (killings and cruel punishment) committed by his subordinates which he had known about or had reason to have known about. He had also been charged with wanton destruction of settlements round Srebrenica not justified by military necessity.

The Appeals Chamber acquitted him because, although the Trial Chamber established beyond reasonable doubt that that the crimes against Serbs had been committed, it had failed to establish who had actually committed the crimes, whether the perpetrators were subordinated to Orić and whether he had known of the crimes. The Appeals Chamber concluded that there was not enough evidence to establish beyond reasonable doubt Orić's responsibility for the crimes he was accused of.

The judgment provoked sharp reactions in Serbia and Republika Srpska. Serbia's War Crimes Prosecution Office said it would launch an investigation against

583 Para 28 of the judgment.

584 Tomislav Nikolić, SRS Deputy President at the time, said not one more Serb should be handed over to The Hague (*Politika*, 4 April, p. A5), while SPS President Ivica Dačić said the acquittal "merely corroborates the essence of the Hague Tribunal, which is not a court but a place pre-designated to try the Serbian people. The Government should immediately break off all cooperation with the ICTY instead of chasing after ICTY indictees all over Serbia". (*Kurir*, 4 April, p. 2)

the perpetrators of the crimes if the Bosnia-Herzegovina prosecutors failed to do so, although it is highly unlikely that a trial can be held in Serbia given that the Serbian judiciary authorities do not have access to the indictees.[585]

Pavle Strugar (IT-01-42). – The ICTY Appeals Chamber on 17 July convicted retired JNA general Pavle Strugar to seven and a half years in jail for shelling Dubrovnik in 1991. During its attack, JNA fired several hundred missiles at the Old Town, leaving two civilians dead and three wounded. Six historical and architectural monuments under UNESCO protection were demolished or burnt down and 46 other buildings and facilities were damaged in that attack.

The Appeals Chamber dismissed all the grounds in the appeal of the Defence and upheld two grounds in the appeal of the Prosecutor, finding Strugar guilty on two more counts. It, however, modified the first-instance conviction of eight years' imprisonment pronounced on 31 January 2005.

Apart from Strugar, two of his subordinate officers were also indicted for the shelling of Dubrovnik. Officer Miodrag Jokić (case *01–42/1)* admitted the crime in 2003 and was sentenced to 7 years' imprisonment. The trial of Vladimir Kovačević was adjourned and his case was ceded to the Belgrade District Court, which on 5 December 2007 dismissed the indictment because of the indictee's illness and inability to stand trial.

Rasim Delić (IT-04-83). – The ICTY Trial Chamber on 15 September convicted former commander of the Bosnia-Herzegovina Army Rasim Delić to three years in jail for crimes in Central Bosnia in 1995. Delić was found guilty of violating the laws and customs of war and for failing to take measures in August 1995 to prevent crimes (cruel treatment) his subordinates in the El Mujahedin unit committed in the village Livade and the Kamenica camp near Zavidovići in Central Bosnia. Delić was acquitted on counts of multiple murder of Serb and Croat prisoners at a number of locations in Bosnia-Herzegovina and command responsibility.

Milan Martić (IT-95-11). – The ICTY Appeals Chamber on 8 October upheld the Trial Chamber judgment of 12 June 2007 sentencing former Croatian Serb leader Milan Martić to 35 years in jail. It upheld some of the grounds in the Martić appeal and found him innocent with respect to two incidents (in Benkovac and the village of Vukovići), but agreed with the Trial Chamber on all the other counts and found him guilty of crimes against humanity and violations of laws and customs of war against Croats and other non-Serbs in the 1991–1995 period. Martić was convicted for crimes involving the persecution, murder, torture, deportation, attacks on civilians, wanton destruction of civilian areas and other crimes against humanity and violations of the laws and customs of war. In the 1991–1995 period, Martić held the posts of Minister of Internal Affairs, Minister of Defence and President of the self-styled Serbian Autonomous Region of Krajina, later renamed to Republic of

585 Statement by War Crimes Prosecution Office spokesman Bruno Vekarić, (*Danas*, 4 July, p. 1).

Serb Krajina. The judgment states that Martić participated in a "joint criminal enterprise" together with, *inter alia* Blagoje Adžić, Milan Babić, Radmilo Bogdanović, Veljko Kadijević, Radovan Karadžić, Slobodan Milošević, Ratko Mladić, Vojislav Šešelj, Franko „Frenki" Simatović, Jovica Stanišić, Dragan Vasiljković, the common purpose of which was to establish "an ethnically Serb territory through the displacement of the Croat and other non-Serb population". Martić was indicted back on 25 July 1995 and turned himself in on 15 May 2002.

2.2.3. Serbia's Cooperation with the ICTY

The arrests and extradition of indictees Stojan Župljanin and Radovan Karadžić marked Serbia's headway in cooperation with the ICTY in 2008. Serbia is still obliged to arrest the remaining two fugitives, Ratko Mladić and Goran Hadžić.

Stojan Župljanin, the former head of the Security Services Centre in Banja Luka, senior police official in the Bosnian Krajina and member of the Autonomous Region of Krajina Crisis Headquarters was arrested in Pančevo on 11 June. He is indicted for partaking in a "joint criminal enterprise" aiming to establish full control over and for ethnic cleansing in the territories of Banja Luka, Bosanska Krupa, Bosanski Novi, Bosanski Petrovac, Celinac, Donji Vakuf, Ključ, Kotor Varoš, Prijedor, Prnjavor, Sanski Most, Šipovo and Teslić. He is charged with crimes against humanity and violating the laws and customs of war (persecution, extermination, killings, torture, cruel treatment and inhumane acts, deportations and wanton destruction and devastation of cities and villages). Serbian War Crimes Prosecutor Vladimir Vukčević was in charge of the operation that led to Župljanin's arrest.

Radovan Karadžić was arrested in Belgrade on 21 July. He was indicted by the ICTY in 1995, only two weeks after the crimes in Srebrenica. The Serbian Radical Party (SRS) staged street protests in Belgrade after his arrest. The clash between the protesters and the police left many injured on both sides and one person dead.

The ICTY Prosecution filed the first indictment against Karadžić and Mladić on 25 July 1995. They were charged with 16 counts, including one for genocide and three for crimes against humanity throughout Bosnia-Herzegovina. The second indictment, dealing with the crimes in Srebrenica, was filed on 16 November 1995. It had 20 counts, one for genocide and nine for crimes against humanity.

Consolidating the two initial indictments into one single document, an amended indictment against solely Radovan Karadžić, confirmed on 31 May 2000, was unsealed on 14 October 2002. Karadžić was charged on 11 counts, including genocide and complicity in genocide, crimes against humanity, violation of laws and customs of war (extermination, willful killing, persecutions on political, racial and religious grounds, deportation, unlawfully inflicting terror upon civilians, taking of hostages).

In June, the then ICTY President Fausto Pocar reported Serbia to the UNSC for its failure to cooperate in the proceedings against former Serbian President Milan Milutinović and other five indictees charged with crimes in Kosovo. The ICTY stated that the Serbian authorities had not enabled the serving of summons to retired Yugoslav Army general Aleksandar Dimitrijević to testify in court[586]. A month later, Dimitrijević testified via a video link, because he was unable to travel to The Hague for health reasons.

ICTY Chief Prosecutor Serge Brammertz on 12 December gave his assessment of Serbia's cooperation with the ICTY in his regular report to the UNSC.[587]

In his report on the work of the Tribunal, he said with respect to Serbia that "the change in the general political environment resulted in the authorities' more decisive cooperation at the political, judiciary and operational levels". He qualified the arrests of Karadžić and Župljanin as "important milestones" and as "the result of improved effective leadership and coordination between political and judicial authorities, and security services". He also said that the assistance provided by Serbia in terms of access to archives and the provision of documents has generally improved but that the Serbian authorities needed to provide information on the still inaccessible documents, especially access to certain key military documents for the ICTY case in the trial against Momčilo Perišić. He noted that the work of the present authorities was complicated by the need to overcome shortcomings of the previous management of the civilian security services. He said the apprehension of fugitives (RatkoMladić and Goran Hadžić), remained the ICTY's chief priority, "the most critical area of cooperation" with Serbia. During his visit to Belgrade, he said, he was presented the operational plans for the arrests of the two indictees still at large and added that it was possible to expect new positive results in their realisation, but noted the need for political support: "Should these plans be successfully implemented, the analytical capacity reinforced, and necessary political support maintained, additional results could be achieved," he stated.

2.2.4. Serbian Media Reports on the ICTY

The work of the ICTY remained one of the most topical issues in the Serbian media in 2008. As regards the electronic media, *RTS* has been broadcasting recordings of the trial of SRS leader Vojislav Šešelj on Channel 2 in the evenings, while the *B92* Info Channel has been broadcasting also recordings of other trials before the ICTY. The other TV stations have been reporting on the trials in their news programmes.

Most of the articles on the ICTY in the print media disputed the legitimacy and impartiality of the ICTY, especially after the acquittals of Haradinaj and Orić. Hardly any serious analysis of the work of the ICTY prosecutors or chambers on specific

586 ICTY press release, 23 June 2008, available at www.icty.org.

587 The whole report is accessible at the ICTY website – www.icty.org.

cases was published by the press. It mostly relayed the statements by politicians and state officials, rarely the statements and testimonies of the victims. The print media, as a rule, devoted little attention to crimes against non-Serbs, their journalists rarely spoke to the victims and hardly ever quoted even parts of their testimonies before the ICTY. When victims of crimes not perpetrated by Serbs are at issue, the press usually carried the statements to criticise the Tribunal judgments. ("Haradinaj's People Tortured me by Electrocution", *Blic*, 23 April, p. 17, "Ramush's Death Machine", "Liquidation of Serbian Women"; *Večernje novosti*, 24 April, p. 12)

The articles published after the arrests of Župljanin and Karadžić mostly focussed on their false identities, their hiding places, Karadžić's alleged agreement with Richard Holbrooke, not the crimes they are indicted for. Some papers even published Karadžić's poems. The media published the results of a public opinion survey conducted by the Strategic Marketing agency and commissioned by the National Council for Cooperation with the ICTY after Karadžić's arrest. The poll showed that more than half of Serbia's citizens were intensively following the events after Karadžić's arrest and that 3% knew absolutely nothing about the arrest. According to the poll, 70% of Serbia's citizens supported cooperation with the ICTY; 54% did not support extradition to the ICTY and 42% did, while 43% thought Mladić and Karadžić had to face trial before the ICTY. One-third of the pollees thought Karadžić was a hero and 17% that he was a criminal, while 42% did not perceive him either as a hero or a criminal. The vast majority of citizens, 86%, were of the opinion the ICTY was partial and anti-Serb and as many as 82% qualified it as a political tribunal.[588]

Little attention was devoted to the trial of former Serbian President Milan Milutinović, former FRY Vice-President Nikola Šainović and Generals Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić. The presentation of evidence has been completed and the Trial Chamber is expected to render its verdict. Although the former leading state officials are on trial, only a few media reported on the proceedings since they opened in July 2006.

2.3. War Crimes Trials in Serbia

The Belgrade District Court War Crimes Chamber and the War Crimes Prosecution Office were established on 1 July 2003 by the Act on the Organisation and Competence of State Bodies in War Crimes Proceedings.[589] District courts had the jurisdiction to try war crimes until this law was passed.[590]

588 *Blic*, 26 July, p. 3.

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

590 Two trials are still conducted before the Niš and Požarevac District Courts, more in *War Crime Trials before District Courts in Serbia.*

The Prosecution Office has prosecuted 275 individuals since it was established. Of the 24 found guilty in the first instance, five were convicted by a final decision, 5 were acquitted; 91 of the 275 people have been indicted and 150 investigated. Only three judgments delivered by the War Crimes Chamber (in the *Ovčara 2 – Milan Bulić, Anton Lekaj*[591] and *Scorpions* cases) became final by end 2008. There are two chief reasons for such a small number of final judgments. The first regards the practice introduced by the Supreme Court of Serbia which has overturned most of the appealed convictions[592] and ordered retrials although it could have resorted to the legal possibility of opening the main hearing itself and eliminating the shortcomings it identified in the first-instance proceedings, which would have been the most appropriate avenue given the importance and complexity of the cases. The second reason lies in the modest capacities of the War Crimes Chamber, which has been unable to hear more cases due to the lack of judges and courtrooms[593]. Eight trials opened in 2008, which marks a headway over the previous years, given that the Chamber opened 11 trials altogether by end 2007.

Given that the 2006 CPC, under which a prosecutor shall lead on investigations (and will be able to form his/her own investigating team), has not come into force yet, the investigations are still conducted jointly by the MIA War Crimes Investigation Service (an extremely small service of modest capacity), the Organised Crime Directorate (UBPOK), in cooperation with the War Crimes Prosecution Office.

The Prosecution Office filed 7 war crime indictments in 2008. Two were raised thanks to cooperation with the Croatian judiciary (*Banski Kovačevac* and *Grubišno polje* cases). Others are in a way a continuation of the trials already under way (charges against Milorad Pejić and Damir Sireta for the crime in Ovčara, and the indictments in the *Zvornik 2* and *Zvornik 3* cases), the investigation of which was launched by the ICTY prosecutors, or of trials conducted before national courts (*Podujevo*[594]). Evidence needed to file the new indictments has been obtained more easily in cooperation with the Croatian judicial authorities and police or during the presentation of evidence at the ongoing trials way than through investigations in cooperation with the Serbian MIA.

The assistance extended by the Humanitarian Law Centre (HLC) in obtaining evidence has been invaluable. The HLC has also represented the victims in the war crimes proceedings and encouraged them and their families to testify. It has established a witnesses/victims support model which to a great extent allows for the voice of the victims to be heard in court, helps acquire relevant documentation and secure testimonies necessary to establish the truth, helps disclose the facts pointing to a commitment of a serious crime and to perpetrators not included in the indict-

591 See *Report 2007*, II 2.4.

592 The *Saša Cvjetan – Podujevo*, *Sjeverin*, *Ovčara 1* cases.

593 See *Report 2007*, II 2.4.

594 More details under *Podujevo*.

ment [opening new investigations], and helps clarify the context in which a particular war crime took place.[595]

Agreements on cooperation signed with Croatia[596], Bosnia-Herzegovina[597] and Montenegro[598] have allowed for regional cooperation. In practice, the Serbian War Crimes Prosecution Office has achieved the best cooperation with the Croatian judicial authorities, which has to date yielded results in four cases.[599]

2.3.1. War Crime Judgments

Three war crime judgments were passed (*Scorpions, Zvornik I* and *Murder of Dragutin Krušić*) and a number of other war crime proceedings were under way in Serbia in 2008.

Scorpions Case – The Supreme Court of Serbia ruled on the appeals of the judgment handed down by the Belgrade District Court War Crimes Chamber on 11 April 2007 against five members of the Scorpions paramilitary unit accused of executing six Bosnian Moslem civilians in Godinjske bare near the Bosnian town of Trnovo in July 1995. The trial began in November 2005 after footage of the execution was aired at the trial of Slobodan Milošević before the ICTY. The prosecutors proved the authenticity of the recording made by the members of the Scorpions during the trial.

Scorpions' commander Slobodan Medić, who had ordered the execution of the prisoners, was initially sentenced to 20 years in jail. Branislav Medić, who carried the execution out together with Pera Petrašević, Milorad Momić and Slobodan Davidović, was convicted to 20 years' imprisonment. Petrašević, who pleaded guilty and cooperated with the prosecutors, was sentenced to 13 years in jail. Milorad Momić is at large. Slobodan Davidović had been found guilty of this crime in Croatia.[600] Aleksandar Medić, accused of accessoryship (initially of complicity, be-

595 See HLC Report, Victim/Witness Counselling and Legal Representation: a Model of Support – Project Implementation Report 21 February 2007, www.hlc-rdc.org.

596 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.

597 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 Office, the Republic of Serbia War Crimes Prosecution Office and the Prosecution Office of Bosnia-Herzegovina was signed on 1 July 2005.

598 Serbia and Montenegro signed the Agreement on Cooperation in the Criminal Prosecution of Perpetrators of Crimes against Humanity and Other Goods Protected by International Law on 31 October 2007.

599 *Zdravko Pašić – Murder of Dragutin Krušić*, *Lovas*, *Banski Kovačevac*, *Bora Trbojević – Grubišno polje c*ases.

600 Davidović was prosecuted for this and another crime by a Croatian court and convicted to a total of 15 years in jail.

fore the prosecutors amended the indictment) was sentenced to 5 years in jail, while Aleksandar Vukov, also accused of accessoryship, was found innocent.

The Supreme Court of Serbia upheld the verdicts pronounced against Slobodan Medić, Pera Petrašević and Aleksandar Vukov and diminished Branislav Medić's jail term from 20 to 15 years. It overturned the sentence against Aleksandar Medić and ordered his retrial.

The Supreme Court stated that the first-instance court had not sufficiently taken into account the extenuating circumstances with respect to Branislav Medić – no prior records or his family circumstances – when it sentenced him to 20 years in prison.

The Supreme Court stated that it overturned the verdict against Aleksandar Medić and ordered his retrial because of the gross violations of the criminal procedure. The retrial opened before the War Crimes Chamber on 15 October.

Medić had first been indicted for complicity, but the prosecutors amended the charges to accessoryship during the trial, because they were unable to prove that he had actually fired shots at the prisoners, only that he was 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. For complicity to exist, more than one person sharing the same, joint criminal intent has to take part in the actual commission of the same crime. For the accomplices to bear equal liability, they all need to take part in the crime, notwithstanding their hierarchy or role[601]; moreover, they need to intend to participate in the joint crime. Therefore, the participants need to share a common intent, which means that they are aware of what the aim of the group's enterprise is and agree to the effects the joint enterprise ought to or may produce. In this case, the video recording of the execution indicates that Medić shared the joint intent, that he was aware of the goal of the act he was taking part in throughout.

The video recording made by the Scorpions shows Medić standing with an automatic rifle in his hands next to the prisoners, who were lying on the ground, with their hands tied on 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 befall them. Moreover, he displayed absolutely no signs that he in any way opposed the commission of the crime; on the contrary, he acted as if he was not in the least uncomfortable to be attending a bru-

601 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.

tal murder of six young men. All this corroborates the view that Medić should have been charged with complicity as he initially had been.

Medić pleaded that he had not known the prisoners would be executed (which is negated by the recording and his words to the prisoners indicating that they would be killed), that he had not fired any shots and that he had never abetted the crime by any of his actions.

Notwithstanding the fact that the judicial chamber was limited by the qualification of the crime in the indictment and could not have punished Medić for complicity, it could have pronounced a stricter penalty than it did, because an accessory can be handed down an identical sentence as the accomplice.

Zvornik 1 Case. – The Belgrade District Court War Crimes Chamber on 12 June handed down judgments against defendants accused of committing war crimes in the Bosnian municipality of Zvornik in 1992. Four members of the paramilitary formations Yellow Wasps and the Pivarski Squad were accused of crimes in the Čelopek Culture Hall and the venues known as Ekonomija and Ciglana, in which 187 civilians were kept prisoner and brutally abused. At least 22 of them were killed.

Dragan Slavković was convicted to 15, Ivan Korać to 13, Siniša Filipović to 3 years in jail, while Dragutin Dragićević was found innocent of this war crime. In its explanation of the verdict, the judicial panel said that it established that the defendants committed war crimes against the civilian population on the basis of ample evidence, especially the statements of witnesses who had recognised the defendants as the perpetrators of the crime during the investigation and the main hearing. The panel found no indisputable evidence that Dragićević had committed the crimes he was charged with. Dragićević is already serving a 20-year prison sentence for the Sjeverin crime[602].

War Crimes Prosecutor Vladimir Vukčević and the attorneys of the injured parties were dissatisfied by the penalties, convinced that they were much too mild, despite the mitigating circumstances the panel took into consideration when it determined the penalties, such as age (Korać was 20 and Filipović only 18 years old at the time) or family circumstances. Both the prosecutors and the lawyers of the defendants appealed the judgments.

The investigation into this case was launched by the ICTY Prosecution, which ceded it to the Serbian War Crimes Prosecution Office in 2004. The latter filed charges in August 2006 and the trial began in November the same year. Seven

602 Dragićević and three other members of the so-called Avengers were convicted for the abduction and murder of 16 Bosniaks, residents of Sjeverin in 2006. The Sjeverin residents were abducted from a bus going from Pljevlja (Montenegro, part of the FRY at the time) to Priboj (Serbia) in Mioče (Bosnia-Herzegovina) and taken to a motel near Višegrad (Bosnia-Herzegovina), where they abused them physically and mentally and then killed them on the bank of the River Drina. See *Report 2006,* II. 2.2.1.

people were initially indicted. Separate proceedings were launched against the two principal 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), also charged with the expulsion of the civilian population from the villages of Kozluk and Stočić, on 26 May 2008. They were indicted in the *Zvornik 2* case on 5 August 2008 for crimes which led to the deaths of over 700 civilians in Zvornik and its vicinity.[603] Another co-defendant, Dušan Vučković, died in pre-trial custody. According to statements by the witnesses and the co-defendants, Vučković, a man going by the nickname Pufta (still at large) and Pivarski (killed in action) had committed the gravest crimes listed in the indictment.

The trial led to the identification of two more men suspected of committing the crime in Zvornik. Charges against one of them were raised and his trial opened on 4 September (this case is known as *Zvornik 3*).

Murder of Dragutin Krušić Case. – Zdravko Pašić (45), was sentenced to eight years in jail by the Belgrade District Court War Crimes Chamber on 8 July for killing doctor Dragutin Krušić in Slunj (Croatia) in 1991.

The panel established that Pašić, a local policeman in the then Republic of Serb Krajina, killed Krušić, a Slunj outpatient health clinic doctor, in the night of 22–23 December 1991 in collusion with Milan Grubješić. Pašić and Grubješić convinced the doctor to leave the clinic under the excuse that he needed to see to a large number of wounded men in the nearby Cetingrad and then Pašić shot him. He and Grubješić fired more bullets at Krušić, who succumbed to his wounds.

The Serbian War Crimes Prosecution Office raised charges against Pašić on 8 November 2007 and the trial opened on 1 February 2008. Pašić was arrested on 26 September 2007 and has been in custody since 28 September under the order of a War Crimes Chamber investigating judge.

The Karlovac County Court (Croatia) had sentenced Grubješić and Pašić (*in absentia*) to 12 years in jail for the crime. Grubješić, who is serving his sentence in Croatia, testified in the Pašić trial.

The Croatian State Prosecutor ceded much of the evidence in this case to the Serbian War Crimes Prosecution Office in accordance with the existing cooperation agreements.[604]

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603 See below case *"Zvornik 2"*.

604 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.

2.3.2. Trials under Way

Ovčara 1 Case. – The trial for the murder of 200 war prisoners (of whom 192 have been identified to date) at the Ovčara farm at Vukovar (Croatia) began in 2004. The defendants are now on retrial after the Supreme Court of Serbia overturned the first-instance judgment in March 2007. Sixteen men, members of the Vukovar Territorial Defence and the Serbian Radical Party volunteer unit Leva Supoderica, stand accused of war crimes against war prisoners[605].

Zvornik 2 Case. – The Serbian War Crimes Prosecution Office on 5 August filed an indictment against Branko Grujić and Branko Popović for war crimes against civilians in Zvornik (Bosnia-Herzegovina) in 1992.

Grujić and Popović are charged with the imprisonment, inhumane treatment and deaths of at least 600 people, 270 of whom have been exhumed from mass graves on Crni Vrh and Grbavci and identified. The indictment states that "Grujić and Popović, in their capacity of head of the Serb Municipality of Zvornik Interim Government and commander of the War Headquarters, and commander of the Territorial Defence Headquarters, respectively, had undertaken intentional and synchronous actions within their powers with the aim of forcibly separating and illegally taking civilians (Bosnian Moslems) hostage and then depriving them of their lives at a large scale."

To track down the direct perpetrators of the crime Grujić and Popović have been charged with, the War Crimes Prosecution Office filed a motion with the War Crimes Chamber on 4 August for investigating four more people, three of whom are Bosnia-Herzegovina citizens and one of whom is a citizen of Serbia.

The Zvornik Municipality is one of the venues at which the greatest number of civilians perished during the war in Bosnia-Herzegovina. As mentioned above, the investigation of the crimes in Zvornik and its vicinity was initially conducted by the ICTY Prosecution. The case was ceded in 2004 to the Serbian war crime prosecutors, who continued the investigation and raised charges against 7 people, including Grujić and Popović, in 2005.

In 2005, the two were accused of issuing verbal orders and forcibly effecting the large-scale expulsion of the civilian population (1822 residents of the Kozluk and Skočić villages) to Hungary via Serbia. Together with members of the paramilitary formations Yellow Wasp and Pivarski Squad, they took 174 male Divič villagers between 18 and 60 years of age out of the refugee column. They first shut them in a building in Zvornik, from which two unidentified members of the Territorial Defence took 11 men, who were never seen alive again. The other 163 men were taken to the Čelopek Culture Hall, where they were subsequently tortured and abused and where at least 19 of them were killed. Popović and Grujić are charged with being aware of the crimes in the Čelopek Culture Hall, the Ekonomija farm

605 Article 144, Criminal Code of the SFRY.

and Ciglana, where thirty or so people were held, tortured and abused by members of paramilitary formations and where at least three people were killed, but that they had done nothing to prevent the crimes wherefore they consented to the commission of the crimes. The trial for these crimes opened in November 2005 and a first-instance judgment finding three members of the paramilitary units guilty of directly perpetrating the crimes in Čelopek, Ekonomija and Ciglana was pronounced in June 2008.[606] Just before the verdict was pronounced, the judicial panel upheld the prosecution's motion to separate the proceedings against Grujić and Popović due to the investigation that resulted in the filing of a new indictment against them on 5 August.

The prosecutors filed another indictment comprising both indictments against Grujić and Popović on 22 October 2008.

Murder of the Bytyqi Brothers Case. – The defendants, Sreten Popović and Miloš Stojanović, members of the Operational Search Group operating within the special police units in 1999, have been charged with illegally depriving of liberty brothers Yili, Agron and Mehmet Bytyqi as they were leaving the prison in Prokuplje (Serbia) after serving a sentence for illegally crossing the border. The two are accused of transferring the brothers to a police camp in Petrovo Selo, where they were taken over by as yet unidentified members of the Special Anti-Terrorist Unit (SAJ), who killed them by shooting them in the back of the neck and thus committing war crimes against war prisoners.

The trial opened in November 2006. The trial was adjourned on a number of occasions in 2008, first because the court did not have access to some of the witnesses and subsequently because defendant Popović (who, just like Stojanović, is not in custody) sustained injuries in a car accident. Although the trial is accompanied by a simultaneous investigation of a number of persons, the prosecutors have not filed an indictment yet against the persons who had ordered the crime and the ones who had perpetrated it. The defendants stated that they were following their superior's orders, which, they claimed, had been issued by police General Vlastimir Đorđević, former Serbian chief of police, awaiting trial in the ICTY for war crimes in Kosovo 1999. The bodies of the Bytyqi brothers were found in a mass grave in Petrovo Selo (Serbia) in 2001.

As the victims were US citizens, the FBI has also taken part in the investigation. It conducted the ballistic expertise.

Suva Reka Case. – The trial of the eight defendants (Radoslav Mitrović, Radojko Repanović, Nenad Jovanović, Slađan Čukarić, Milorad Nišavić, Miroslav Petković, Zoran Petković, Ramiz Papić), five of whom were active policemen at the time of the arrest (the main defendant Mitrović is a colonel, assistant commander of the Gendarmerie), opened in October 2006. They are indicted for war crimes against

606 See *Zvornik 1* above.

the civilian population. They are charged with ordering and effecting an attack on the ethnic Albanian civilian population in Suva Reka (Kosovo), killings, large scale destruction of property and expulsion of the civilian population 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.

The bodies of the killed were transported and buried in a mass grave in Batajnica near Belgrade.

The ICTY also indicted for this crime the then FRY President Slobodan Milošević, Serbian President Milan Milutinović, FRY Deputy Prime Minister Nikola Šainović, Serbian Minister of the Interior Vlajko Stojiljković and army and police generals Nebojša Pavković, Vladimir Lazarević, Dragoljub Ojdanić, Sreten Lukić and Vlastimir Đorđević.

Interestingly, a state security official (Milorad Nišavić) has also been charged with the crime.

This is the first case in which the clashes in the territory of Kosovo are qualified as an armed conflict regulated by the Geneva Conventions, which represents headway in the acceptance of international humanitarian law standards and ICTY practice.

Ilija Jurišić – Tuzla Column Case. – The trial of Ilija Jurišić, a 64-year-old resident of Tuzla (Bosnia-Herzegovina), charged with use of unlawful means of combat[607] during the assault on the JNA column in Tuzla on 15 May 1992, opened on 22 February 2008. Jurišić is indicted for issuing the order to attack the JNA column, which resulted in the death of at least 92 and wounding of at least 33 JNA members. The JNA was withdrawing in accordance with the agreement on the army's retreat forged between the Bosnian authorities and the FRY.

The War Crimes Prosecution Office took this case over from the Military Prosecution Office in Belgrade in 2004.

Lovas Case. – Fourteen men are standing trial for war crimes against the civilian population in the Croatian village of Lovas in October 1991. The trial opened before the Belgrade District Court War Crimes Chamber on 11 April. Ljuban Devetak, Milan Devčić, Milan Radojčić and Željko Krnjajić, members of the local civilian and military authorities at the time, Miodrag Dimitrijević, Darko Perić, Radovan Vlajković and Radisav Josipović, members of the Territorial Defence subordinated to the then JNA Second Proletarian Guard Motorised Brigade, and Petronije Stevanović, Aleksandar Nikolaidis, Dragan Bačić, Zoran Kosijer, Jovan Dimitrijević and Saša Stojanović, members of the armed group of volunteers Dušan the Great, have been indicted.

According to the indictment, the principal defendant Devetak and several members of the party Serbian People's Renewal (SNO), formed a unit of volunteers

607 Art. 148 (2) of the SFRY Criminal Code.

from amongst SNO sympathisers and several Lovas residents to launch an attack on that village. The volunteers were brought together and armed by the Territorial Defence in Nova Pazova and Šid (Serbia) and then sent on to Tovarnik (Croatia). Together with the members of the Tovarnik Territorial Defence and the militia, commanded by defendant Željko Krnjajić, they launched an attack on Lovas on 10 October 1991 although they were aware that there were no Croatian armed forces that could offer resistance in the village, only the civilian population, which was not taking part in the armed conflict. One person died as the group fired from its artillery weapons and 21 while it was capturing the village. They were killed by infantry fire, bombs or other explosive devices in their homes, front yards, the streets; some were dragged out of their cellars or yards and taken elsewhere to be killed.

After physically abusing, torturing and illegally detaining the villagers for a few days, the group led 13 people out of the makeshift prisons and shot them dead and another 14 from their homes or other houses and killed them in various locations.

According to the indictment, on 18 October 1991, JNA troops and volunteers took a group of civilians they had earlier imprisoned to a field they believed had been mined and forced them to walk through it holding hands, and ordered them to halt if they noticed a mine. One of the civilians, who had previously been heavily beaten up and injured, tripped over a mine which simultaneously activated a large number of other mines. In the ensuing chaos, an armed guard member opened fire at the helpless civilians; in result, 20 civilians died and 12 sustained grave or light bodily injuries. One civilian was shot dead as the guards were taking them to the mined field, because he could not walk after having been beaten up the previous night and that morning.

All these crimes were accompanied by looting and destruction of property.

Sixteen people, including Ljuban Devetak, Milan Devčić, Željko Krnjajić and Milan Radojčić, members of the then local civilian and military authorities, are on trial before the Vukovar County Court for the Lovas crime. However, the Vukovar Court is holding only one defendant in custody and is trying the others *in absentia*. Over 40 witnesses, who have testified in this case, also gave statements during the investigation conducted by the Serbian War Crimes Prosecution Office in cooperation with its Croatian counterparts.

This is the first case tried by the War Crimes Chamber indicting former JNA troops.

Zvornik 3 Case. – The War Crimes Chamber opened the trial of Goran Savić and Saša Čilerdžić (both from Kraljevo, Serbia) on 4 September for war crimes against the civilian population. The two, who were members of the volunteer Pivarski Squad operating as part of the Zvornik Territorial Defence, are charged with inhumane treatment of local Bosnian Moslem villagers held captive at the Ekonomija farm and Ciglana at Zvornik in May and June 1992.

Together with Dragan Slavković, Ivan Korać (both found guilty by a first-instance verdict in the Zvornik 1 case) and a still unidentified person going by the nickname Pufta, the two defendants are accused of taking the imprisoned civilians out of the makeshift prisons and forcing them to ransack the deserted houses in Zvornik and its vicinity and ship the loot to Serbia. They are also accused of complicity in injuring and killing a civilian at Ciglana.

Savić is also charged with torturing civilians at the Ekonomija farm, where he, Slavković, Korać and Pufta on two occasions beat the civilians up incurring them numerous physical injuries and killed a prisoner who was trying to escape. The killing was described by witness Svetislav Mitrović aka Niški, also a member of the Pivarski Squad, during the *Zvornik 1* trial. Mitrović said he and Savić had interrogated the killed man before he tried to flee. Besides Mitrović, a number of other witnesses at the trial of Slavković and Korać (*Zvornik 1*), as well as the defendants themselves, named Savić and Čilerdžić as the perpetrators of the crimes in Ekonomija and Ciglana in their testimonies.

The defendants are not in custody.

Podujevo Case. – The trial opened on 8 September and the four defendants, Željko Đukić, Dragan Medić, Dragan Borojević and Miodrag Šolaja, members of the Scorpions unit, are charged with killing 14 civilians (7 of whom were minors – the youngest victim, Albio Duriqi, was only two years old) and gravely wounding five children between 6 and 14 years of age by opening fire from automatic weapons at a group of civilians, women and children on 28 March 1999 together with Saša Cvjetan[608] and several as yet unidentified policemen in Podujevo (Kosovo).

The Ministry of the Interior pulled the Scorpions unit out of Kosovo after the crime.

The ICTY indicted former Serbian chief of police Vlastimir Đorđević for this crime.

Banski Kovačevac Case. – Pane Bulat and Rade Vranešević, members of the erstwhile Republic of Serb Krajina Army, are accused of killing 6 Croatian civilians between 63 and 81 years of age, five of whom were women, in Banski Kovačevac (Karlovac Municipality, Croatia) in March 1992. They are charged with war crimes against the civilian population.

The Karlovac County Court conducted an investigation against Bulat and Vranešević for war crimes against the civilian population (Art. 120 (1) of the Basic Criminal Code of the Republic of Croatia). Art. 120 is in accordance with the relevant Geneva Conventions and nearly identical to the crime in Art. 142 (1) of the FRY Criminal Code. Although Croatia did not have access to either defendant, it

608 Saša Cvjetan was sentenced to 20 years in jail for this crime by a final judgment issued on 21 February 2006 and is currently serving his sentence.

persisted with the investigation of the crime, collected the relevant data, information and evidence and heard 12 witnesses.

In accordance with the Agreement on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide between the Serbian War Crimes Prosecution Office and the State Prosecution Office of the Republic of Croatia and the Act on Cooperation between Serbia and Croatia on Legal Assistance in Civil and Criminal Matters, the Karlovac County State Prosecution and Court forwarded the whole case file to the Serbian War Crimes Prosecution Office for consideration and prosecution given that both defendants have been residing in Serbia and defendant Bulat has Serbian citizenship.

The indictment was filed on 16 April and the trial opened on 2 September 2008.

Bora Trbojević – Grubišno polje Case. – The trial of Bora Trbojević, accused of war crimes against the civilian population[609], opened on 26 September. Trbojević, who had been a member of the Bilogorski unit operating under the Territorial Defence of Velika Peratovica, is charged with participating in an attack on the Croatian civilian population, taking Croatian civilians hostage, imprisoning, torturing and inhumanely treating them and killing five civilians.

The Bjelovar County Court tried Trbojević *in absentia* for the crimes in the villages of Topolovica and Velika Peratovica back in 1993 and convicted him to 20 years in prison.

The Croatian State Prosecutor ceded the evidence in the case to its Serbian counterparts in accordance with the Agreement on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide.

Damir Sireta – Ovčara Case. – The War Crimes Chamber on 23 December opened the trial against Damir Sireta, charged with war crimes against war prisoners at the Ovčara farm in November 1991.

Under the indictment, Sireta, a member of the Vukovar Territorial Defence which was part of the JNA at the time, was in the firing squad that executed 200 Croatian war prisoners (192 of whom have been identified to date) at the Grabovo pit at the Ovčara Farm near Vukovar.

Sireta was arrested in December 2006 in Norway, where he had been living for a couple of years and was extradited to Serbia on 8 May 2008. A custody order was issued on 30 July 2004, but as Sireta was on the run at the time, an international arrest warrant was issued. The Norwegian authorities decided to extradite Sireta to Serbia although Croatia, too, had sought his extradition, given that its court had sentenced him to 12 years in jail *in absentia* for killing prisoner Ekrem Nakičević in Vukovar in 1991.

609 Art .142 (1), FRY Criminal Code.

Aleksandar Medić Case.[610] – The retrial of Aleksandar Medić opened on 15 October, after the Supreme Court overturned the April 2007 judgment sentencing Medić to 5 years in jail for accessoryship in war crimes against the civilian population.[611]

2.3.3. War Crime Trials before Serbian District Courts[612]

The trial of two policemen accused of war crimes against civilians was under way in the Požarevac District Court in 2008.[613] Police reservist Boban Petković from Velika Hoča (Kosovo) and policeman Đorđe Simić from Orahovac (Kosovo) were indicted back on 12 November 1999, the former for murdering three Albanian civilians and the latter for aiding and abetting him. On 19 July 2000, the court sentenced Petković to 4 years and ten months imprisonment and Simić to one year imprisonment for the crimes. The Supreme Court of Serbia overturned the verdict on 18 December 2001 and ordered a retrial.

On 19 February 2003, the District Public Prosecutor amended the indictment, accusing both of war crimes against the civilian population, Petković of killing the three civilians and Simić of aiding and abetting him. The court found Petković guilty and convicted him to five years in jail and compulsory psychiatric treatment at liberty; Simić was found innocent. The Supreme Court of Serbia reviewed the appeals of the Požarevac District Prosecutor and the defence counsel and again overturned the verdict, ordering another retrial.

The main hearing opened on 5 December. The hearing sessions have been adjourned on a number of occasions because the defendants, who are not remanded in custody, failed to respond to court summons and show up in court.

The Niš District Court is trying policeman Miloš Simonović and former police reservist Dragiša Marković accused of killing ethnic Albanian Iso Emini. They are charged with breaking into Emini's apartment in Priština on 5 May 1999. Marković seized Emini's wife, pulled her into the other room, tied her hands and gagged her and threatened her with his gun. Simonović then fired two shots at Emini, hitting him in the head. Although the crime was committed during the fighting in Kosovo, the prosecution initially qualified it as murder, not as a war crime.[614] The trial opened on 14 September 2004. The judicial panel on 15 June 2007 found the two men innocent, but the Supreme Court on 30 June 2008 overturned its verdict and ordered a retrial. The men are still charged with murder, not war crimes. Although scheduled twice, the main hearing was not held by the end of the reporting period because the defendants did not show up in court. Although the defend-

610 See *Scorpions Case* above.

611 Art 142 (1), FRY Criminal Code.

612 More on these trials at www.hlc-rdc.org.

613 Art. 142 (1) FRY Criminal Code.

614 Art. 47 Serbian Criminal Code.

ants have failed to accept service of the summons or appear in court on a number of occasions since 2004, the court still has not ordered their remand in custody.

2.3.4. Media Reports on Trials in Serbia

There are only a few journalists attending and reporting on trials in Serbia. Most media do not have their own reporters in the courtrooms and merely pick up agency reports (most often those on the *BETA* wires) or statements issued by the War Crimes Prosecution Office.[615] Articles on events on trial before the War Crimes Chamber[616] are usually very short and, with a few exceptions (e.g. those published in the weekly *Vreme*), do not provide the readers with a clear and comprehensive idea of the specific crimes the defendants stand accused of. Nor can such articles qualify as investigative journalism. TV reports on these trials are even rarer and usually boil down to brief information that an indictment has been filed, a trial opened or a judgment delivered. The TV station *B92* is an exception in that respect: it has aired several broadcasts focusing on war crimes on trial before Serbian courts (on the crimes in Ovčara and Lovas and on those committed by the Scorpions unit at Trnovo and Podujevo).

Of the Serbian judiciary's activities in prosecuting war crimes, the one that attracted the most attention was the investigation into the fate of missing Kosovo Serbs by the War Crimes Prosecution Office. These people were reportedly abducted and transferred to Albania, where their organs were extracted and trafficked, while their bodies were buried in mass graves.[617] The investigations launched by the War Crimes Prosecution Office against Peter Egner, Milivoj Ašner and Sandor Kepiro suspected of WWII crimes, also received extensive media coverage. Proceedings like the ones cited above, in which the Serbs were victims of crimes, as a rule get more publicity, even by media otherwise not reporting on war crimes. Hardly any attention is, on the other hand, devoted to other trials, even for the brutal grave crimes with large numbers of victims (especially the Zvornik 1, 2 and 3 cases, the Suva Reka and Podujevo cases).

2.4. Organised Crime Trials

2.4.1. Introduction

The Confiscation of Crime-Derived Property Act adopted in 2008 shall apply to perpetrators of criminal offences related to organised crime, abuse of official post, pornography, international crimes, trafficking of illicit narcotics and public law and order. Under the Act, new institutions shall be established to combat organ-

615 The Prosecution Office statements are available at www.tuzilastvorz.org.rs.

616 The most interesting print articles on war crime trials in Serbia are available at the BCHR website www.bgcentar.org.rs.

617 Media documentation available at BCHR's website www.bgcentar.org.yu.

ised crimes. A specialised unit for financial investigation and identification of property derived from crime shall be set up within the Ministry of internal Affairs. A directorate for managing confiscated property shall be established within the Ministry of Justice to manage the confiscated property, assess its value and perform other relevant duties. The systemic solutions introduced by the Act shall greatly improve the fight against organised crime in Serbia especially if they are fully applied. This particularly pertains to the provisions allowing the confiscation of property of a person who is the legal successor of the owner of the crime-derived property and the provision on persons against whom criminal proceedings had not been instituted due to their death, but who were found to have committed the crimes from which they derived their property in collusion with other persons during the proceedings against the other persons.

Transparency of media ownership needs to be regulated to complement the legislation aiming to combat organised crime. Regulations on ownership of media would enable insight in who really holds what stake in the outlets and lay the foundations for responsible reporting. To recall, specific media were responsible for presenting the late Prime Minister Đinđić as a criminal who ought to be assassinated, that they discredited the work of the Serbian judiciary to muster public condemnation of the convictions handed down to the members of the Zemun Clan, that the main defendant Ulemek attempted to humiliate the Organised Crime Chamber before it pronounced its first-instance decision and undermine the relevance of the trial by giving an interview to newspapers and presenting his defence.

The application of the following new laws shall also indirectly help combat organised crime: the Criminal Liability of Legal Persons Act, the Act on the Anti-Corruption Agency and the Act amending the Act on Financing of Political Parties.[618]

Trials of organised crime groups continued before the Belgrade District Court special Organised Crime Chamber in 2008.

2.4.2. The Assassination of Prime Minister Zoran Đinđić

2.4.2.1. Second-instance Proceedings. – The Supreme Court of Serbia in September began the review of appeals of the Organised Crime Chamber first-instance judgment against the persons convicted for assassinating the former Serbian Prime Minister Zoran Đinđić in 2003.[619]

The appeals proceedings opened before a Supreme Court five-member panel on 8 September with justice-rapporteur Zoran Savić giving an overview of the judgment and the appeals. The panel, chaired by justice Dragiša Đorđević, also included the following justices: Anđelka Stanković, Sonja Manojlović and Miodrag Vićentijević.

618 *Sl. glasnik RS*, 97/08.

619 More on the first-instance proceedings in *Report 2007*, II 2.5.1.

The defence counsels called for the exemption of justices Sonja Manojlović and Miodrag Vićentijević, who had been members of the judicial panel that rendered the final judgment convicting Milorad Ulemek to 40 years' imprisonment for murdering Ivan Stambolić and attempting the assassination of Vuk Drašković in Budva. The motion was dismissed.

In his appeal, defendant Dušan Krsmanović asked to be sentenced to the mildest penalty because he had admitted everything during the investigation to help reveal the truth and expressed his remorse for taking part in Đinđić's assassination. Krsmanović was initially sentenced to 30 years in jail. The mildest sentence for the crimes he committed is ten years' imprisonment. The Republican Public Prosecution Office suggested to the Supreme Court of Serbia to uphold Krsmanović's appeal and mitigate his sentence. Milodrag Rašić, the defence counsel for Aleksandar Simović and Miloš Simović, convicted to 35 and 30 years' imprisonment respectively, suggested in the appeal that the case be retried and the disputed facts established. Olivera Đorđević, the defence counsel for Ninoslav Konstantinović, convicted to 35 years in jail, also called for a retrial, underlining that her client had not taken part in Đinđić's assassination. Sretko Kalinić's counsel stated in the appeal that there was no evidence against his client and called for a reconstruction of the assassination. Vladimir Milisavljević's counsel claimed that the Organised Crime Chamber had failed to establish the facts and sought a retrial and Milisavljević's release. The counsel of Branislav Bezarević, found guilty of releasing information on Đinđić's planned whereabouts to the Zemun Clan, suggested their client be tried before the Supreme Court or retried by other Organised Crime Chamber judges. They asked the Court for his provisional release citing his health problems. The counsels for Saša Pejaković and Željko Tojaga requested the release of their clients or the overturning of the first-instance judgment or that their clients be charged with aiding and abetting before the fact and sentenced to milder penalties. The man who pulled the trigger, Zvezdan Jovanović, a former State Security Lieutenant Colonel, denied in his appeal all the crimes he was charged with and sought a retrial. Aleksandar Zarić called for a retrial or a milder penalty for his client Milan Jurišić Jure. The main defendant, Milorad Ulemek *aka* Legija, stated in his appeal that many disputed issues had remained unclarified, filed a motion that the judgment be modified, sought that all the charges against him be dropped or that the case be retried.

The Special Prosecution Office stated that appeals were unfounded and asked the Court to dismiss them.

At a closed session, the Supreme Court Judicial Panel decided to modify parts of the first-instance judgment pronounced by the Belgrade District Court Special Chamber and uphold the rest of it.[620]

With respect to the main defendant, Milorad Ulemek Legija, the Court modified the first-instance judgment, notably the legal qualification of the crime and the

620 The integral Supreme Court statement is available at http://www.vrhovni.sud.srbija.yu/code/navigate.php?Id=730&newsId=392&bigText=true&offset=

decision on the penalty. The Court qualified his crime as conspiracy to commit crimes against the constitutional order in relation to the crime of assassinating the topmost state representatives and convicted Ulemek to 40 years' imprisonment for this crime and 6 years' imprisonment for the attempted murder of Đinđić's former chief of security Milan Veruović. The Court also modified the sentence pronounced against the assassin, Zvezdan Jovanović, by qualifying his crime as the assassination of topmost state representatives and convicting him to 40 years' imprisonment, convicting him also to 8 years' imprisonment for attempted murder and another 3 years' imprisonment for the crime of conspiracy in hostile activity. Ulemek and Jovanović were each convicted to 40 years' imprisonment and may appeal the sentences given that they were handed down the maximum penalties. The appeals will be reviewed in third-instance proceedings before the Supreme Court.

The Supreme Court upheld some of the counts in the appeals filed by Dušan Krsmanović, his spouse and counsel and those filed by the counsels for Željko Tojaga, Milan Jurišić, Aleksandar Simović and Ninoslav Konstantinović.

The Supreme Court qualified the crimes committed by Miloš Simović, Ninoslav Konstatinović, Aleksandar Simović, Vladimir Milisavljević, Sretko Kalinić, Milan Jurišić and Dušan Krsmanović as conspiracy in hostile activity, attempted murder and aiding and abetting the assassination of the topmost state representatives.

The Court modified Dušan Krsmanović's sentence to 20 years' imprisonment. It also mitigated the sentences of Sretko Kalinić, who is at large (from 35 to 30 years in jail), and Željko Tojaga (from 30 to 15 years' imprisonment), whom it found guilty of conspiracy in hostile activity and aiding and abetting the assassination of the topmost state representatives. Aleksandar Simović, Ninoslav Konstantinović and Vladimir Milosavljević were sentenced to 35 years in jail each, while Miloš Simović, Milan Jurišić and Branislav Bezarević were convicted to 30 years' imprisonment each.

The Supreme Court found that there were no gross violations of the criminal procedure, as the appellants claimed, or any violations of criminal procedure that the Supreme Court reviews *ex officio*. It assessed as groundless allegations of erroneous or incomplete establishment of facts in the appeals.

The Supreme Court sessions, held in the Belgrade Palace of Justice, were mostly unobstructed. Despite the 40 bomb hoaxes in 2008 alone, Belgrade District Court President Siniša Važić decided that the sessions be held in the Palace and not at a safer venue, such as the Special Court building.

The police found five hand grenades and a Zbrojovka pistol beside the Belgrade-Niš Highway, the route by which the defendants were taken from the Požarevac Prison to the Belgrade Palace of Justice for trial every day. The MIA stated that the routes by which the defendants were driven to Belgrade were alternated for security reasons.

2.4.2.2. Political Background of the Assassination. – No headway was made in revealing the political background of Đinđić's assassination in 2008. Special Organised Crime Prosecutor Miljko Radisavljević in June mentioned that a debate on the political background of the assassination would be launched, but it has been put off until a final judgment is pronounced. The prosecution's hitherto actions indicate that the investigation of the political background of the assassination is mentioned only when the need arises. Neither do the prosecutors appear to seriously consider opening such an investigation nor does it seem that there is political will to conduct one.[621]

2.4.3. Other Proceedings

2.4.3.1. "Zemun Clan" Case. – The Special Organised Crime Court in Belgrade on 18 January 2008 found the members of the Zemun Clan headed by main defendant Milorad Ulemek guilty of 15 murders, 3 abductions and terrorist attacks on the headquarters of the company Difens roud and DSS offices in Belgrade.

This was the third maximum prison penalty of 40 years pronounced against Milorad Ulemek Legija. After judge Milimir Lukić handed down the verdict, Legija stormed out of the courtroom before the judge had the chance to explain his decision. Aleksandar Simović, Đorđe Slavković and Nikola Bajić immediately followed suit. Legija was convicted to five years in jail for organising the Zemun Clan, to 40 years in jail for killing Ivica Nikolić and attempting to kill Ljubiša Buha Čume, to 15 years in jail for abducting Milija Babović and to 15 years in jail for ordering the blowing up of the machines owned by Difens roud. He was thus sentenced to the maximum 40-year prison sentence.

The court found that the group was not only involved in criminal activities, but that it was politically motivated to attempt to cause dissent on Serbia's political stage as well. The political motives of the Zemun Clan and its leaders are corroborated by the fact that the leaders of the Clan ordered their subordinates to hurl two bombs at the DSS headquarters in Belgrade and blow up Difens roud equipment. The court further established that the defendants then accused the Democratic Party and Ljubiša Buha Čume of the attacks with the aim of causing a rift between the DS and DSS.

Maximum penalties were also pronounced against Miloš Simović, Vladimir Milisavljević Budala and Sretko Kalinić, who are at large. Aleksandar Simović, Nikola Bajić and Đorđe Slavković were each sentenced to 25 years in prison, Milan Jurišić Juriško was convicted to 34 years' imprisonment and Milan Glišović to 32 years' imprisonment *in absentia*. Milan Jurišić Jure and Dušan Krsmanović were each handed down 20-year prison sentences; Darko Milićević was sentenced to 13 years in jail and Selman Hamidović and Milomir Kaličanin to 10 years' imprison-

621 More on the investigation into the political background of the assassination in 2007 in *Report 2007*, II 2.5.1.2.

ment each, while Dalibor Nišavić was convicted to 9.5 years in jail. Slobodan Pažin was sentenced to 7.5 years in jail, while Saša Petrović, Dragan Miladinović Gagec, Milan Jovanović. Milan Drča and Darko Milić were each convicted to five-year prison terms. Bojan Dolić and Srećko Trajković were each sentenced to 4.5 years in jail and Slobodan Kovčić to four years' imprisonment. Toni Gavrić and Predrag Maletić were each convicted to three years in jail.

Apart from the prison sentences, seven Zemun Clan members were also ordered by the court to together repay 11.6 million Euros they had taken as ransom to release Milija Babović, Vuk Bajrušević and Suad Musić, whom they had abducted. This is one of the first verdicts in Serbia ordering the defendants to repay the money they gained through crime.

The institute of witness collaborator played a very important role in this case. Ljubiša Buha Čume and Miladin Suvajdžić *aka* Mutavi testified in closed court sessions and Dejan Milenković Bagzi testified after them. They explained in detail how the Clan operated, its hierarchy and spoke about the tasks they were given by Ulemek and Spasojević. They also testified of all the murders and abductions committed by the Clan members.

The prosecution, defendants and defence counsels appealed the judgment with the Supreme Court of Serbia in mid-November.

The Special Organised Crime Prosecution Office submitted a draft indictment against three former members of the Special Operations Unit (JSO) to the Fifth Municipal Prosecution Office in Belgrade accusing them of perjury at the trial of the assassins of former Serbian President Ivan Stambolić and the persons who had attempted to assassinate Serbian Renewal Movement leader Vuk Drašković in Budva in 2000. Perjury warrants a penalty of maximum five years' imprisonment. The Supreme Court of Serbia had dismissed their testimonies as false while it reviewed the appeals. The Prosecution Office would do well to also file reports against the former JSO members, who gave false testimonies at the trial of Đinđić's assassins in the attempt to provide the assassin Jovanović with an alibi.

The Fourth Municipal Court in Belgrade also tried Zemun Clan members for abducting Delta Company President Miroslav Mišković, two other kidnappings and extortion. The Court delivered its judgment on 29 May, finding the defendants guilty and ordering them to pay the injured parties over 272 million dinars. The Simović brothers Miloš and Aleksandar, were each sentenced to eight years in jail, the latter *in absentia*; Vladimir Milisavljević, who is also at large, was convicted to seven years in jail for kidnapping Mišković, Dragoslav Vuković and Milenko Aleksić.

Nenad Opačić was sentenced to three years in jail for inciting Vuković's abduction, while Milan Jurišić, who is on the run, was convicted to two years' imprisonment for extorting constructor Saša Pešić. Nikola Bajić was sentenced to 18 months' imprisonment and Dušan Krsmanović to 15 months' imprisonment for their involvement in the abduction.

2.4.3.2. "Football Mafia" Case. – Former senior officials of the Red Star soccer club Dragan Džajić, Vladimir Cvetkovic and Miloš Marinković were arrested in February on suspicion that they abused their posts in the 4 July–15 March 2002 period and defrauded 5.1 million Euros during the transfer of player Goran Drulić to the Spanish Real Zaragoza. They are suspected of striking a deal with Zaragoza under which Red Star would be paid 27 million DM in compensation and then falsely presenting that 18 million belonged to Drulić. These officials opened a foreign currency account in his name without his knowledge or consent in a local bank. They transferred 6,127,104 Euros into Red Star's account and then forged Drulić's signature to withdraw the money which they pocketed. Džajić and Cvetković are suspected of illicitly gaining 3.5 million DM from the sale of player Zoran Njeguš to the Madrid Atletico in 1998.

The Belgrade District Court expanded the investigation against Džajić and Cvetković after suspicions emerged that they defrauded one million USD during the transfer of player Perica Ognjenović to the Madrid Real; Džajić and Marinković are also being investigated for abuse of post during the transfer of Nemanja Vidić to the Moscow club Spartak.

The District Court in December expanded the investigation against Džajić and manager Ranko Stojić. They are suspected of defrauding 5 million DM during the transfer of player Ivan Dudić to the Portuguese club Benfica.

None of the questioned soccer players claimed the Red Star had failed to pay them the amounts agreed in the transfer deals, apart from Drulić, who stated that Red Star still owed him 2 million DM.

In a show of support to Džajić, who was in custody at the time, the Roma Union of Serbia named him head of its parliamentary election list and asked the then Justice Minister Dušan Petrović to help pardon him from criminal prosecution.

The Supreme Court of Serbia in July found that the motion by the investigating judge and the prosecutor to extend the custody of the Red Star officials was groundless and released them. Investigating judge Pantelić had filed for the extension of their custody fearing they may exert influence on the witnesses who still had not given their statements to the court. The prosecutor appealed the decision, but the Supreme Court rejected it. The aptness of the Supreme Court decision was brought into question when Džajić became a national of Montenegro; he can now avoid answering for any crimes in Serbia given that the Montenegrin Constitution explicitly prohibits the extradition of its nationals to the judiciary authorities of other states.

Former Secretary General of the Community of First League Clubs Milovan Nikodinović was arrested in April on suspicion of forging a decision on the basis of which soccer player Vanja Grubač terminated his contract with OFK Beograd and signed up with the German Hamburg as a free player, without compensation. Nikodinović is suspected of aiding the then President of OFK Beograd Zvezdan

Terzić to pocket the 1.1 million DM of compensation the German club had nevertheless paid for Grubač. A criminal report was filed against Terzić, who headed the Football Association of Serbia; he remained at large by the end of the reporting period although an arrest warrant was issued against him on 4 March. The investigation was in the meantime expanded after suspicions emerged that he defrauded 1.3 million Euros from the sale of soccer player Srđan Stanić to the Moscow Spartak. The Belgrade District Prosecutor filed a motion to expand the investigation against former OFK Beograd officials Zvezdan Terzić, Vladimir Bulatović and Dražen Podunavac suspected of abusing their posts during the sale of Branislav Ivanović to the Moscow club Lokomotiva and the transfer of Stevan Stošić to the Spanish club Malaga. Media reported that there were indications that Terzić, who is on the Interpol wanted list, was hiding in Montenegro. The Montenegrin police claim they have no information of his whereabouts.

The five-year investigation against famous local folk star and widow of warlord Arkan Svetlana Ražnatović continued in 2008. The Belgrade District Prosecutor in December filed a motion to complement the investigation. Ražnatović, who was President of the soccer club Obilić, is suspected of defrauding funds paid to the club for the transfers of 15 players. The investigation has dragged on due to difficulties in obtaining bank documents from Russia. The investigation into the fraud committed during the transfers of 14 players could have been completed in 2006 because the prosecutors back then had enough grounds to indict Ražnatović. Protracting the investigation in expectation of the documents from Moscow may have been unnecessary, because they may be used as evidence of only one illegal transfer. Ražnatović is suspected of exceeding her authority and abusing her post, whereby she illegally gained 22,529 million DM and 480,000 USD.

Montenegrin journalist Mladen Stojović was brutally beaten up in his apartment in Bar in May after talking about malversations in the local world of soccer in TV B92's show *Insider*, notably about the people who had headed the Obilić, Sutjeska and Zeta soccer clubs in the nineties. He has also written about how games were rigged and the football associations operated. The attack on Stojović constitutes an impermissible violation of the freedom of expression and straightforward corroboration of the accuracy of his claims of malversations in soccer.

2.4.3.3. "Bankruptcy Mafia" Case. – The Supreme Court decided to set free the accused in this case, Goran Kljajević, Sekula Pjevčević and Jelica Živković because it found there was no longer any risk of them absconding, the reason why they were in custody since their arrest on 12 April 2006. The Belgrade District Court Special Organised Crime Chamber judicial panel accepted Svetlana Pantić Brašnjović's offer of bail amounting to 30,000 Euros in cash and disposal of her apartment, valued at 88,000 Euros. Svetlana Pantić Brašnjović, the widow of Mika Brašnjović, who had been accused as one of the masterminds of the so-called bankruptcy mafia, was arrested at the Serbian-Macedonian border after being on the run for a year and a half.

The trial of this group opened in January 2007. All of the defendants were interrogated and the presentation of evidence was under way at the end of the reporting period. The end of the main hearing is not in sight yet because the prosecutors have complemented the indictment on a number of occasions.

2.4.3.4. "Pay Toll Mafia" Case. – The judicial panel trying this case was notified by the police that an arrest warrant has been issued against the former Serbia Roads public company Financial Director, who is at large. Nedeljković was not initially indicted but his complicity was explicitly corroborated by the telephone conversations between the members of this organised crime group, which were presented as evidence in court, and the police investigation. The transcripts of the conversations were made public in TV B92's show *B92 Investigates*. A witness by the name of Jovanović even testified in court that Nedeljković was the ring-leader of this organised crime group. The police stated that former Serbia Roads employee and potential witness Miroslav Klopanović was also on the run. One of the defendants, Savatije Jović, committed suicide in his apartment in Niš.

The recording made by witness Goran Milošević, also a former Serbia Roads employee, disappeared from the court case file. The recording unambiguously proves the fraudulent issuance of toll tickets and reveals the methods applied by this organised crime group to commit their crimes. The Belgrade District Court Organised Crime Chamber spokesperson Maja Kovačević issued a press statement saying that the court had a copy of the recording and explained that the original recording had been sent to the Belgrade Natural Sciences College for expertise, but was returned by the college messenger boy to the Palace of Justice and not to the Chamber, headquartered at a different location. The First Municipal Court, situated in the Palace of Justice, issued a public statement saying it had never received the recording. The original recording was not found by the end of the reporting period.

Former chief of the Security Intelligence Agency (BIA) Goran Petrović testified of the links between the members of the so-called pay toll mafia and state authorities. He stated that the members of this crime group were alerted to the forthcoming arrests after a meeting between the then leading police officials, Minister Dragan Jočić and Police General Miroslav Milošević and BIA chief Rade Bulatović. Petrović said he got this information from the BIA agents working on the case. The defence counsels objected, quoting hearsay. Petrović underlined that Milošević's wife was employed as a lawyer in Serbia Roads at the time the crimes in the indictment were committed.

The budget inspection in December filed a criminal report against a senior New Serbia party member Branko Jocić, the former Serbia Roads Director General. The report prompted an investigation and financial court inspection. Jocić is suspected of forging documents on company outlays and violating the Act on the Budget System by spending tens of millions of Euros of the company funds more than planned in the state budget. Jocić denied he even knew Miloš Nedeljković,

who held the post of Financial Director at the time he was the company Director General.

2.4.3.5. "Petroleum Mafia" Case. – The special prosecutor's indictment against the so-called petroleum mafia came into force in late March 2008. Twenty-one persons are charged with the crimes of bribery, abuse of post and criminal conspiracy. Miša Stojanović, Dalibor Vidaković, Dejan Terzić, Srđan Knežević and Nenad Jovanović are indicted for abuse of post and Jovanka Vukša and Siniša Popadić for aiding and abetting them. Apart from the money they earned on the discrepancies between the purchase and sale prices, they also evaded paying excise and other taxes, thus illicitly gaining over 13 million dinars.

The proceedings against the main defendant, Miša Stojanović, have been separated from the trial of others, due to his seriously impaired psychological state. Stojanović was referred to the Belgrade District Court Hospital for two-month evaluation after the court expert testified of his psychological problems.

2.4.3.6. "Anton Stanaj" Case. – The Belgrade Special Court opened the trial of an organised crime group charged with illegal imports of cigarettes masterminded by Anton Stanaj. In the 2004–2007 period, this criminal group imported cigarettes reportedly to market them in Montenegro. However, it shipped them from unregistered storage houses in Podgorica and Pljevlja to Serbia and then onwards, to other European countries. According to the indictment, the group smuggled 44,000 cartons of cigarettes, thus incurring the Serbian budget losses amounting to 63 million Euros. Stanaj refused to declare himself on the counts, while his co-defendant Paja Jurić dismissed them, claiming the cigarettes he had imported had always undergone customs control and that they were only transiting through Serbia. Twenty-five other people have also been indicted for this crime.

2.4.3.7. "*Belgrade City Transport Mafia" Case.* – The Supreme Court of Serbia upheld the defence appeals and overturned the first-instance verdict delivered by the special court on June 26 2007. The Special Organised Crime Chamber had found the group guilty of forging public transport tickets and monthly passes and incurring 128 million dinars of damages to this public company.

Gojko Samardžić was convicted to 6 years and three months in jail and Goran Karović to four years and three months in jail. Radovan Spasenović and Milovan Petrović were each sentenced to three years in jail, while Dragan Martinović, Boriša Pandurević, Nebojša Grujičić and Goran Dacić were sentenced to two and a half years' imprisonment each. Vojkan Milanović, Žarko Radosavljević and Nenad Miškov were each sentenced to two years and three months in jail, while Darko Grahovac, Marko Bugarski and Borislav Ivanović were convicted to two-year prison sentences each. Radoslav Brković was sentenced to 18 months and Mladen Đujić to 16 months in jail.

The case will be retried. The Supreme Court stated that it overturned the verdict because of the gross violations of the procedure, because the text of the

judgment was unclear and contradictory and the reasons on all the decisive facts were explained insufficiently clearly, wherefore the circumstances of fact were incompletely and incorrectly established and it had been unable to establish whether criminal law was correctly applied.

2.4.3.8. "Wahhabi" Case. – The Special Organised Crime Prosecution Office in 2008 filed an indictment against a group of Novi Pazar Wahhabis. The fifteen defendants are charged with criminal conspiracy to commit crimes against the constitutional order in relation to the crimes of terrorism and unlawful possession of weapons and explosive material, and with planning the assassination of Mufti Zukorlić. Under the indictment, the Wahhabis were in contact with their think-alikes, ideologues and mentors in Bosnia-Herzegovina, Saudi Arabia, Austria by telephone, e-mail and received from them instructions recorded on CDs.

One of the defendants, 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 a 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.[622] In mid-April 2007, the Special Organised Crime Prosecution Office stated that this case has been declared a state secret.[623]

The Special Organised Crime Chamber opened the trial of the Wahhabis in January 2008. The main defendant, Fuad Hodžić, dismissed the charges, as did Ismail Prentić and Erhan Smajlović. Hodžić accused Mufti Zukorlić of conducting repression in Novi Pazar with his group of followers. Zukorlić, who heads the Islamic Community in Serbia, testified at the trial, but gave negative answers to most questions posed by the judges. He was of the view that the goal of his testimony was to personally and professionally disqualify him and continue the hue and cry against him and the Islamic Community in Serbia.

2.4.3.9. "Tobacco Mafia" Case. – In 2008, the judicial authorities combating organised crime continued proceedings against three organised crime groups charged with the trafficking and smuggling of cigarettes in the 1990s.[624]

The Special Organised Crime Prosecution Office charged Stanko Subotić *aka* Cane and 14 other persons, including former Federal Customs Bureau chief Mihalj Kertes, with smuggling cigarettes and illicit gain of 56 million DM and 8 million USD in the nineties. With the consent of the prosecutors and the defence, the proceedings against Subotić and another four fugitive defendants were separated to ensure the efficiency of the proceedings.

Stanko Subotić was arrested at the Moscow airport Sheremetyevo on 28 April on the basis of an international arrest warrant. He was placed under custody pend-

622 *B92 News*, 14 September, www.b92.net.

623 *B92 News*, 16 April, www.b92.net.

624 More on proceedings against these groups in 2007 in *Report 2007*, II 2.5.2.7.

ing extradition but Russia rejected the Serbian judicial authorities' request to hand him over. The Supreme Court of Serbia dismissed as ungrounded the appeal of the Special Court decision to try him *in absentia* filed by Subotić's counsels.

Fugitive Stevan Banović, former Customs Bureau employee who also stands accused of cigarette smuggling in this case, was arrested at Belgrade Airport on 22 April 08.

The defendants presented their defence in 2008; most of them denied the charges in the indictment. Subotić's defence team published an ad in the print media, claiming that the indictment was politically motivated, that Subotić was denied the right to a fair trial and that his counsels were denied the right to help him defend himself in the best way. The Culture Ministry reacted to the publication of the ad, noting that it constituted interference in the trial although it did not constitute a misdemeanour under the media-related laws. Acting Republican Prosecutor Slobodan Radovanović called on the Serbian and Belgrade Bar Associations to launch disciplinary proceedings against Subotić's counsels. They, in turn, reported Radovanović to the Ethical Council of the Association of Prosecutors of Serbia, asking it to end the "intimidation" and take Radovanović to task in accordance with the Association's Statute and enactments.

The indictment and international arrest warrant against Subotić and the decision on his custody are still in force.

Media reported that the indictment did not include the names of all those on whom the police had evidence of involvement in cigarette trafficking and mentioned that the following people were implicated as well: Jovica Stanišić, Miroslav Mišković, Mirko Vučurević, Milorad Vučelić, Mladen Grujić, Petar Komljenović, Dušimir Zabunović.[625]

The trial of the so-called Badža Group also continued in 2008. Nine members of this group have been charged with the illegal import and sale of cigarettes in Serbia in 1997 and pocketing two million USD. Apart from the main defendant, Siniša Stojčić, the brother of a state security official gunned down in the nineties Radovan Stojčić *aka* Badža, the following people are also accused of cigarette trafficking: Dejan Milenović (owner and director of the company „Deks"), Petar Milenković (former Assistant Chief of the Niš Customs Office and Kertes' adviser), Stojan Mišić (former Assistant Police Minister), Radisav Gvozdenović (former Chief of the Niš Police), Nenad Živadinović (former Chief of the Zaječar Police), Nebojša Nikolić and Zdravko Hristov.

The organised crime authorities also continued the investigation into an organised crime group suspected of cigarette smuggling and masterminded by the son and widow of the late Serbian and Yugoslav leader and war crime indictee Slobodan

625 "Subotić Trial Opens", *B92 News*, 19 May 2008, http://www.b92.net/info/komentari.php?nav_id=299332, "Arrest all Tobacco Smugglers", *Blic*, Topic of the Day, http://www.blic.rs/temadana.php?id=6834, accessed on 31 December 2008.

Milošević, Marko Milošević and Mirjana Marković. This organised crime group is also believed to comprise six other people and Bojana Bajrušević, the widow of Tref company owner Vladimir Kovačević. Marko Milošević is believed to have been behind Tref's operations. An international arrest warrant was issued against Milošević and Marković, but Russia has granted them asylum and it is highly unlikely that they will appear before the Serbian courts. Serbian media claimed that their application for asylum in Russia was accompanied by strong pressures on the Serbian judiciary not to launch any criminal proceedings against them for fear that such charges would constitute a formal obstacle to Russia's approval of the asylum status.

The Special Court withdrew the Interpol arrest warrant issued against Bojana Bajrušević and accepted the bail of 370,000 Euros she offered in exchange for not being remanded in custody. It took the view that Bajrušević could offer evidence sufficient to file an indictment against Milošević and Marković.

2.4.3.10. "City Waste Disposal" Case. – The Special Organised Crime Prosecution Office in May filed an indictment against 34 persons for abuse in the Belgrade public company charged with waste disposal. Former company director Dragan Ignjatović dismissed the counts in the indictment at the beginning of the main hearing in mid-November.

The members of this group are charged with criminal conspiracy, abuse of post, money laundering and tax evasion. They are believed to have illegally gained 374 million dinars. Besides Ignjatović, owner and director of Best internacional, Best kompani and Best tobako Milan Kuzmanov, owner and director of the Mionica firm Hidraulik sistem Goran Puce and 31 other people have been charged with these crimes. The first three are accused of establishing the criminal group for illicit gain.

According to the indictment, the three men and Nebojša Drulović, the owner of the Belgrade company Faplos, conspired to issue false invoices and bills of lading on the sale of hydraulic and other equipment to the City Waste Disposal company but never actually delivered the goods.

The City Waste Disposal company thus had fictitious dues to the alleged suppliers, while the companies of other indictees were tasked with exchanging forged documents, invoices and bills of lading to create a fictitious inflow and outflow of goods from their companies to Hidraulik sistem and Faplos for the products these two firms allegedly delivered to the City Waste Disposal company.

The City Waste Disposal company paid all its fictitious dues and the money was then laundered via companies in Cyprus and Austria.

2.4.3.11. "Kertes" Case. – A large number of witnesses confirmed at the trial of former Federal Customs Bureau chief Mihalj Kertes before the Special Organised Crime Department that money was siphoned out of Serbia without control.

Kertes is charged with abuse of post and transfer of at least 21 million DM from the state budget to bank accounts in Cyprus in the nineties.

The witnesses testified in detail about how the money was taken out from Serbia but were mostly unable to explain in which accounts the funds ended up. Former Dimitrovgrad and Subotica customs chief Lazar Šarac admitted he had transferred at least 21 million DM to Cyprus together with Kertes on two occasions. Witnesses also testified that the money was first taken to Timisoara, Sophia and Bucharest and then flown over to Cyprus. Kertes was released in mid-March, after spending a year in custody.

2.4.4. Other Court Proceedings, Investigations, Criminal Reports and Arrests Related to Organised Crime

After its investigation, the Special Organised Crime Prosecution Office established that Rade Terzić was not a member of an organised crime group and that this former district prosecutor would be held accountable for criminal abuse of post, which is a much milder crime than criminal conspiracy. Terzić is charged with helping effect the release the members of the so-called Zemun Clan from custody. Terzić's trial was to have begun in March but the Smederevo Court declared it did not have jurisdiction loci to hear the case. The case was referred to the Second Municipal Court in Belgrade and the Belgrade Second Municipal Prosecution Office, which asked to be recused because Terzić had worked in the Office.

The First Municipal Prosecution Office in Belgrade halted the criminal prosecution of former chief of Belgrade police Milan Obradović, who had allegedly extorted confessions from the members of the so-called Maka Group suspected of murdering police general Boško Buha. The alleged extortion of confessions and torture of the suspects was committed by the Zemun Clan. The First Municipal Court in Belgrade is still conducting an investigation against Ulemek, former deputy chief of BIA Milorad Bracanović and police inspector Slobodan Pažin, suspecting them of extorting the confessions. Bracanović and Obradović had been arrested and spent over two months in custody. The decision to drop the prosecution of Obradović with the consent of the Republican and Organised Crime Prosecution Offices came nearly four years after his arrest, only after the DSS suffered election defeat and a new Government was formed in Serbia.

In coordination with the Special Organised Crime Prosecution Office, the police arrested a ten-member group comprising lawyers, MIA employees, doctors and go-betweens. They are suspected of a number of crimes of offering and accepting bribes, abuse of post and criminal conspiracy for illicit material gain in the Belgrade, Šabac, Kragujevac and Jagodina areas in 2007 and until May 2008, when they were arrested. The lawyers are alleged to have masterminded the group and, in cooperation with doctors and the police, issued false medical certificates and records allowing the release of their clients. The forged medical certificates were issued at the Belgrade Military Medical Academy. Well-known Belgrade lawyer Nebojša

Pavlović and former Juvenile Justice Department Chief Slavoljub Mitrović are presumed to have been the ring-leaders of this group.

The Monaco police in mid-October arrested an unnamed Serbian national and a Bosnian national by the name of Duško Poznan, suspected of belonging to the Pink Panther organised crime group, which is believed to have committed 100 armed robberies in nearly 20 countries. The Special Organised Crime Chamber judicial panel issued a first-instance judgment against three Pink Panther members in October 2007, finding them guilty of robbery and other crimes. Aleksandar Radulović was convicted to 7 years' imprisonment, Đorđe Rašović to six and a half years in jail and Snežana Panajotović to three years and two months in prison. The Supreme Court of Serbia stated in October 2008 that it upheld the Special Prosecutor's appeal and overturned the verdict and ordered a retrial; it also modified the penalty handed down for forging documents. Radulović and Rašović were each sentenced to 10 months in jail and Snežana Panajotović to five months' imprisonment.

In cooperation with the Special Organised Crime Prosecution Office and the tax police, the Jagodina Criminal Police Directorate arrested 25 people, while 4 suspects are still at large. They were arrested on suspicion of having committed the crimes of criminal conspiracy, abuse of post, accepting and offering bribes, money laundering, forgery of official documents and tax evasion. The group purchased secondary raw material and other goods for cash, forged invoices and thus illicitly gained over 3 million Euros and incurred over 1.250 million Euros of damages to the Serbian budget.

2.5. Human Rights Situation in Kosovo

2.5.1. Introduction

After the status negotiations between the Serbian government and the representatives of Kosovo Albanians, mediated by the so-called "Troika" (US/EU/Russia), did not produce any results, the Assembly of Kosovo declared the independence of the Republic of Kosovo by a unanimous quorum (109 members present). The eleven MPs representing the Serbian minority community boycotted the vote, whereas the other nine representatives belonging to other minority communities took part in the vote.

On 18 February 2008, the National Assembly of Serbia declared the unilateral declaration of independence void, after the Serbian Constitutional Court found the act illegal and against the UN Charter, the Constitution of the Republic of Serbia, the Helsinki Final Act, UN Security Council Resolution 1244[626] and the conclusions of the Badinter Commission.[627] 53 states recognised Kosovo by

626 UN doc. S/RES/1244, 10 June 1999.

627 Decision of the National Assembly of the Republic of Serbia of 18 February 2008, available at: http://www.parlament.sr.gov.yu/content/lat/akta/akta_detalji.asp?Id=367&t=O.

2009.[628] In October 2008, the UN General Assembly backed Serbia's proposal and the International Court of Justice (ICJ) was asked to deliver an advisory opinion on the legality of the decision of the Provisional Institutions of Self-Governance in Kosovo (PISG) to unilaterally declare the independence of Kosovo.

In the field, the year 2008 was marked by dramatically increasing confusion over the competencies of the international and local institutions operating in Kosovo. The international presence in Kosovo underwent profound changes in accordance with the guidelines given in the Ahtisaari Plan,[629] a document that has never been formally endorsed by the UN Security Council. In February 2008, the International Steering Group (ISG), comprising key international stakeholders, appointed an International Civilian Representative (ICR), who is at the same time the EU Special Representative in Kosovo and who was nominated by the EU Council. According to the Ahtisaari Plan, "the ICR will be the final authority in Kosovo regarding the interpretation of the civilian aspects of the settlement [... and] will be supported by an International Civilian Office (ICO). The ICO will be smaller and its role will be substantially different from the role of UNMIK. [...] Unlike UNMIK, the ICR will not have an executive mandate to administer Kosovo."[630]

A further novelty on the institutional plane was the arrival of EULEX, a technical EU Rule of Law Mission in Kosovo that had been also envisioned by the Ahtisaari Plan and may be perceived as a continuation of the international civil presence in Kosovo in the area of rule of law. The EULEX – composed of around 2,000 police officers, prosecutors, judges and civil servants – was approved by the European Council in December 2007[631], but its deployment began only in late 2008/early 2009.

Although the institutional role of UNMIK and its responsibilities nominally remain the same, as the UN SC Resolution 1244 is still in effect, the factual situation is apparently developing in quite the opposite direction. UNMIK has transferred almost all of its competencies to the local institutions and to EULEX and, as UN Secretary General Ban Ki-Moon reported to the Security Council, "following the entry into force of the Kosovo constitution, [...] UNMIK will no longer be able to perform effectively the vast majority of its tasks as an interim administration"[632].

628 Twenty-two of the 27 EU states recognised Kosovo.

629 Comprehensive Proposal for the Kosovo Status Settlement, Addendum to the Letter dated 26 March 2007 from the UN Secretary-General addressed to the President of the UN Security Council (S/2007/168).

630 Andrea de Guttry, *The European Union Rule of Law Mission in Kosovo: Remarks on Its Legality and Its Relations with UNMIK*, Scuola Superiore Sant'Anna, Pisa, Italy, 2007, p. 4.

631 Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO of 4 February 2008 (L 42/92).

632 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 12 June 2008, S/2008/354, p. 5.

The coexistence of UNMIK, NATO/KFOR, EULEX, ICR, ICO and Kosovo Albanian institutions has become a factor of mounting confusion on who's responsible for what. The mixture of different local and international actors without a clear delineation of their competencies contributes to the pessimism with regards to their effectiveness in ensuring an adequate level of protection of human rights in the province.

2.5.2. Human Rights in Kosovo – Legislation in 2008

2.5.2.1. Certain Aspects of the Legal System in Kosovo

Inconsistency of the Different Sources of Law. – In the reporting period, the legal system in Kosovo became an even more perplexing amalgam of legal texts coming from a number of different sources. Not only did most of the legal acts applicable in 2007 remain in force; an entirely new set of laws came into effect after the unilateral declaration of independence. The specific feature of these new legal texts compared to the already applicable ones is that they are not promulgated by the Special Representative of the Secretary General (hereinafter: SRSG), but by the President of the unilaterally declared Republic of Kosovo (hereinafter: President of the Republic of Kosovo), thus fully reflecting the intention of the current political leadership to establish fully-fledged statehood in the territory.[633] This is, however, very much complicated by the fact that UNSC Resolution 1244 is still in force.[634]

A laborious analysis of the existing legal norms shows that the following categories of legal texts were in force in Kosovo in 2008: a) regulations and subsidiary instruments issued by UNMIK, b) laws in force in Kosovo on 22 March 1989,[635] c) laws in force in Kosovo after 22 March 1989, which are not discriminatory and are in accordance with international human rights instruments, under the condition that their subject matter is not covered by other sources of law,[636] d) in-

633 The "Constitution of the unilaterally declared Republic of Kosovo" in Article 84 provides that the "President of the Republic of Kosovo" shall promulgate laws approved by the "Assembly of Kosovo".

634 According to the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 12 June 2008, "pending guidance from the Council, the United Nations would continue to operate on the understanding that Resolution 1244 (1999) remained in force and that UNMIK would continue to implement its mandate in the light of the evolving circumstances." However, according to the Report, practical implications of UNSC Resolution 1244 "will depend on evolving circumstances". In the same document, the UN Secretary General stresses that "the international responsibility of the United Nations will be limited to the extent of its effective operational control". UN Security Council, S/2008/354, pp. 2–4.

635 Article 1 of UNMIK Regulation 1999/24 On the Law Applicable in Kosovo of 12 December 1999 as amended by UNMIK Regulation 2000/59 of 27 October 2000.

636 *Ibid.* The supremacy of the legal system imposed by the UN administration was realised recognising the coexistence of UNMIK law with pre-1999 domestic law, but also considering the latter as law of lesser strength than UNMIK law.

ternational human rights instruments directly applicable in Kosovo;[637] e) laws enacted by the Assembly of Kosovo (PISG)[638] and promulgated by the SRSG;[639] f) laws enacted by the Assembly of the Republic of Kosovo and promulgated by the President of the Republic of Kosovo;[640] g) subsidiary legislation adopted by the Provisional Institutions of Self Governance in Kosovo (further: PISG), h) subsidiary legislation adopted by the institutions of the Republic of Kosovo.

Not only has the number of applicable laws significantly grown during the reporting period; it is now difficult, if not impossible, to say which legal texts have formal supremacy over others. Moreover, the legal validity of the Constitution of the Republic of Kosovo and the laws promulgated after the unilateral declaration of independence is questionable. The constitutional act of the unilaterally declared Republic of Kosovo is designed in such a way as to effectively divest UNMIK of its powers as an interim civil administration. Yet, UNSC Resolution 1244 is still in force and, although the reconfiguration of UNMIK seemed to lead to a transfer of all its legislative and executive authority to the local institutions, some recent political developments may suggest that this process is not a linear one. For instance, in his Letter of 12 June 2008 addressed to the President of the Republic of Serbia[641], the Secretary General of the United Nations stated that additional local and districts courts serving Serb-majority areas would be created and that they would operate within the Kosovo court system under the applicable law within the framework of UNSC Resolution 1244 (1999).[642] This clearly implies the recovery of certain UNMIK functions, at least in the field of the organisation and management of judiciary.

The legal and institutional system in the province becomes even more perplexing when the mandate of the International Civil Representative (ICR) is taken

637 Although Kosovo does not have international legal subjectivity it needs to become a party to an international treaty, major human rights instruments are directly applicable in its territory by virtue of Article 1 of UNMIK Regulation 1999/24 and Chapter 3 of UNMIK Regulation No. 2001/9 On the Constitutional Framework for Provisional Self-Government in Kosovo of 15 May 2001. The "Constitution of the unilaterally declared Republic of Kosovo" also guarantees their direct applicability in Kosovo.

638 In the period in which the Assembly was part of the Provisional Institutions of Self Governance in Kosovo.

639 Articles 9.1.44 and 9.1.45 of UNMIK Regulation No. 2001/9 On the Constitutional Framework for Provisional Self-Government in Kosovo of 15 May 2001.

640 BCHR here refers to the legal texts enacted and promulgated by the institutions of the "Republic of Kosovo" after its unilateral declaration of independence.

641 *See* UN Security Council, S/2008/354, Annex 1, Letter of 12 June 2008 from the Secretary-General to Serbia's President Mr. Boris Tadić.

642 According to the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 24 November 2008: "the courthouse complex in northern Mitrovica has been recently made operational on a limited basis under UNMIK control, applying UNMIK law only and staffed by UNMIK personnel for a period of up to 60 days from the opening of the courthouse; [a] phased plan has provided a framework for current and future judicial operations."; S/2008/692, p. 9.

into consideration. According to the Ahtisaari Plan, the ICR shall supervise the implementation of this document. Hence, the mandate of ICR comprises certain powers on the basis of which the ICR can exercise significant influence over the legal system in Kosovo. According to Article 2 of the Comprehensive Proposal, the ICR "shall take corrective measures to remedy, as necessary, any actions taken by the Kosovo authorities that the ICR deems to be a breach of this Settlement, or seriously undermine the rule of law, or to be otherwise inconsistent with the terms or spirit of this Settlement; such corrective measures may include, but are not limited to, annulment of laws or decisions adopted by Kosovo authorities".

Accessibility of the Applicable Laws. – As noted in the previous reporting period, not only is it hard to grasp which law in Kosovo ought to be applied in a concrete case; there is also a problem regarding the very accessibility of the laws. Although certain improvements have been noted after the creation of the Office for Management and Administration of the Official Gazette, Kosovo laws are still not available in libraries or other public venues and can be accessed only via the Internet. The old Yugoslav laws formally still applicable in Kosovo are almost impossible to find. Furthermore, quite a few of them are inaccurately translated into the languages of the minority communities. Although the Official Gazette of Kosovo should be published in five languages, including Albanian and Serbian, which are the official languages in Kosovo, there is no guarantee that the laws convey the same meaning in the different language versions. To add to the legal uncertainty, several pieces of legislation were published in the Official Gazette with inaccurate amendments or in total ignorance of amendments to the laws made by the promulgating UNMIK regulations and with incorrect references to the dates of adoption, promulgation or entry into force.

Supersedence of Laws and Vacatio Legis. – Like the UNMIK regulations, the laws adopted by the "Assembly of the Republic of Kosovo" also rarely specify which legal acts they have replaced. As a rule, they merely contain an omnibus provision stating that the law supersedes all previous legal acts which are inconsistent with its text. Needless to say, such a vague provision does not clarify which laws are superseded by the new one and which laws continue to remain in force.

The lack of *vacatio legis* additionally impedes the efficiency of the legal system. This constant shortcoming of legal acts brought by UNMIK – an issue raised by the Ombudsperson Institution in Kosovo many times – remains a topical problem. The above-described shortcomings of the legal system in Kosovo, coupled with the extremely low degree of implementation of laws in force, have led to the situation which is "often inconsistent with elementary rule of law principles".[643]

There are still concerns that the serious flaws of the manner in which the international administration has been exercising its legislative powers could become tenacious. In other words, it seems that while transferring its competences, the in-

643 Ombudsperson Institution in Kosovo, *Annual Report for 2007–2008*, Priština, 2008, p. 11.

ternational administration has transferred to the local institutions not only its good practices but its weaknesses as well.

2.5.2.2. New Legislation Related to Human Rights

The previous year has witnessed a giant leap in the quality and ambit of the legal documents guaranteeing human and minority rights in the province. Although the legality of these new legal texts will depend on the future political settlement of Kosovo's status, the fact that they are factually being applied in Kosovo renders meaningful the analysis of their provisions related to human rights in the interest of people living in Kosovo. The titles of the enactments used in Kosovo shall hereinafter be cited verbatim to avoid any ambiguity on which enactments the Report refers to. The most relevant for the present analysis are the Constitution, the Law on the Protection and Promotion of the Rights of Communities and Their Members in Kosovo and the Law on the Constitutional Court of the Republic of Kosovo.

On 9 April 2008, the Assembly of the Republic of Kosovo passed the Constitution of the Republic of Kosovo, which came into effect on 15 June 2008. This legal act is completely based on the Ahtisaari Plan and its provisions shall be interpreted as to be in compliance with this document: "[i]f there are inconsistencies between the provisions of this Constitution, laws or other legal acts (...) and the provisions of the said Settlement, the latter shall prevail" (Art. 143 (3) of the Constitution).

Chapter II of the Constitution is entirely dedicated to the protection of human rights and fundamental freedoms. It endorses as directly applicable in the province all the international human rights instruments[644] that have been already introduced in the Kosovo legal framework by the international administration. The provisions of Article 22 also provide that the enlisted international instruments shall have priority over laws and other acts of the local institutions in case of conflict. Moreover, Article 53 specifies that "internationally recognised human rights and fundamental freedoms guaranteed by this act shall be interpreted consistent with the judgments of the European Court of Human Rights".

The Constitution proclaims the general prohibition of discrimination. In Article 24, it provides that "no one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status". Although the cited provision refers to

644 Article 22. These include the following international human rights instruments: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights and its Protocols; the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; the Council of Europe Framework Convention for the Protection of National Minorities; the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child.

a long list of grounds of potential discriminatory behaviour, it is unclear why its wording and the listed grounds differ from the comparable provision in the Anti-Discrimination Law.[645] Article 24 also sets out the legal grounds for affirmative action measures, which are subsequently reinforced in Chapter III, dedicated to the rights of ethnic communities.

Chapter III endorses a number of rights aimed at granting broad legal protection to the communities "traditionally present on the territory of the Republic of Kosovo" and their members (Art. 57). It entitles them to "equitable representation in employment in public bodies and publicly owned enterprises at all levels, including in particular in the police service in areas inhabited by the respective Community" (Art. 61). It lists a number of rights that ought to protect the minority communities against assimilation and lays down the responsibilities of the authorities in Kosovo in this regard. This chapter also provides for the creation of a Consultative Council for Communities aimed at securing their rights at the central level and several other mechanisms that shall secure adequate representation of the minority communities in the institutions of local government.

The Constitution also envisions the establishment of a Constitutional Court that shall be a final authority for the interpretation of its provisions and, when requested, deliver opinions on compliance of laws with the supreme legal act.

The Law on Protection and Promotion of the Rights of Communities and Their Members in Kosovo,[646] adopted as one of the laws from the so-called "Ahtisaari package", provides for specific measures aimed at promoting and protecting the rights of the traditional communities in Kosovo and their members. Its provisions lay down the key aspects of the identity of a minority community to be protected, such as: identity (Art. 2), language (Art. 4), symbols (Art. 5), culture (Art. 5), access to information (Art. 6), right to freedom of belief, conscience and religion (Art. 7), education (Art. 8), economic opportunities (Art. 9), health (Art. 11), political participation and representation (Art. 11), etc.

Having in mind the hitherto legislation on the educational system in Kosovo, the most radical shift was introduced by Articles 8.5 and 8.6 dealing with the right to education of the minority communities. Article 8.5 envisages that "schools which teach in the Serbian Language may apply curricula or textbooks developed by the Ministry of Education of the Republic of Serbia upon notification to the Kosovo Ministry of Education, Science and Technology according to procedures established in the Law on Local Education." Article 8.6 further provides that the University of North Mitrovica "shall be an autonomous public institution of higher learning" and that the "municipality of North Mitrovica shall have authority to exercise responsibility for this Serbian language university as governed by law".

645 Article 2 of Anti-discrimination Law No. 2004/32, promulgated by UNMIK Regulation 2004/32 On the Promulgation of the Anti-discrimination Law, of 20 August 2004.

646 Law No. 03/L-047 adopted by the "Assembly of the Republic of Kosovo" on 13 March 2008.

The Law on the Constitutional Court[647] departs from the notion that the Court is supposed to have broad authority to protect human rights and minority communities' rights guaranteed in the constitutional act and other relevant laws. According to Article 47 of this legal text, "every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority". The individual request may be submitted after the applicant has exhausted all legal remedies provided by the law.

According to Chapter VIII of the Constitution, this judicial body is supposed to have the final authority on the interpretation of the Constitution and the adherence of the laws to the principles enshrined in it. There was an idea to establish a body that would be competent for interpreting laws and defining their place in the legal hierarchy ever since UNMIK began work. By bestowing the Constitutional Court with such jurisdiction, the Court may, ideally, play a fundamental role in bringing clarity into the legal system of Kosovo.

In order to secure participation of minority communities in the judicial appointment process, Article 6 prescribes the obligatory participation of a representative of the Consultative Committee for Communities in the process of reviewing the candidates. With the same aim, paragraph 6 of the Article stipulates that an invitation/call for nominating candidates shall be published in the print and electronic media "including those widely read by the Communities not in the majority in Republic of Kosovo".

2.5.3. Human Rights in Practice in 2008

The problem of legislation related to human rights and applicable in Kosovo lies not so much in its quality but rather in the lack of its proper implementation. The complexity of the legal system and the related lack of legal certainty, the low level of implementation of laws and bylaws, the non-execution of court decisions and an extremely weak judiciary tottering under a huge backlog, as well as the general lack of accountability of judges, prosecutors and authorities at central and municipal levels, "constitute and contribute to the ongoing human rights violations of the Kosovo population".[648]

This creates an unfortunate picture in which the legal texts are being passed only for the sake of demonstrating that human rights standards are being achieved rather than because there is an adequate institutional set-up and readiness to implement them.

2.5.3.1. Implementation and Application of Law on the Use of Official Languages. – The implementation of the 2006 Law on the Use of Official Languag-

647 Law No. 03/L-121 adopted by the "Assembly of Kosovo" on 16 December 2008, promulgated by Decree No. DL-070-2008 of the "President of Republic of Kosovo" of 30 December 2008.

648 Ombudsperson Institution in Kosovo, *Annual Report for 2007–2008*, Priština, 2008, p. 10.

es[649] remained unsatisfactory at both the central and local levels due to the lack of financial resources, non-existence of bylaws necessary for its implementation and the passiveness of the Language Commission.[650] According to the OSCE Mission in Kosovo, most municipalities "continue to receive from Ministries and other central institutions documents not translated in Serbian or whose Serbian translation is of poor quality, but do not report these cases to the Language Commission".[651]

Although this body was set up back in 2007, no public campaign accompanied its establishment and the general population remained unaware of its existence. The Commission still does not have its own budget, resources or office space, while "the appointment and composition of the Commission has not enabled the effective participation and representation of all linguistic communities",[652] which is in contravention of the provisions of Law on the Use of Official Languages. According to the available information, only one complaint has been submitted to this body so far.

The minority communities in Kosovo are not aware of the job vacancies and ongoing competitions in the public and private sectors, given that they are hardly ever published in their languages in the local media. Members of the minority communities frequently receive official documents such as bills, bank account receipts, etc., issued only in one of the official languages. Very often, their personal names are written in the Albanian script instead of the Serbian Cyrillic Script or the scripts of the other languages in use in Kosovo. Only limited improvement has been registered in posting topographical signs in both official languages along the regional roads and most of the street names and other signs are still displayed only in the language of the majority community in the given settlement.

2.5.3.2. Implementation and Application of the Anti-Discrimination Law. – The Anti-Discrimination Law[653] is still merely a set of the well-conceived legal standards but with hardly any practical implications. The general lack of awareness of its provisions, combined with the lack of adequate instruments for its implementation and the lack of accountability of the central and local authorities, have led to widespread discrimination practices not sanctioned by courts or other competent bodies. Since its entry into force four years ago, domestic courts have received just a couple of cases alleging discrimination and, according to available information,

649 Law No. 02/L-37 On the Use of Languages as promulgated by UNMIK Regulation 2006/51 On the Promulgation of the Law on the Use of Languages of 20 October 2006.

650 The Language Commission was established by virtue of Article 32 of the Law No. 02/L-37 On the Use of Languages.

651 OSCE Mission in Kosovo, *Implementation of the Law on the Use of Languages by Kosovo Municipalities*, June 2008, p. 9.

652 *Ibid.*

653 Anti-discrimination Law No. 2004/32 promulgated by UNMIK Regulation 2004/32 On Promulgation of the Anti-discrimination Law, of 20 August 2004.

they have not yet taken any decisions based on the provisions of this advanced legal text.

The provision in the Constitution of Kosovo listing grounds of potential discriminatory behaviour does not mention age discrimination. It is unclear why age discrimination has been omitted, especially when one bears in mind that it is not a rare phenomenon in Kosovo.[654] Illustrative is the case *Group of complainants of Branch of Dentistry, Faculty of Medicine Against the Rectorate of the University of Prishtinë*[655] where the Acting Ombudsperson found that the decision of the respondent to refuse to shortlist or recruit the complainants for the teaching assistants' position, solely based on the age limit, led to discrimination based on age and breached the non-discrimination provisions of international and national human rights instruments.

2.5.3.3. Media. – Notwithstanding the advanced legislative framework regulating freedom of expression in Kosovo, its implementation still remains problematic and difficult. Kosovo has a low circulation of newspapers[656] and a media scene that often does not follow the standards of "fair information" and impartiality. Strong political pressures on journalists[657], coupled with the fact that part of the population – mostly IDPs and returnees – do not have access to virtually any sources of information, has ranked Kosovo amongst places that continue to face serious problems with respect to the freedom of the press and the individual right to be informed and produce information.

Kosovo's legislation guarantees members of minority communities the right to receive and provide information in their respective languages and the right to a special "quota" of representation in public media. According to Law on Radio Television of Kosovo (RTK),[658] Kosovo's public TV broadcaster should "serve and give voice to all ethnic communities in Kosovo, by dedicating no less than 10 percent of its programming budget and not less than 15 percent of its program time"[659]. However, the RTK Board has not been appointed yet, although the law entered into force two and a half years ago. Moreover, RTK is financially unstable, because of the absence of "sustainable financing mechanisms"[660] and

654 *See* Ombudsperson Institution in Kosovo, *Special Report On Age Discrimination in Kosovo*, Priština, 2006.

655 Ombudsperson Institution in Kosovo, *Annual Report for 2007–2008*, Priština, 2008, pp. 13–14.

656 The daily circulation of all newspapers in Kosovo stands at 25,000–30,000 copies.

657 *See* OSCE Mission in Kosovo, *Human Rights, Ethnic Relations and Democracy in Kosovo* (summer 2007 – summer 2008), p. 30.

658 Law No. 02/L-47, On Radio Television of Kosovo, promulgated by UNMIK Regulation 2006/14 of 11 April 2006.

659 *Ibid,* Art. 6 (6).

660 OSCE Mission in Kosovo, *Human Rights, Ethnic Relations and Democracy in Kosovo* (Summer 2007 – Summer 2008), p. 29.

because of the problems related to the collection of TV fees through the public electricity provider KEK.

The RTK program schedule still does not respect provisions of the Law on Radio Television of Kosovo, which stipulate that around 15 percent of its programming shall be broadcast in minority languages. Its programming for minorities is of low quality and does not meet the minimum standards required of a public broadcaster. According to several field studies, "minorities in Kosovo are not satisfied with the information they receive through the programs broadcast in the languages of minorities"[661]. Moreover, RTK coverage does not extend to the northern part of Kosovo and a large part of southern Kosovo (where Goranis and Bosniaks account for the majority population), but residents of these areas are nevertheless obliged to pay the RTK broadcasting fee.

The Fund for Support of Non-Majority, Multiethnic, and Disadvantaged Media,[662] UNMIK's endeavour to ensure the participation of minority communities in the media scene of Kosovo was *de facto* suspended in 2008. Actually, the Fund stopped with the distribution of grants back in 2007, although RTK transferred it €176,000. Moreover, the Draft Law on the Management of the Minority Media Fund had not been finalised by the end of the reporting period.

Of the total of 113 licensed broadcasters in Kosovo, 43 are from minority communities[663], but most of them are not self-sustainable because they lack funds and the support of UNMIK and local institutions.

Defamation remains a criminal offence in Kosovo, thus leaving open the possibility of political pressure on and interference in the work of over media professionals, TVs, newspapers and journalists. The Council of Europe's recommendations to "modernise" and to formulate in a "press-friendly" manner a Law on Defamation and Insult were not taken into account and the law remained unmodified in 2008.

2.5.3.4. Rule of Law and Security. – The destiny of 1,963 persons – most of them Kosovo Albanians – who had gone missing during and after the end of the 1999 conflict remains unknown.[664] The last months of 2008 were marked by speculations and serious investigative reports by local[665] and international media about the destiny of around 300 Serbs kidnapped after the end of the conflict and subsequently transported to Albania. According to former ICTY Chief Prosecutor Carla Del Ponte, their bodily organs were supposedly taken in illegal clinics in Albania

661 Humanitarian Law Centre, *The Beginning of the Implementation of the Law on the Promotion and Protection of Rights of Communities and Their Members in the Republic of Kosovo*, 2008, p. 87.

662 The fund was established in 2006 within the Office of the Prime Minister.

663 34 Serbian, 4 Bosniak, 3 Turkish, 2 Gorani and 1 Roma stations.

664 Human Rights Watch, *World Report 2009*, p. 412.

665 See *B92*, "Tajna žute kuće", http://www.b92.net/info/emisije/istrazuje.php.

and sold at the black market.[666] In June 2008, the Assembly of the Council of Europe nominated Dick Marty special rapporteur in this case.[667] The Government of Kosovo refused to investigate the allegations.

The Kosovo Police Service (KPS) registered around 50 ethnically motivated incidents in the first six months of 2008, 18 of them in the divided city of Kosovska Mitrovica/Mitrovicë.[668] Contrary to its prior practice, UNMIK did not provide any statistical figures on ethnically motivated incidents for 2008.

On 19 February 2008, two customs posts were attacked and burned down by Kosovo Serbs. The attacks were a sign of their opposition to Kosovo's independence. At the same time, police officers belonging to the Serbian minority community quit their jobs in the Kosovo Police Service on 17 March, after UNMIK decided to re-establish control over the courthouse of Northern Mitrovica. On that day KFOR tried to enter by force the building that was in the hands of the local Serbs since 14 March. One Ukrainian KFOR soldier was killed during the attack and another 150 people injured. Fortunately, the incidents did not escalate, but low-scale tension persisted in the subsequent months, resulting in renewed clashes on 4 August.

Few attacks were recorded against returnees belonging to the Serbian community. The most serious incidents registered included the assault on an elderly Serbian returnee in the area of Dečani/Deçan (May 2008)[669] and the shooting of Serbian inhabitants of the village of Suvi Do/Suhodoll[670] at Kosovska Mitrovica/Mitrovicë in April 2008.

On 26 June, there was a clash between Kosovo Serbs and Albanians in the ethnically mixed village of Berivojci/Berivojcë over the site for the construction of a new mosque. New clashes broke out on 4 July over the construction of a water pipeline for the ethnically mixed village of Suvi Do/Suhodoll. On 30 October, again in the area of Kosovska Mitrovica/Mitrovicë, there was an attempt by Kosovo Albanians to start the reconstruction of their homes without UNMIK's authorisation. The action provoked the immediate reaction of Kosovo Serbs in the vicinity. Order was restored only after KFOR intervened.[671]

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666 Paul Lewis, At Family Farm, Grim Claims of Organ Culling from Captured Serb Soldiers, in *"The Guardian"*, 25 November 2008, http://www.guardian.co.uk/world/2008/nov/25/kosovan-albanian-guerrillas-war-crime.

667 See for instance: *Deutsche Welle*, Investigation Launched into Kosovo Organ Trafficking, http://www.dw-world.de/dw/article/0,2144,3444303,00.html.

668 In 2007, 31 incidents were recorded in Mitrovica/Mitrovicë alone.

669 UN Security Council, S/2008/549, Monthly report to the United Nations on the operations of the Kosovo Force, May 2008, p. 2.

670 *Ibid.*; UNMIK/PR/1735, Thursday, 17 July 2008, SRSG statement on the pipeline project in Suvi Do/Suhodoll.

671 See UN Security Council, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 24.12.2008, p. 2.

There were fewer attacks on cultural and religious sites and heritage belonging to minority communities in 2008. In May, unknown persons damaged the windows and the roof of the Saint Sava Church (Orlović village) and several graves in its vicinity.[672] The properties of the monastery of Visoki Dečani were again targeted. In July, the municipality of Dečani/Deçan covered the remaining foundations of an ancient Orthodox church in the centre of the town, used in the last couple of years for dumping waste, and transformed the land into a public park without consulting the monastery or the competent authorities.[673]

There was no significant headway in the reconstruction of churches and other cultural heritage destroyed after 1999, in particular during the March 2004 riots, due to the lack of available funds and political will.

2.5.3.5. Repossession of Property'. – The 6-month deadline for submission of immovable property claims before the exclusively competent Kosovo Property Agency (KPA) expired in December 2007. In November 2007, the Ministry for Kosovo and Metohija of the Republic of Serbia and the NGO "Praxis" independently asked UNMIK to extend the awkwardly set deadline. However, UNMIK neither responded to the requests nor found it appropriate to extend the deadline within the 2008 timeframe of the KPA's full mandate to "receive and register and [...] resolve" the claims.[674]

In June 2008 the authorities of the unilaterally declared Republic of Kosovo attempted to alter the legal status of KPA under UNMIK Regulation 2006/50. These authorities adopted an act with a view to amend the Regulation "in order to reflect the Constitution of the Republic of Kosovo and other relevant instruments".[675] Pursuant to the act, KPA appeared to be placed under the control of local authorities and, provisionally, the ICR. UNMIK has not proclaimed the act by means of its own regulation, wherefore it is formally legally inexistent in the legal framework established under UNSC Resolution 1244. However, the situation raised serious concerns regarding the *de facto* application of this and similar acts of the local authorities and UNMIK's manifest acquiescence to such moves. The Serbian Ministry for Kosovo and Metohija tried to address the particular issue by immediately asking both UNMIK and KPA for their official views of KPA's legal status. UNMIK and KPA officially remained silent. In reaction, the Government of the Republic of Serbia provisionally suspended all activities of KPA in the territory of 'Serbia proper'.[676]

672 UN Security Council, S/2008/549, Monthly report to the United Nations on the operations of the Kosovo Force, May 2008, p. 2.

673 *Ibid.*

674 Article 3.1 of UNMIK Regulation 2006/50.

675 Preamble of Law No. 03/L-079 of the Assembly of the Republic of Kosovo, dated 13 June 2008.

676 At the time, KPA was operating in the territory of 'Serbia proper' through its offices in Belgrade, Kragujevac and Niš.

On 31 December 2008, UNMIK Regulation 2006/50 ceased to possess legal validity[677], *i.e.* in the absence of the explicit renewal of the regulation by the Special Representative of the Secretary-General KPA ceased to exist under the applicable UNMIK legal framework. Despite the arguable lack of UNMIK-provided legal grounds, KPA will continue to operate, under the mentioned local legal act, for at least a year with the financial support of the United Kingdom, Germany, Sweden, Switzerland and, possibly, a number of other EU countries.

Out of approximately 40,000 claims received until December 2007, KPA has managed to resolve over 18,000 claims. It should be noted that KPA adjudicated only non-contested cases. The most demanding work on the fair resolution of contested cases is yet to be conducted under the new, even more precarious circumstances.

Section 12 of UNMIK Regulation 2006/50 provided the possibility of appealing the decisions of the KPA Property Claims Commission (PCC) before the Supreme Court of Kosovo, *i.e.* a three-judge panel (two international and one local judge). However, this panel was not established in 2008, and there have been no clear indications as to when that would be done. The non-compensation of successful property claimants is another obstacle in the enjoyment of property rights. In cases where the successful claimants could not avail themselves of restitution in kind, the erstwhile Housing and Property Directorate and Housing and Property Claims Commission (HPD/HPCC), the predecessor of KPA's PCC, was granting in its decisions the right to an adequate compensation, the amount of which was to be determined on the basis of formulae set by the Housing and Property Directorate (HPD) and paid within 120 days of the Commission's decision on the right to restitution.[678] Despite the firm legal obligation and the capacity for passing the legislation that would regulate the problem of compensation, as well as the precise payment deadlines, HPD/KPA and UNMIK have not tackled the issue yet. A draft Law on Compensation was reportedly submitted to UNMIK in 2004, but no headway has been recorded in that respect although more than eight years have passed since this legal obligation was set. Due to the practical absence of the imperative compensation remedy and the omission of KPA and UNMIK to implement their legal obligations in respect of the HPCC decisions, a large number of successful claimants were in 2008 still prevented from realising their property-related rights.

In accordance with its mandate, KPA has also administered over 4,300 abandoned properties in Kosovo and, out of those, managed a rental scheme for over 2,500 properties. However, KPA does not guarantee any income for the property right holder if an occupant/tenant refuses to pay the rent. It is common knowledge that the process of collecting the rent manifestly fails in the prevailing number of the rent-related cases.

677 Section 22 of UNMIK Regulation 2006/50.

678 *See e.g.* Articles 3.3, 4.2, 4.4, and 4.5 of UNMIK Regulation 2000/60.

One of the common problems in the course of executing evictions is that KPA does not guarantee for any damages that occur on the movable and immovable property in relation to which the evictions are carried out, nor in the cases of the property placed under its administration, *i.e.* in the procedure regarding the application of the rental scheme. The most severe problem in this respect is the occurrence of the significant, if not total destruction of property during and immediately after the first eviction. Fearing total loss of the only residential facility they can live in, many owners have decided not to request or to reject the evictions of the unlawful occupants.

A special problem in the sense of ensuring long-lasting enjoyment of property rights relates to the lack of adequate protection of owners in the period after the first eviction. Namely, the unlawful occupants or others often illegally repossess the property within 24 hours from the eviction, by simply removing the KPA's seal from the property without authorisation. In such cases, the KPA does not have the obligation to carry out multiple evictions – the matter is transferred to the law enforcement authorities. However, the police and the public prosecutors in Kosovo rarely try to prosecute the perpetrators of repeated unlawful repossession.

Municipalities in Kosovo continue to perform the long-standing practice of expropriating property to the detriment of individual owners, seemingly pursuant to the still applicable 1978 Law on Expropriation of the Autonomous Socialist Province of Kosovo. The expropriations have been conducted in defiance of virtually all rules of the prescribed procedure – from the flawed determination of an underlying public interest, through the lack of relevant information management, to practically inexistent or nugatory compensations for thereby affected owners. The adoption of a new law is expected.

2.5.3.6. Economic Situation. – The overall economic situation in Kosovo continues to be a grim one. Kosovo remains affected by "[...] uncertain property rights and poor enforcement of contracts, corruption and insufficient energy supply as a result of weak governance of the provider KEK and infrastructure" which continue to weigh down the productiveness of Kosovo's economy.[679]

Unemployment is a problem seriously affecting all communities in Kosovo. However, the employment prospects of the minority communities are even worse. Many members of the minority communities, especially those living in enclaves, do not have any access to the job market and the unemployment rate in the enclaves varies from 70% to 100%[680]. These communities mostly derive their main source of income from agriculture, but there is still no progress in protecting their right to work and access to land, as in many cases their farms are occupied or the owners do not feel safe to cultivate them.

679 European Commission, *Kosovo (under UNSCR 1244) 2008 Progress Report*, Brussels, 2008, p. 32.

680 Ombudsperson Institution in Kosovo, *Annual Report for 2007–2008*, Priština, 2008, p. 42.

The Roma, Ashkali and Egyptian (RAE) communities remain the most vulnerable and marginalised groups in Kosovo. They experience the highest rates of unemployment, educational exclusion and infant mortality, and the greatest difficulties in accessing social services.

2.5.3.7. Returns. – The years-long problem of the stalled returns to Kosovo was additionally exacerbated by the political developments. Statistical data on the displaced population and statistics on returns[681] paint a straightforward picture of the failure of UNMIK and local institutions to ensure adequate conditions for the return of the minority communities. Only 254 persons returned to the province in the first six months of 2008, which clearly illustrates the mistrust of the new Kosovo institutions. The mistrust further deepened after the Kosovo Police Service (KPS) on several occasions asked NGOs organising 'Go and See Visits' (GSV)[682] not to provide this assistance to some IDPs as they were reportedly actively engaged in the 1999 conflict. One IDP was taken into custody during a GSV and accused of war crimes.

The institutions in Priština lack administrative skills and budgetary resources to successfully carry on the return process.[683] The Ministry for Communities and Returns of the Republic of Kosovo still has not addressed the issues related to management problems and other irregularities detected in 2008.[684]

Selective Public Debt Exemption. – The Kosovo Energy Corporation (KEK) has been consistently charging returnees with power supply bills for the electricity consumed during the period of their displacement. In May 2008, UNMIK passed an administrative direction[685] which eliminated the payments due for public utilities services for the properties under KPA administration. The bylaw did not address the same problems experienced by other property right holders.

In such a situation, KEK customers may opt to file complaints to KEK local offices. However, there are no KEK offices in most of the Serbian enclaves

681 According to UNHCR official estimates, 228,365 members of Kosovo minority communities were displaced since 1999. There are 207,069 Kosovo IDPs living in Serbia proper, 16,284 in Montenegro and 22,000 within Kosovo (so-called "internally-internally displaced"). The vast majority of them are Serbs and Roma. The number of returns in the 2000–2008 period totalled 18,232.

682 The 'Go and See' visits "enable people to visit their places of origin and see for themselves whether they can return. These visits are, as a rule, organised by the NGOs engaged in IDP returns and by IDP associations.

683 *See* Massimo Morati, Milica V. Matijević: *Sustainable Partnership for Returns in Kosovo (Individual Returns Facility) – Impact Assessment Report*, (Assessment prepared at the request of UNDP and UK Embassy), Priština, September 2008.

684 *See* European Commission, *Kosovo (under UNSCR 1244) 2008 Progress Report*, Brussels, 2008, p. 12–25.

685 UNMIK Administrative Direction 2008/5 implementing UNMIK Regulation 2006/50.

and a direct visit to the central office of KEK in Priština entails additional costs and security problems. According to available information, some of the claimants addressed competent municipal courts, but none of them were successful with their claims.

Fees for Electric Meters. – It has been reported that KEK charges returnees relatively high fees for activating power consumption meters (electric meters), although it is unreasonable to charge the activation of electric meters in houses reconstructed thanks to humanitarian assistance. Given that most returnees are extremely poor and in view of the unfortunate fact that the majority of the return-related projects do not cover this particular cost, the returnees are, in general, not able to cover the fees on their own. Therefore, they cannot start using and, consequently, paying for the used electric power. Such an approach runs also counter to basic logic of post-conflict reconstruction and is in contravention of UNMIK's implicit obligation to refrain from actions that may threaten or infringe access to adequate housing and sheltering.

Access to Construction Documents. – The process of obtaining the necessary construction permits from municipal authorities for the construction or refurbishment of residential units is encumbered by procrastination and unreasonable costs, posing an additional burden on the already extremely vulnerable returnee community. Obtaining the relevant documents continues to be a problem faced even by the international NGOs implementing return-related projects. The procedure for issuing the permits may last up to a year, and given the restricted freedom of movement and limited communication with municipal authorities, such a protracted period can be seen as a serious obstacle in the realisation of the right to freely choose a place of living and/or return, and the right to adequate housing.

Administration of Reconstructed but Currently Vacant Residential Property. – Displaced Serbs and members of other minority communities were alarmed after an initiative was launched to place the reconstructed but currently vacant residential property of minority communities at the disposal of the municipal authorities, to provide shelter to unsuccessful asylum seekers from Western European countries. Namely, the Project of Return and Reintegration in Kosovo that is supposed to become a lead project in the return sector, worth $5 million and financed by the EU and UNDP in Kosovo in cooperation with the Ministry for Return and Communities of the Republic of Kosovo, envisages as one of its results "[d]evelopment of a revised strategy for municipal administration of reconstructed empty property."[686] In the light of the above-mentioned problems related to the process of restitution of property in Kosovo, this may be perceived as yet another activity that may have far-reaching negative effects on returns to Kosovo.

686 EU/UNDP Project of Return and Reintegration in Kosovo (2008–2010), p. 11.

2.6. Prohibition of Discrimination

Discrimination remained a problem in 2008, *inter alia* due to the fact that a general anti-discrimination act still had not been adopted.[687] Notwithstanding systemic shortcomings, the state authorities have assumed a more responsible attitude towards the problem. They have begun admitting that there is discrimination in various walks of life and, moreover, undertaking more specific steps to stifle it.

The UN Resident Coordinator and UNDP Resident Representative spoke about the state of human rights in Serbia in the Belgrade Media Centre in September. Having concluded that Serbia has been making headway in this area, he highlighted that the members of the Roma national minority and persons with disabilities were in the most precarious situation. In his opinion, these two groups face numerous problems, the gravest being access to education. (*Danas*, 16 September, p. 2)

2.6.1. Neo-Nazism and Racism in Serbia

Numerous incidents were provoked in 2008 by members of a large number of neo-Nazi and clero-Fascist organisations. These organisations also actively promoted Nazi ideas in the year behind us, as the European Commission against Racism and Intolerance[688] assessed in its report with respect to the rights of national minorities in Serbia. The report criticises the "racial discrimination against Roma and other minorities" such as the Hungarian minority in Vojvodina and the Albanian minority in Serbia, notably in the Preševo, Bujanovac and Medveđa area "where this minority suffers from discrimination in areas such as access to education and the civil service, particularly the police and the judiciary". The Report lists examples of inefficient police and judicial reactions to racially motivated assaults and the desecration of religious sites and gravestones and concludes that the authorities have not taken the necessary steps to punish the perpetrators of these acts. The Commission also notes the presence of anti-Semitism, "expressed in the widespread and unencumbered sale of antisemitic books and other publications, as well as in acts of vandalism, including the desecration of graves and graffiti on the walls of synagogues and Jewish monuments".

In early January, the Novi Sad police filed a criminal report against several members of the neo-Nazi organisation National Formation for spreading racial, religious and national hatred. The criminal reports were filed because of an incident the neo-Nazis caused in October 2007. (*Politika*, 8 January, p. 9 and *Danas*, 8 January 2008, p. 33)

Swastikas and other Nazi symbols were drawn on the facades of buildings in the heart of Niš. The vandals inscribed the words National Formation next to them. (*Politika*, 9 January, p. 1)

687 See I.4.1.

688 The Commission is an expert Council of Europe body (editor's note.) The full report on Serbia, drafted in December 2007, and published in April 2008, can be accessed at www.coe.int/ecri.

In late January, the Novi Sad police filed criminal reports against Rudolf R. (20), Holik N. (21) and M. M. (17), all from Novi Sad, who had set fire to the pastry shop "Violeta" owned by an ethnic Albanian in the night of 2/3 September 2007. The three young men filmed the arson by camera and posted it on *YouTube*. (*Blic*, 24 January 2008, p. 14)

Fresh Nazi graffiti appeared in early February. Nazi symbols, the message "Off with the Roma to Camps" and the symbol of the organisation Stormfront were drawn on the facade of the Kraljevo elementary school Dimitrije Tucović. (*Kurir*, 3 February, p. 3)

In early March, unidentified perpetrators pelted with stones a number of bakeries owned by ethnic Albanians in Sombor. A "boycott of Albanian bakeries" was organised and residents of Sombor were advised not to shop there.[689]

In April, the media reported that the portrait of Adolf Hitler was hanging on the wall of a room in the Belgrade Hotel President. Many NGOs and the Israeli Ambassador called on the proprietor to take the picture down. He said he had hung the portrait for "commercial reasons" (*Politika*, 19 April, p. A8 and *Blic (Belgrade edition)*, 19 April, p. 4). Under huge public pressure, the hotel owner took the portrait off in late May, replacing it with a picture of the "Dayton Troika". (*Blic (Belgrade edition),* 21 May, p. 9)

The Niš police took into custody 24 people for disrupting public law and order in early May after the Kamenica villagers, disturbed by the rallying of a large number of young suspicious persons near their village, had reported them to the police. The suspects were found in possession of a large number of Nazi flags and other symbols. (*Politika,* 23 April, p. A12, and *Večernje novosti*, 23 April, p. 13)

The Čačak District Prosecutor filed criminal charges against five persons in May 2008 for inciting national, racial and religious hatred and intolerance (Art. 317 of the CPC). These fans of the Čačak soccer club Borac were indicted for insulting and assaulting Ghana player Soloman Opaka. In early June, 26 fans of the Čačak club were indicted for insulting on racial grounds the then Borac player Mike Temwanjera from Zimbabwe. (*Politika*, 30 May, p. A9 and *Blic*, 1 June, p. 17)

The Čačak District Court in mid-October found four fans guilty of the crime of inciting national, racial and religious hatred and intolerance. The following were found guilty of assaulting and insulting the Ghana soccer player Soloman Opaka: Darko Obrenović (sentenced to 18 months in jail), Mladen Ikonić (sentenced to 14 months in jail), Milan Milosavljević (sentenced to 10 months in jail). Dragan Dragović was sentenced to six months' imprisonment for the obstruction of justice (intimidation of witnesses). In mid-November, the Čačak District Court passed another sentence against Borac fans – 26 of them were found guilty of inciting national, racial and religious hate and intolerance. Dragan Dragović (24), Slobodan Gostiljac (25) and Jovica Ristić (25) were sentenced to six months in jail each,

689 *B92 News*, 6 March, www.b92.net.

while the other 23 members of the "unit" were each sentenced to four months in jail/ two years on probation. The court found that they insulted on racial grounds the Borac Zimbabwe-born footballer Mike Temwanjera during the home game with the Belgrade team Voždovac on 14 October 2006. The 26 had hung a US Confederate flag and a banner saying "Leave because no one here likes you" on the East Grandstands, from which this "fan unit" watches soccer games, Dragović, Ristić and Gostiljac, the leader of the "unit", handed out to the others white nylon capes with eye slits resembling KKK capes and, at Dragović's command, donned them on two occasions. At their leaders' signal, they chanted "Leave because no one here likes you", "Nigger Out" and raised their right hands in the Nazi salute, chanting "Sieg Heil" and "Heil Hitler" and flying the Confederate flag above their heads. The judicial panel qualifed the capes and the flag as symbols of racial hatred; the defendants claimed those were merely "ordinary soccer game props". (*Politika*, 15 November, p. 12)

The neo-Nazi organisations National Formation and Blood and Honour announced on their Internet fora that they would break up the Anti-Fascist Festival held in Zrenjanin on 6–7 June. They attacked several of the Festival participants. The police failed to react adequately to protect the assaulted participants. (*Blic*, 6 June, p. 16 and *Kurir*, 8 June, p. 3)

The arrest of one of the most wanted ICTY indictees, Radovan Karadžić, demonstrated the extremely intensive cooperation between neo-Nazi organisations and men charged with the most heinous violations of international humanitarian law. Members of known rightist movements, notably *Obraz* (Cheek) and Movement 1389 (*Pokret 1389*), were identified as participants in the unrest that erupted in Belgrade after the arrest, which had left a large number of policemen and protesters injured. Scores of criminal reports were filed against the perpetrators after the protest.

Members of the neo-Nazi organisation Movement 1389, who have been taking part in the daily protests ever since Karadžić was arrested, left a swastika in front of the office of the Helsinki Committee for Human Rights in early October. The Serbian Ombudsman said that the participants in the event "had crossed the line between the conflict of opinions immanent to democracy and threats of violence". (*Danas*, 3 October, p. 11)

October was marked by the neo-Nazi rally held in the heart of Belgrade despite the police ban. The rally was announced for Saturday, 11 October, by National Formation and other organisations already known for propagating Fascist ideas. On this occasion, the police reaction was prompt and sharp – it banned the rally, while certain political parties and NGOs reacted by staging an anti-Fascist civil march at the same time. The message "Stop Fascism" was sent from the city streets whilst the police were protecting the civil march from the neo-Nazis.

On 14 October, the Justice Ministry submitted an initiative for the ban of National Formation. The state prosecutor upheld the initiative and asked the Consti-

tutional Court to prohibit the work of this organisation because it has been inciting racial and national hatred. The prosecutor quoted a police report qualifying National Formation as a pro-Nazi organisation, the Novi Sad District Court sentence against its members for inciting racial and religious hatred and intolerance, and the provisions of the National Formation Statute, Programme and Declaration as grounds for banning this organisation.

The fact that the state has for the first time adequately reacted to the expansion of neo-Nazism is definitely encouraging. A number of ministries have to take synchronised actions to halt the neo-Nazis, as they have in the case of the attempt to hold a neo-Nazi rally. The MIA first banned the neo-Nazi rally; the MoJ then launched the initiative to ban National Formation and the initiative was upheld by the Public Prosecutor, who launched the proceedings before the Constitutional Court. The latest announced measure is the forming of a joint working group of the MIA and the Ministry for State Administration and Local Self-Government to draft a law prohibiting the display of Nazi symbols.

The book by Dejan Lučić entitled Kingdom of the Khazars appeared in the shops in October. Lučić is well known for his anti-Semitic views and his latest book is about a secret "Jewish conspiracy" to subjugate Serbia and the world. He even calls on the Serbs "to rise to our feet, we are occupied, but we must decide when and whom to hit! Not sooner – not later. A nation that knows its goal shall find the way." (*Danas*, 22 October, p. 5)

The MoJ said in November that it would not initiate the ban of the organisation *Obraz* for lack of a final court verdict on the damage this organisation has been incurring by its activities. (*Kurir*, 13 November, p. 3)

Unidentified persons drew swastikas and other Nazi symbols in the biggest park Čair in Niš. The police have been searching for the perpetrators and expect to arrest them soon given that the whole park is under video surveillance. (*Politika*, 1 December, p. A18)

2.6.2. Hate Speech and Attacks on Political Opponents

2.6.2.1. Attacks on Political Opponents. – The tumultuous political events in 2008 led to a repetition of the events that had characterised the nineties. Hate speech escalated during the campaigns preceding the presidential, parliamentary and local elections. Kosovo's declaration of independence provoked an exchange of sharper rhetoric between the political parties and the revival of branding people as "patriots" and "traitors". At the end of the year, the political life sailed into calmer waters, but the lack of maturity of the political elites remained evident.

Activists of the Democratic Party were attacked on several occasions during the presidential election campaign in mid January. Serbian Radical Party official Nemanja Šarović was also assaulted. The heated political campaign prompted the President of Serbia to condemn the assaults and call for easing of tension. (*Politika*, 11 January, p. 7; *Kurir,* 13 January, p. 13 and 14 January, p. 2)

Some parties used the events in Serbia that ensued after Kosovo's declaration of independence to lash out at their opponents. The then Infrastructure Minister, Velimir Ilić, for instance, accused the LDP of staging the unrest in Belgrade during the rally against Kosovo's independence and called them a "small group of traitors". LDP President said he would file a criminal report against Ilić and called on the prosecutors to react. (*Blic*, 29 February, p. 2)

Unidentified persons in Bor pasted the town with bogus warrants for the arrest of Dragan Strilić, the chair of the local DS municipal chapter. The warrants said that he must be "urgently reported to the nearest police station" for a number of reasons, because he had committed a number of crimes and malverations "as a member of the Croatian intelligence service" – from laundering money through NGOs and employing people in contravention of the law to planting radio locators during the NATO air strikes. The warrant, highlighting that Strilić is a Croat and a Catholic, was signed by a Movement of Bor Youth.

Posters showing Serbian President Boris Tadić and Deputy PM Božidar Đelić, and branding them "Enemies of the State" appeared in the heart of Belgrade in early May. (*Politika*, 3 May, p. A7)

Senior SRS official Gordana Pop-Lazić said in early May that the SRS would undertake a set of "patriotic measures" if it won the 11 May elections, including "bringing the youth to reason" so that it could be "brought up in the patriotic and national spirit". She also told B92 that SRS would "unfortunately have to deal with the media and also the NGOs helping these Euro-uniatic forces, because that kind of conduct is not good". This clear announcement of the repressive moves the SRS would undertake if it won power met with an outcry amongst the intellectuals and media associations. (*Danas*, 7 May, p. 4)

The arrest of Radovan Karadžić prompted several SRS MPs to voice threats against senior government officials. SRS official Vjerica Radeta said: "We would also like to remind Boris Tadić, the yellow dictator, that treason is never forgiven in Serbia. We are not threatening, just warning of the curse that has befallen all traitors throughout Serbian history. We would like to remind him of the collapse of the Obrenović dynasty and my message to today's power-wielders is that not all of them may be as lucky as Zoran Đinđić. God punishes the whole family, seven generations down the line, and they should bear that in mind". This statement provoked sharp reactions amongst the political parties. The Acting Republican Prosecutor said Radeta's statement would be analysed to ascertain whether it contained elements of threat against the topmost state officials. (*Blic*, 26 July, p. 2 and *Politika*, 27 July, p. A1)

Curses and insults were again voiced in September, from the parliament dais. SRS MPs threatened their political opponents as well as some of their party colleagues. (*Danas*, 3 September, p. 1 and *Politika*, 3 September, p. A7)

2.6.2.2. First Hate Speech Verdict. – The Belgrade First Municipal Court found the former chief editor of the daily *Glas javnosti* Ivan Čorbić guilty of hate speech. Čorbić had published a bogus advertisement rife with hate speech and call-

ing for the boycott of the Croatian supermarket Idea. The NGO Youth Initiative for Human Rights (YIHR) stated that this was the first verdict in the history of the Serbian judiciary establishing that a text constituted hate speech and the second verdict prohibiting the further illegal publication of such texts. The First Municipal Court upheld the YIHR's motion for prosecution and found that the text entitled "Boycott" and published on 16 March 2006, constituted hate speech. The Court prohibited the republication of the text or the publication of any text inciting discrimination or hate. The incriminated text included an alleged advertisement signed by "Expelled Serbs" and calling for the boycott of the Croatian supermarket Idea because "the Croatian boot is freely trampling on Serbian soil, buying companies and opening shops". The alleged advertisers claimed that purchasing in Idea was tantamount to "giving money to those who killed us and banished us from our homes". The text ends with a threat that all those shopping in Idea would be watched. The First Municipal Court's verdict is a precedent in Serbia's jurisprudence and proves that the Act on Public Information is not merely a dead letter, YIHR stated. The verdict is a clear sign that hate speech, a very dangerous and socially harmful phenomenon, will no longer be tolerated. It represents a major step forward to building rule of law in Serbia and attaining equality before the law for all its citizens, the NGO states.[690]

2.6.3. Status of Religious Minorities

The status of religious minorities did not change much since 2007. The number of religiously motivated incidents had fallen, but they still occurred. The problem of registering religious communities not belonging to the group of "traditional churches and religious communities" has not been resolved yet. In its annual International Religious Freedoms Report on the state of religious freedoms in the world published in late September[691], the US State Department criticised Serbia for discriminating against some religious groups and denying some groups legal status. The report states that "There is no state religion; however, the law on religion recognizes seven "traditional" religious communities: the Serbian Orthodox Church, Roman Catholic Church, Slovak Evangelical Church, Reformed Christian Church, Evangelical Christian Church, Islamic community, and Jewish community" and that they "receive some preferential consideration". (*Danas*, 22 September, p. 7)

In early February, unidentified perpetrators broke the window of and incurred material damage to a facility belonging to the Church of Jesus Christ of Saints of the Last Days. The police filed a criminal report against unidentified perpetrator(s). (*Kurir*, 10 February, p. 7)

In late February, the police caught three young men in the act of breaking the glass on the Catholic Church Birth of St. John the Baptist in Smederevo and filed a criminal report with the competent prosecutor. (*Politika*, 19 February, p. 12)

690 *B92 News*, 6 November, www.b92.net.

691 http://www.state.gov/g/drl/rls/irf/2008/108470.htm.

In April, the Novi Sad police filed criminal reports against underage Novi Sad youths J. K., N. S. and B. B. for breaking the windows of the Catholic Church in Futog. The police issued a statement saying they caught the juveniles after the fact. (*Blic*, 21 April, p. 15)

In June, the Supreme Court of Serbia reviewed the Montenegrin Orthodox Church (MOC) appeal of the Ministry of Religions decision not to register this religious community. The MOC in Serbia, headquartered in Lovćenac, Vojvodina, applied for registration on 31 October 2007. The Ministry of Religions rejected the MOC application for registration on 22 November 2007 on the grounds that it was a civil organisation and could not be included in the system of churches and religious communities according to the law. In the explanation of its decision, the Ministry said that the state could not interfere in the relations between religious communities, because the Montenegrin Orthodox Church was not canonically recognised. The Supreme Court upheld the MOC appeal and annulled the Religion Ministry's decision to refuse the registration of the MOC Diocese in the Registry of Churches and Religious Communities in Serbia. The Court found that the Ministry had violated the administrative procedure regulations because the decision was not signed by the then Minister of Religion Radomir Naumov, specified as the official passing registration decisions. The Supreme Court also established that the Ministry's decision did not state the grounds on which it was reached. The Supreme Court was of the view that it could not review the lawfulness of the disputed decision because the facts were not established, i.e. the disputed decision did not include the evidence on the basis of which the facts could be established. (*Danas*, 11 June, p. 4, and *Večernje novosti*, 11 June, p. 7)

A group of 50 people in November disrupted the holding of a liturgy in the St. George the Triumphant Church and handed out leaflets of the organisation *Obraz*, which called for the "defence of the eastern rite of liturgy". They then entered the Church and disrupted the rite, calling on the priests to "close their doors because they are heretics, renegades, zealots, Uniats and Catholics". The Church officials notified the police of the incident and noted that a similar one had occurred in the church in the Jasenak suburb in October. (*Danas*, 10 November, p. 29 and *Blic*, 10 November, p. 7)

2.6.3.1. Islamic Community Conflict. – The conflict between the believers of the two clashing Islamic Communities intensified in 2008. The police intervened in Prijepolje in February to prevent a clash between the two factions. (*Kurir*, 17 February, p. 8)

The Riyaset of the Islamic Community of Serbia, which is led by Adem Zilkić, said in late May that unidentified persons fired shots at their offices in Novi Pazar. The Riyaset stated that the shots were fired from a car in motion and that the police were notified of the incident (*Danas*, 28 May, p. 4)

One of the fiercest clashes between the two factions of the Islamic Community broke out in Prijepolje in early July over ownership of a religious facility. (*Večernje novosti*, 7 July 2008, p. 6, and *Blic*, 7 July 2008, p. 17)

Misdemeanour reports against 17 Prijepolje residents for disturbing public law and order were filed with the competent authorities after the clash in front of the Islamic Community facility in Prijepolje, which houses the Islamic Community of Serbia Mejlis Board supporting the Reis-l-Ulema. (*Danas*, 8 July, p. 5)

Stones were thrown and shots fired at the Bor Mosque in Novi Pazar in late July. The Islamic Community led by Zilkić called on the state authorities to react to the incident. (*Danas*, 15 July, p. 5. and *Večernje novosti*, 15 July, p. 11)

Conflicts between the two factions were renewed in Prijepolje in late August. The dismissals of the mosque priests in the Prijepolje suburbs of Ratjska and Luka led to quarrels and clashes between the believers of the two factions. Several people sustained injuries and some were taken into custody. (*Večernje novosti*, 31 August, p. 4 and *Kurir*, 31 August, p. 5)

2.6.4. Status of Women

The UNDP report "Women on the Labour Market" and the Republican Statistics Bureau report "Women and Men in Serbia" were both presented in May. The studies were conducted to assist the implementation of the National Strategy for Improving the Status of Women and Gender Equality. According to report, there is still gender discrimination in Serbia. Women account for 51.4% of Serbia's population. The report on the position of women on the labour market shows that the participation rate of women in unemployment was 50% higher than of men. The employment rates of women are lower than those of men (44% versus 63%). Eighty percent of those who had quit their jobs for family reasons are women. Women make up 98.1% and men only 1.9% of those whose only job is keeping house. Women account for 29.7% of the owners of registered real estate, hold 30.5% of managerial positions (20.8% of them are directors), whilst only 14.3% of the managerial boards are headed by women. Only 27% of the women are listed as breadwinners. (*Blic*, 21 March, p. 4)

Based on the lists of MPs submitted to the Republican Election Commission by the parties which won seats in the parliamentary elections, the Centre for Modern Skills highlighted the fact that women would again be underrepresented in the National Assembly. Only 54 of the 250 MPs are women. (*Danas*, 7 June, p. 5)

The then Assistant Labour and Social Affair Minister Željko Vasiljević prompted many reactions in early September when he said that Serbia should resolve its low birth rate problems by "importing" women from Asia. Vasiljević is of the opinion that 100,000 Asian women should be "imported" to improve Serbia's demography and ensure the birth of a large number of children. Such "imports" would also address the problem of lack of labour in rural communities, because

Asian women are "hard-working" and "healthy" and would have no problem working the fields. The project, in his opinion, ought to be conducted by a state authority. Both the public and the Ministry in which Vasiljević works, reacted. Minister Rasim Ljajić publicly apologised because of his assistant's statement, said the state did not traffic in people and qualified the whole situation as an "incident". Ljajić, unfortunately, stated that he could not sack Vasiljević because he would thus bring into question the stability of the government. Vasiljević's conduct has thus gone unpunished, compromising the work of the whole Ministry, which has otherwise been discharging its duties with considerable success. This statement by a senior state official openly advocating trafficking is extremely problematic as well as insulting to the female population. Vasiljević was forced to apologise under great public pressure, but the impression remains that he did so without truly understanding what the problem with his "project" really was.

2.6.5. Status of Persons with Disabilities

The status of persons with disabilities remained precarious in 2008. They face many problems, from the impossibility to freely move, to problems in accessing education. Fortunately, the media have begun increasingly frequently reporting on their plight and alerting the public to their problems. Aware of the problem of unemployment amongst persons with disabilities, the Government drafted a law on the professional rehabilitation and employment of persons with disabilities and submitted it for adoption. The National Assembly will probably pass the law in early 2009.

In early January, Marko O. from Kragujevac beat up Miodrag M, who is an invalid, incurring him bodily injuries. The police brought the assailant before an investigating judge at the Kragujevac Municipal Court. (*Politika*, 12 January, p. 12)

Ljupka Mihajlovska, who uses a wheel-chair, was forced to sign a statement in JAT in early July during the high season relieving the staff of the local airlines of responsibility in case her health deteriorated because she flew in its plane or due to undertaken measures or specific services by JAT related to carrying passengers. Prompt media and public reactions led JAT officials to state that signing of such statements was not a regular procedure and that passengers were exceptionally asked to sign them if they suffered from a specific disability, did not have a health certificate or failed to note that they would be using a wheelchair or another aid when they were purchasing their tickets, and that this practice was applied by other world airlines as well. They promised that the form would be deleted from the Plane Staff manual. When he was notified of the case, the Republican Protector of Citizens stated that Mihajlovska had been discriminated against and ordered JAT to amend the disputed Manual. Although JAT made the amendment as instructed by the Ombudsman, it failed to apologise to Mihajlovska.

The study on employment of persons with disabilities, presented in the Media Centre in September, showed that Serbia has nearly one million people with disabilities, of whom only 21% earn a living; the percentage of permanently employed persons with disabilities is much lower. (*Danas*, 8 September, p. 7)

2.6.6. Persons of Alternative Sexual Orientation

Persons of alternative sexual orientation were victims of numerous attacks in 2008 as well. Some media, notably the tabloid *Kurir*, have evidently been creating and stirring up the atmosphere of lynch against them.

The Gay Straight Alliance (GSA) stated in January that it had sent a questionnaire to the presidential candidates asking them in detail about their views on issues relevant to this segment of the population. It said only LDP President Čedomir Jovanović supported the gay population without any reservations. The questionnaire was also filled by the following candidates: Milanka Karić, Ištvan Pastor, and Jugoslav Dobričanin. The two presidential favourites, however, did not fill the questionnaire. (*Politika*, 9 January, p. 6, *Politika*, 11 January, p. 7 and *Večernje novosti*, 16 January, p. 4)

To mark 17 May, the World Day against Homophobia, GSA and CeSID published the results of a public opinion poll on persons of homosexual orientation. According to the poll, the degree of homophobia in Serbia is still high. Only four laws have provisions prohibiting discrimination on grounds of sexual orientation. The poll showed that 70% of the population thought homosexuality was an illness. In its campaign "Are you homophobic?", the organisation Labris called on the Serbian Medical Society and the Medical Chamber of Serbia to reaffirm that homosexual orientation is not an illness. Neoropsychiatrist and Secretary of the Serbian Medical Society Psychiatric Section sent a letter to Labris stating that homosexuality is not a "mental disorder" or a "behavioural disorder", as the valid classification of diseases (ICD–10) of the World Health Organisation, which Serbia is also a member of, confirms. (*Danas*, 16 May, p. 18)

In an interview to Radio Free Europe in May, the then Human and Minority Rights Service Director Petar Lađević expressed a number of views that caused the organisations advocating the protection of the rights of sexual minorities to react. A group of NGOs called for Lađević's resignation because of the interview. (*Kurir*, 23 May, p. 3 and *Politika*, 17 June, p. A8)

The fifth Queer Festival, organised by a number of NGOs advocating better status for persons of alternative sexual orientation, was held in Belgrade in mid-September. The gathering was unfortunately not incident free – a group of twenty or so people attacked the participants in the Festival and injured them. The police, however, reacted differently than before – it appeared at the scene of the incident quickly and efficiently proceeded to protect the Festival participants and take the perpetrators into custody. The fact that the Festival was not cancelled and that the

police safeguarded the participants until its end is encouraging as well. Such police conduct indicates that the authorities have to an extent begun reacting differently to violations of the freedom of expression of homosexuals. The public reactions were very strong. The incident was condemned by the Ministry of Human Rights and Freedoms, the Protector of Citizens and numerous NGOs.

The tabloid *Kurir* attacked homosexuals in several articles in 2008. The abusive language and insults, interviews with extremist organisations merely reaffirm the image of sexual minorities this daily wants to create. "Dynamite for Eurosong Fags" is a prime example of its editorial policy. In this article, the *Kurir* journalist described a plan by a Predrag Radetić to throw an explosive device at the Eurosong audience and noted that he had even served a jail sentence because of his plan. *Kurir* quoted a statement by Radetić and gave his short biography. The Ministry of Culture reacted to the article and said it would launch a misdemeanour procedure with the competent court against *Kurir* in accordance with the Public Information Act. Both the headline and the content of the frontpaged article appear to suggest and condone the use of force (dynamite in this case) against homosexuals, the Ministry said.

At the very end of the year, a Belgrade court was the first in Serbia to pronounce the first penalty for threats against an activist of the Gay Straight Alliance.[692]

2.6.7. Status of National Minorities

Assaults on Persons Belonging to National Minorities. – Serbia's nationals belonging to national minorities, above all ethnic Albanians, were exposed to intimidation and harassment after the Kosovo Assembly declared independence on 17 February. According to Human Rights Watch (HRW) data,[693] the police registered over 200 incidents, mostly in Vojvodina. The perpetrators vented their fury by attacking shops and homes owned by ethnic Albanians. Many of them committed criminal offences. They broke windows of the shops and homes, tried to set homes on fire, wrote graffiti inciting hatred, staged protests in front of Albanian homes and shops with the aim of intimidating them. In Sombor, they organised a boycott of bakeries owned by an Albanian and handed out hate-mongering leaflets[694]. Some

692 B92 News, 23 December, www.b92.net.

693 A 74-page report entitled "Hostages of Tension Intimidation and Harassment of Ethnic Albanians in Serbia after Kosovo's Declaration of Independence" documenting attacks on ethnic Albanians and other minorities in February-March 2008, is available at www.hrw.org.

694 Shtjefen Kerhoni, owner of several bakeries and restaurants in Sombor, had one of his bakeries boycotted for a week after a group of people publicly called for the boycott and alleged the Kerhonis were providing guns and drugs for Kosovo. Several people demonstrated in front of the bakery for one week. On 17 February, after Kosovo declared independence, the police got into touch with Kerhoni and asked him to report any incidents. A protest was held in the centre of Sombor the following day. That night, unidentified perpetrators broke the windows of Kerhoni's bakery *Dva brata*. The police reacted by sending police cars to keep vigil in front of

incidents broke out during or immediately after the public protests organised against Kosovo's declaration of independence, others in the ensuing days, most of them late at night. Some people and facilities were attacked time and again. Although the police could have presumed that persons belonging to national minorities, above all ethnic Albanians, would be targeted given their experience with ultra nationalist reactions to events in Kosovo in the recent past, they failed to take preventive measures to protect their property before the attacks occurred. Policemen were mostly deployed to safeguard the property of minority residents only after the initial attacks and they deterred the assailants by their physical presence in the days to come. The police did little to identify or energetically prosecute the perpetrators of the attacks, even when they themselves witnessed the incidents or when these incidents were witnessed by other people or filmed by security cameras. According to information HRW obtained from the police, of the 221 officially registered Kosovo-related incidents (including those, such as the criminal damage caused during protests in Belgrade, that lacked an ethnic dimension), 10 people were convicted and fined for misdemeanours. Many of the proceedings were halted for lack of evidence or instituted against "unidentified perpetrators".

During the campaign preceding the local (and parliamentary) elections on 11 May, posters insulting and accusing local politicians and insisting on their nationality (Croatian) and religious affiliation were pasted all over Bor and Kuršumlija.[695] No one has been sanctioned for these incidents.

In April, the then Assembly Speaker Oliver Dulić received letter from a Chicago Serb émigré organisation called *Organizacija S. S.* in which they threatened

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Kerhoni's home and the bakery over the next 5–6 days. The boycott of the *Dva brata* bakery began on 22 February. Several youths (who were 20–25 years old in the owner's opinion) were standing in front of the bakery and handing out free loaves of bread and leaflets calling for the boycott of the bakery because, as the leaflets alleged, the bakery was "funding arms and drugs for Kosovo". Derogatory anti-Albanian graffiti were written on the walls of Kerhoni's house, in the other part of town, that week. All Serbian print and electronic media reported on the boycott in Sombor, including *Blic, Danas* and *B92,* as did the local papers. Mayor Jova Slavković, Protector of Citizens Saša Janković, Vojvodina Ombudsman Petar Teofilović and several local and Belgrade human rights activists organised a visit to Sombor on 4 March 08 and demonstrated their solidarity with Kerhoni by having breakfast together at the boycotted bakery.

695 The posters put up in Kuršumlija read: "Who do the residents of Kuršumlija trust more, the great Serb Milošević or the small Croat Cahun?" – Dejan Milošević heads the Toplica Iron Regiment association of army reservists, whilst Đura Cahun ran for local councilman on the Together for Kuršumlija list (*Danas,* 16 April, p. 4). The posters put up in Bor were designed as an arrest warrant and had the photograph of the local DS chapter chairman Dragan Strilić, "who is wanted and must be urgently reported to the nearest police station" for several reasons, *inter alia*, "because he committed a number of offences and malversations as a member of the Croatian Intelligence Service – from money laundering through NGOs to unlawfully hiring people and marking targets during NATO air strikes". The posters underlined that Strilić was a Croat and a Roman Catholic. The posters were signed by the Bor Youth Movement (*Kurir*, 4 May 2008, p. 3).

that he would inevitably meet his doomsday soon, that all those who think that they will arrest ICTY indictees Ratko Mladić and Radovan Karadžić were mistaken and that Dulić, (Helsinki Human Rights Committee Chairwoman) Sonja Biserko and all other Croats were not welcome in Serbia, that they belonged in "Zagreb, amongst the Ustashas". (*Danas*, 25 April, p. 29)

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, which need to cross the much lower so-called natural threshold standing at 0.4% to get into parliament. Given that the law does not specify the number of signatures minority parties must collect when submitting their election lists, the Republican Election Commission (REC) on 18 March passed Instructions on the Implementation of the Act on the Election of Assembly Deputies, stipulating that minority parties needed to collect 3000 signatures to run in the May 2008 parliamentary elections, like they did for the January 2007 elections. At the motion of the SRS, the Constitutional Court halted the application of the Instructions and ethnic minority parties were forced to collect 10,000 signatures, like the other parties, if they were to run in the elections.[697] The Constitutional Court passed its decision although the election procedures were already launched, merely 13 days before the deadline by which all the parties had to submit their lists and signatures. Ten minority parties took part in the elections and three won seats in the Assembly: the Hungarian Coalition (4 seats), the Bosniak List for European Sandžak (2 seats) and the Coalition of Preševo Valley Albanians (1 seat). Four deputies of the Bosniak Social Democratic Party (SDP) and one deputy of the Democratic Alliance of Hungarians in Vojvodina (DZVH) ran on the For a European Serbia Coalition list headed by Serbian President and President of the Democratic Party Boris Tadić. The Union of Roma of Serbia and the Roma Party, each of which had won one seat at the previous elections, did not make the threshold at the May 08 elections. Although the national legislation envisages the use of minority languages in parliament, only Serbian is used in the National Assembly in practice.

The Hungarian Coalition won 9 of the 120 seats in the provincial Vojvodina Assembly. Member of the Alliance of Vojvodina Hungarians (SVM) Sandor Egeresi was elected Vojvodina Assembly Speaker.

Status of Roma. – In July, Serbia assumed chairmanship of the Decade of Roma Decade 2005–2015 for the 1 July 08 – 30 June 2009 period. This international initiative was launched at a conference in Budapest in 2003 by Bulgaria, the Czech Republic, Croatia, Hungary, Macedonia, Serbia and Montenegro, Slovakia

696 *Sl. glasnik RS*, 18/04.

697 *B92 News*, 9 April, www.b92.net.

and Romania. It was subsequently joined by Albania and Bosnia-Herzegovina, while Slovenia enjoys the status of observer. The implementation of the initiative began with the signing of the Declaration on the Decade of Roma Inclusion by the prime ministers of the participating states in Sofia on 2 February 2005.

The goals of the Decade include closing the unacceptable gaps between Roma and the rest of society by drafting and implementing national action plans in the fields of education, housing, health and employment. Apart from these priority areas, special attention is devoted to suppressing discrimination, to poverty reduction and improving the status of women. The main principle of the Decade entails involving representatives of Roma communities in all the processes – from drafting the documents, to their implementation, monitoring and evaluation.

The Decade is managed by an International Steering Committee comprising delegations of states participating in the Decade and made up of two representatives of every participating state (national coordinator and expert), representatives of Roma NGOs and international organisations. In Serbia, the Deputy PM in charge of EU Integration Božidar Đelić is Serbia's national coordinator. Numerous international organisations are also taking part in the Decade.[698]

The following fields have been identified as priorities in the programme of Serbia's Presidency of the Decade:[699]

- Housing (legalisation and improvement of Roma settlements, relocation, low cost housing and combating discrimination);
- Combating discrimination in education;
- Development of a European Roma Policy and access to EU funds for non-EU countries to implement programmes aiming at the improvement of the status of Roma;

The Human and Minority Rights Ministry has a Roma National Strategy Secretariat charged with initiating, coordinating, monitoring and implementing activities aimed at improving the status of the Roma ethnic minority.

Under the 2002 census, 108,913 Roma lived in Serbia. The precise number of Roma living in Serbia, however, is not known. Estimates are that between 250,000 and 500,000 Roma may be living in Serbia.[700] Roma in Serbia have faced numerous long-standing problems.

Statistical data obtained at the 2002 census allow for a comparison of the degrees of education of Roma over 25 and the overall population of that age in

698 World Bank, Open Society Institute, Council of Europe, UNICEF, Roma Education Fund (REF), UNDP, CoE Development Bank (CEB), Contact Point for Roma and Sinti Issues (CPRS/ODIHR/OEBS), European Roma Information Office (ERIO), European Roma and Traveller Forum (ERTF), European Roma Rights Centre (ERRC). UN-Habitat and UNHCR.

699 Serbia's chairmanship programme is available at www.humanrights.gov.yu-roma.

700 *Equal Access to Quality Education for Roma in Serbia* Open Society Fund Belgrade and Institute for Open Society, Budapest, 2007.

Serbia. These data showed that 27% of the Roma vis-à-vis 6% of the overall population had no schooling (which marks an improvement over the 1991 census results, when 37% of Roma had no education). The number of Roma, who have not completed elementary school, is two times greater than that of the overall population. Compared to the overall population, there are four times fewer Roma who have completed secondary school and 20 times fewer Roma with college degrees. According to the UNDP,[701] Roma spend half the time the others do in school. The UNDP survey on the status of Roma, IDPs and Refugees[702] shows that one-third of the Roma population has no education or has completed only several grades of elementary school, that a little over 20% of the Roma completed elementary schooling, that around 11% have high school degrees and only 1% college degrees. According to data in the 2006 Annual League for Decade Report, published in January 2007, nearly 50% of Roma parents do not send their children to school because they lack money and another 20% because they lack personal and other documents and are unable to obtain them.[703]

The language barrier is one of the chief reasons for the underachievement of Roma children in school and simultaneously one of the main reasons why a high percentage of Roma children is sent to schools for children with special needs.[704] Although education in minority languages is guaranteed by the Constitution and regulated by law albeit minimally, Roma children mostly attend Serbian language classes and, in some parts of Vojvodina, schools in Hungarian. The subject "Roma Language with Elements of National Culture" is taught only at 42 Vojvodina schools that have 1,266 pupils altogether. The greatest problems are faced by children coming from communities, whose native language is Albanian and who are unable to attend schools in Albanian, and by children of families that have returned to Serbia under the Readmission Agreement and who had been schooled in the languages of the countries they had lived in.

In its overview of the status of Roma children in Serbia, the NGOs Save the Children and the Belgrade Centre for the Rights of the Child assessed that Roma accounted for as many as 80% of the pupils of schools for children with special needs.[705] Roma children are relatively unsuccessful at the pre-school tests evaluating a child's maturity and mental abilities needed to follow class for socio-cultural and linguistic reasons, not because they lack the intellectual capacity. Ensuring the attendance of a Roma assistant/interpreters during the testing is a systemic way that alleviates and even eliminates such problems. Although this practice has over the

701 *Faces of Poverty, Faces of Hope*, UNDP, 2005.

702 *At Risk: The Social Vulnerability of Roma, Refugees and Internally Displaced Persons in Serbia*, UNDP, June 2006.

703 *Roma and the Right to Legal Subjectivity*, Roma Rights Centre, Belgrade, April.

704 League for Decade 2006 Annual Report.

705 Centre for the Rights of the Child and Save the Children: *More than an Unofficial Estimate – Status of Roma children in Serbia*, Belgrade, 2006.

past decade or so proven extremely useful in preventing the referral of Roma children to special schools without real cause, the attendance of a Roma assistant has been left at the sole discretion of the school staff conducting the testing. The Education Ministry in 2007 issued a recommendation on the presence of Roma assistants at the tests but the recommendation has not been translated into a binding legal provision yet. Some NGOs have noted that, rather than providing this type of support to Roma pre-schoolers, the school staff often relate to the parents all the material advantages of enrolling their children in special schools.

Even when they are against the idea, Roma parents encounter a series of obstacles when they try to counter it, given that the procedure for transferring a child from a special school to an ordinary one after a re-evaluation is not clearly defined; nor is it clear how many times it has been applied, if at all. The parents are entitled to appeal with the Education Ministry but they rarely resort to this measure for various reasons, because they are unaware of the possibility, cannot find their way through the bureaucratic maze or because they mistrust the state. There are no records of a child transferring from a special to a regular school. The Roma children, who have enrolled in ordinary schools, often leave them early on and transfer to a special school, because they are not awarded the necessary attention and support by the teachers nor protected from the disregard, marginalisation, harassment and even discrimination. All this leads to lack of motivation and underachievement in school, further deepening the sense of being a failure until the conditions for transfer to a special school are fulfilled.[706]

The forming of segregated classes constitutes another form of discrimination, which is sometimes based on a clear and open discriminatory ideology. Roma and other organisations[707] have noted establishing of such segregated classes after non-Roma parents complained about the increasing number of Roma children in the schools their children attend. Some teachers justify the existence of such classes by the need to improve the efficiency and success of work with more uniform groups of children, which indicates a didactic approach dominated by teachers and *ex cathedra* teaching, with little focus on the child and participative and pro-active methods.[708]

Despite appeals by NGOs not to segregate Roma children, two elementary schools[709] set up separate Roma classes in the 2007/2008 school year. After the Centre for Minority Rights appealed that new classes not be established and that a

706 Save the Children, *Denied a Future? The Right to Education of Roma/Gypsy and Traveller Children in Europe*, London, 2001; Minority Rights Centre, *Abuse of Rights in Serbia*, Belgrade, 2001.

707 Centre for Interactive Pedagogy, Minority Rights Centre, Roma Education Centre, Roma Child Centre.

708 J. Stojanović, A. Baucal, (2007): *Equal Access to Quality Education for Roma in Serbia*, IOS, Budapest/FOS, Belgrade.

709 Elementary schools Žarko Zrenjanin in Apatin and Jožef Atila in Bogojevo.

desegregation programme be applied in the existing ones, one school[710] conducted an evaluation of the children in the Roma classes and referred them to a school for children with special needs.

Although segregation is prohibited by the law, there are no specific comprehensive anti-segregation legal provisions. Nor is the monitoring of such phenomena institutionalised, although the strengthening of the trend in schools could well lead to the further ghettoisation of the Roma population.

Peer violence is widespread in Serbian schools amongst non-Roma children as well, but Roma children are an extremely vulnerable target because they are always in the minority, isolated from the rest of the school community. Investigations of peer violence cases show that teachers usually do not react adequately to it or punish pupils expressing religious or ethnic intolerance.

According to UNICEF's report on the state of children in Serbia,[711] nearly 70% of the Roma children are poor and over 60% of Roma households with children live below the poverty line. The most vulnerable are the children living in rural areas, Vojvodina and in households with many children. Over 4/5s of the poor Roma children live in families whose adult members have not completed even elementary school.

Roma live in adverse conditions both in cities and villages. Most Roma do not have the adequate documentation proving their ownership of their homes or land, which additionally complicates the problems of Roma housing. Some of them have been living in facilities or land owned by others, most often former socially-owned property. The worst off in terms of housing are Roma displaced from Kosovo[712] and Roma returnees, mostly those sent back from EU states.[713] Problems Roma face with forced evictions and demolition of illegal homes and settlements mostly arise from the unregulated legal status of ownership over land and buildings.

The social and economic status of Roma is characterised by low economic activity, high unemployment rates and nearly 100% exclusion from public institutions. Most Roma are not in the employment system or legally employed and the majority of them are registered as unemployed. But Roma are present on the labour market, performing the most difficult and dangerous jobs for miserly pay.

Tens of thousands of Roma left Serbia in the past 15 years in search of refuge in Western European countries. Most applied for asylum. The majority of the asylum seekers were afforded temporary protection by the host countries at the time.

710 Tornjoš elementary school Temerkinj Ištvan.

711 The State of Children in Serbia Report 2006 – Poor and Excluded Children.

712 *Analysis of the Situation of Internally Displaced Persons from Kosovo in Serbia: Law and Practice UNHCR and PRAXIS*, March 2007.

713 *Violations of the Rights of Roma Returned to Serbia under Readmission Agreements*, Ecumenical Humanitarian Organization, 2007.

The democratic changes in Serbia and the Readmission Agreement with the EU[714] allowed for their return i.e. for denying them further temporary protection. Such persons are returned to Serbia either by deportation or within the framework of so-called mandatory return, qualified as voluntary return i.e. return a person/family has agreed to. The CoE in 2003 assessed that between 50 and 100 thousand nationals of Serbia would be returned from Western European countries. The number of returnees is probably greater, given that the German government alone stated that as many as 100,000 of the 600,000 nationals of Serbia were residing illegally in Germany.[715] The Serbian MIA assesses that 18,000 nationals of Serbia have returned to date and that at least 47,000 are yet to return. The exact number of persons who have been or will be returned from Western Europe remains unknown.

The Government of the Republic of Serbia established a Council for the Reintegration of Returnees under the Readmission Agreement.

Many Roma face serious obstacles with respect to the rights to be recognised by the law and to possess documents. Roma without personal documents are legally invisible and prevented from realising their elementary human rights, such as the rights to health care, social welfare, education, work, etc. Especially vulnerable are the Kosovo Roma who not only have no personal documents but do not enjoy the status of IDPs either. Registered IDPs with IDP cards can live in collective centres or participate in other accommodation programmes, receive humanitarian aid and health care. There are no precise data on the number of Roma who do not have personal documents.

2.7. Right to Life

2.7.1. Deaths of Army Sentries. – The Belgrade District Court in 2008 continued pre-trial proceedings regarding the deaths of two Army conscripts serving in the Guardian Brigade Dragan Jakovljević and Dražen Milovanović in the Belgrade Topčider Barracks at the underground facility Karaš on 5 October 2005.[716] The proceedings have to date comprised two inquiries, three exhumations, a number of ballistic and medical analyses and FBI expertise (*Danas*, 14 October, p. 7). The inquiries were conducted by a military commission and an independent state commission which came to conflicting conclusions. The independent foreign experts' findings coincide with those of the independent commission. The military commission claimed that the troops had died in a mutual shoot-out, while the independent commission experts concluded that this would have been impossible and that their deaths had been caused by a third party. The media have speculated that the sentries

714 The Agreement was signed in September 2007.

715 Group 484 Report: Return from Western Europe of nationals of Serbia and Montenegro who were not granted asylum or whose temporary protection ended, July, 2005.

716 See *Report 2007,* II 2.8.1.

were killed after they had seen ICTY indictee Mladić near the Karaš facility. (*Danas*, 11 October, p. 3)

An FBI expert, who testified over a video link in April, ruled out the possibility that Jakovljević had committed suicide (*Danas*, 4 April, p. 3). The Chief Oakland County (Michigan) medical examiner Ljubiša Dragović underlined in his report that there was no objective evidence to establish that Jakovljević had deprived Milovanović of his life or vice versa and presented evidence corroborating that a third person had killed the sentries. (*Danas*, 11 October, p. 3 and *Blic*, 15 November, p. 14)

Proceedings against Vuk Tufegdžić, who had first handled the case, are under way before the First Municipal Court in Belgrade after Ivanka Baralić, a member of the independent inquiry commission, sued him for libel, slander and claiming that she was incompetent (*Danas*, 11 October, p. 3). According to chairman of the independent state commission Božo Prelević, the court has failed to serve a summons to judge Tufegdžić 28 times, although he works in the same building. (*Blic*, 11 October, p. 16)

2.7.2. Negligent or Unprofessional Treatment. – A boy by the name of Dalibor Havlek died at the Belgrade University Children's Hospital after spending a month and a half in a coma he fell into during a gastroscopy, probably due to a doctor's mistake. The Director of the Hospital, Dr. Krstić resigned. (*Blic*, 18 February, p. 15)

The Požarevac police arrested three doctors and a medical technician of the private special ob-gyn clinic Medikus on suspicion that they had terminated the pregnancy of Katarina M in December 2007 at an inappropriate venue in terms of space, equipment, staffing and sanitary and hygienic standards. After the intervention, she was taken to the Belgrade Emergency Medical Centre, where she died. The police arrested another doctor on suspicion of abusing his position and illicit gain; as the responsible person in Medikus, he misled patient MM into believing that he had successfully treated her and that she was pregnant, although he knew that she was not with child. (*Danas*, 17 April, p. 33)

The Bor Municipal Prosecution Office opened an investigation against a local Health Centre gynaecologist on suspicion of negligence while delivering Sanja Todorović's baby, who contracted cerebral palsy in result. (*Blic*, 11 May, p. 16)

Around 200 patients of the Oncology Clinic in Niš had to interrupt their therapies after the radiotherapy machine broke down. Of the three machines, one is so old that it is almost useless and should have been dismantled years ago; the second machine has also been in use for years and is used so much that it often breaks down, while the third machine has not been installed yet. One of the three operating radiotherapy machines in Vojvodina has served its purpose and ought to be dismantled; according to EU standards, Vojvodina should have at least eight such machines given its population. (*Danas*, 13 June, p. 9)

The Institute for Lung Diseases of Vojvodina in Sremska Kamenica filed a criminal report with the Novi Sad District Prosecutor against the former Head of the Intensive Care Department Dr. Sava Nenić accusing him of a number of crimes, including mercenary murder and illegal experimenting and drug testing. Dr. Nenić and the head of the Institute, Dr. Aleksandar Milovančev, fiercely clashed in the media in August. The families of the deceased patients voiced numerous accusations against both doctors. (*Blic,* 26, 27 and 29 August, pp. 14, 17 and 16; *Danas,* 27 August, p. 7)

The Fourth Municipal Prosecution Office in Belgrade filed a motion to investigate two Zemun Hospital doctors suspected of negligent treatment of patient Milijana Lj, who had died of sepsis after a gall bladder operation. (*Blic*, 14 October, p. 15)

The Čačak District Court ordered the local health centre Dr. Dragiša Mišović to pay 900,000 dinars to compensate damages incurred to patient Stanica Simonović. Simonović was erroneously diagnosed with breast cancer; her left breast was amputated and she was subjected to 22 irradiation treatments and five cycles of chemotherapy. This Court is hearing two other cases against the Health Centre. According to the Health Protection Institute report, three mothers were infected with Hepatitis C, most probably during delivery. The other case regards a misdiagnosed cancer in a boy, which led to the extraction of most of his digestive organs; subsequent analysis showed he had been suffering from Hodgkin's disease. (*Blic,* 28 October, p. 17)

The Third Municipal Prosecution Office in Belgrade filed charges against four doctors of the private Decedra clinic for negligent treatment of Jelica Radović, who died of sepsis after a minor foot operation in October 2006. (*Kurir*, 14 November, p. 6)

2.7.3. Fires. – Mirjana (23) and Miloš (19) Pekić, Milena Klundžić (23), Branka Savković (23), Boris Bjekić (23), Dušica Kulaš (23), Marija Gavrančić (23) and Vladan Dragović (27) died of injuries sustained when the Novi Sad café Laundž was set on fire in February (*Blic,* 18 February, p. 14). The Novi Sad District Court found the main defendant Miloš Malešev guilty of setting the fire; he set the woollen rug in the hall of the café on fire with his lighter and the flames enveloped the whole facility. He was sentenced to 12 years in jail. The other two main defendants, Tamaš Kolar and Srđan Bovan, the owners of the café, were convicted to 10 years in jail each for failing to take all the necessary fire protection measures. Bojan Kulačanin was sentenced to five years' imprisonment for aiding and abetting Malešev after the fact. The counsel for the victims' families, Slobodan Beljanski, protested because none of the competent inspectorial authorities, which had to have known what a risk the café posed, had been indicted.[717]

Three women, Silvia Vuličević-Ilić, her daughter Elena and Slađana Petroski lost their lives and eight tenants and one fireman were injured in a fire caused by

717 *B92 News,* 27 November, www.b92.net.

old faulty electrical installations in the basement of a building in the Belgrade suburb of Kotež. (*Danas,* 23 June, p. 28 and *Blic,* 23 June, p. 14)

2.7.4. Other Violations of the Right to Life. – The Kruševac District Court convicted policeman Igor Marić and a Milan Veljović to 30 years in jail and policeman Aleksandar Jovanović to 18 years in jail for the murder of Croatian citizen Jakup Hajdini.[718] The court took into consideration that two perpetrators were policemen and Veljović a son of a former policeman, the brutality of the murder and the perpetrators' absolute lack of remorse. (*Danas*, 4 June, p. 33)

Saša Stojković aka Boxer, believed to be a drug dealer, was killed when someone fired shots at him at the Zaječar pool, in front of hundreds of witnesses. The TV crews filming the events surrounding his murder were intercepted by Stojković's friends, who confiscated their cameras, deleted the footage and threatened to kill the journalists if they published any information on the event. (*Blic,* 14 July, p. 14)

Jelena Matić from Paraćin was killed and Dafina Anastasova and Đorđe Markoski from Prilep were seriously injured when a strong wind brought down a tree branch, which fell on their tent in the Exit Festival Camp in Novi Sad. (*Blic,* 14 July, p. 12)

The police filed a criminal report against the Dušan Vučić and Strahinja Milošević, the owners of a pit bull terrier and a crossbreed of an English Bull and a Pit Bull Terrier, who bit Emerencija Lošunc to death. (*Kurir,* 28 January, p. 10)

A Rottweiler owned by Jovica Nedeljković aka Konajar from Radinci bit to death Dragan Arsić; Nedeljković then threw Arsic's body into a well and threw bricks over it. The Smederevo District Court filed charges against Nedeljković for not keeping his dog restrained and a grave crime against general safety. There was no proof that he had set the dog free or loose on Arsić. (*Blic,* 12 August, p. 15)

2.7.5. Life in a Healthy Environment. – Apart from the authorities' failure to undertake the necessary legislative reforms related to environmental protection, the year 2008 was also marked by a number of serious pollution incidents. The values of benzene and other harmful matter in Pančevo exceeded by far the permissible limits on a number of occasions.

The breakdown of the electricity grid at the petrochemical plant Petrohemija led to a halt in the work of all Petroleum Refinery Pančevo facilities. The concentration of benzene in the air ranged between 135 and 160 micrograms per cubic metre. (*Blic*, 5 June, p. 4)

There was an incident in the Pančevo artificial fertiliser plant Azotara after a worker poured nitrogen acid into a tank for storing nitrogen solution and it leaked through the tank walls. The concentration of nitrogen oxides reached 900 micrograms per cubic metre of air, five times the permissible limit. (*Blic*, 5 June, p. 4)

718 See *Report 2007,* II 2.8.5.

On 20 August, 88 micrograms of benzene per cubic meter were measured in the Pančevo air. According to the City Public Health Institute, the permissible limit of benzene stands at 5 micrograms per cubic metre. The Republican Environment Inspector Olivera Topalović said that the pollution was caused by the Pančevo Refinery waste water. (*Kurir*, 21 August, p. 7)

The construction of a plant for processing used car batteries was halted in Inđija only in October, although the Environment and Spatial Planning Ministry issued an order to that effect on 9 September at the request of environmental associations. (*Danas*, 4–5 October 2008, p. 21)

The Republican Environment Inspection filed an economic offence report against Blažo Lekovski, the Director of the Bor copper mining complex RTB, because RTB had exceeded the average daily emissions of sulphur dioxide, and a misdemeanour offence report against the Bor Mayor, Branislav Rankić for not enabling the monitoring of the quality of air at the designated measurement sites. (*Večernje novosti*, 23 May, p. 6)

A group of employees of the Vinča Nuclear Science Institute sent an open letter to the MIA and BIA, asking them to open an investigation into the possible harmful effects on the health of the Institute staff and the population and on the environment caused by the oversights made during the implementation of the VIND project. They warned that there had been oversights with respect to protection from irradiation and the treatment and storage of radioactive waste and accused the supervisory bodies of covering some of them up. (*Kurir*, 25 June, p. 7)

A fire broke out in the Galenika Fitofarmacija plant in April. The Republican Environment Inspection filed a criminal report against the plant's responsible persons for causing environmental pollution and endangering lives or property on a large scale. (*Kurir*, 8 April, p. 7)

Four hundred kilograms of heating oil of the construction company Partizanski put leaked into the Sava River in October. (*Večernje novosti*, 14 October, p. 21)

2.8. Prohibition of Torture

Violations of the prohibition of torture and other forms of ill-treatment occurred again in 2008. 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.

2.8.1. Torture. – The Humanitarian Law Centre (HLC) stated on 6 June 2008 that the state paid 250,000 dinars in compensation for damages to Danilo Dimitrijević

for the torture he had been subjected to in a Novi Sad police station in 1997. HLC was of the opinion that the awarded redress was much too low and in contravention of the Convention against Torture.[719]

The police took Dimitrijević into custody without serving him with an order or telling him why he was deprived of liberty. He suffered bodily injuries during his three days in custody. The investigating judge noticed his injuries and ordered the police to take him to a doctor. The police ignored the judge's order and instead served Dimitrijević with a decision terminating his custody.

Dimitrijević filed a criminal report with the Novi Sad Municipal Prosecution Office in 1997. The prosecutors failed to file a motion to institute proceedings over the next three years. The HLC and the European Roma Rights Centre filed a petition with the Committee against Torture in 2000. The Committee rendered a decision on 2005 concluding Dimitrijević had been exposed to torture.

It was only in 2007 that the Novi Sad Municipal Prosecution Office dismissed Dimitrijević's criminal report as groundless. The HLC in October 2007 filed a compensation claim. Dimitrijević agreed to redress amounting to 250,000 dinars.[720]

The Valjevo Municipal Public Prosecution Office filed a motion to prosecute policeman Dejan R for ill-treating three young men who had been brought in for questioning for disrupting public law and order. The Valjevo police stated that disciplinary proceedings were instituted against the policeman after an internal enquiry and that a criminal report was filed against him for ill-treatment. (*Danas*, 18 December, p. 25; *Politika*, 19 December, p. A10 and *Blic*, 18 December, p. 15)

Four policemen, Nikola Brković, Radovan Kerčulj, Miroslav Stjepanović and Dragan Pauljev, were taken into custody in Bela Crkva for incurring corporal injuries to Vladica S. in the Miraž café. All four policemen were inebriated at the time of the incident. Disciplinary proceedings have been launched against them. After questioning them, the investigating judge released them from custody. (*Danas*, 22 December, p. 21; *Blic*, 21 December, p. 16 and 23 December, p. 16)

In Knjaževac, traffic policeman Goran A. forced Dalibor S. to enter his car and then incurred him bodily injuries. A criminal report has been filed against the policeman. (*Blic*, 7 May, p. 13)

The Brus police arrested three youths suspected of robbing a gas station and beat them up. All three young men suffered bodily injuries and the doctors established that one of them had suffered grave corporal injuries. The police let them go after a gas station employee said they were not the ones who had robbed the station. The identity of the policemen remains unknown although three months have passed since the incident.

719 http://www.hlc-rdc.org/O_nama/FHP-u-medijima/1071.sr.html.

720 http://www.hlc-rdc.org/O_nama/FHP-u-medijima/1071.sr.html.

Gornji Milanovac car mechanic Marko Lazić and the transportation company "Autoprevoz" filed a criminal report against policeman D. Č. for beating up Lazić in Autoprevoz's garage. Doctors established that Lazić had suffered an ear concha contusion. (*Večernje novosti*, 6 May, p. 15; *Blic*, 6 May, p. 14)

Three Kuršumlija policemen, Miljan Komnenović, Miloš Filipović and Ivan Milosavljević, beat up brothers Toni and Ivica Jovanović in the attempt to extort from them confessions that they had stolen water meters. They hit them with a baseball bat and a Motorola and their hands and kicked them. Toni Jovanović stated that one of the policemen had unlocked his gun and shoved it into his mouth. The police let the Jovanović brothers go after four hours of ill-treatment, after they established that the brothers had not stolen the water meters. The brothers turned to the Kuršumlija Roma Association for help and filed a criminal report against the policemen. The policemen have been suspended and the Municipal Prosecution Office filed a motion for an investigation against them. (*Danas*, 9 August, p. 1; *Blic*, 9 August, p. 15 and 16 August, p. 15)

The Zrenjanin District Court verdict convicting policeman Saša Mijin to 6 years' imprisonment was upheld in April 08. Mijin had been found guilty of torturing Zdravko Trivan that led to his death in October 2001.[721] (*Dnevnik*, 15 April, p. 8)

2.8.2. International Commitments. – The case of 19-year-old Milan Ristić has not been closed yet, although 13 years have passed since his death. The cause of Ristić's death remains unclear although the UN Committee against Torture back on 11 May 2001 issued a decision finding Serbia in violation of Articles 12 and 13 of the Convention against Torture and ordering it to conduct a prompt and thorough investigation. On behalf of Milan's parents, the HLC filed a claim for the compensation of non-material damages with the First Municipal Court in Belgrade in April 2002. The court ordered the state to pay the Ristićs one million dinars in damages. The court decision was enforced after the Belgrade District Court reviewed the appeal filed by the counsel for the state and the Supreme Court dismissed as groundless the motion to review the judgment.[722] Ristić was again exhumed and, although the experts established he had not died because he jumped off the roof of a building, as the initial reports claimed, proceedings into his death have not been reopened yet. (*Danas*, 22 July, p. 14)

2.8.3. Situation in Prisons. – Damir Joka, the head of the Treatment and Alternative Sanctions Department within the Ministry of Justice Penal Sanctions Enforcement Directorate, said that there was no systematic ill-treatment or torture in Serbian prisons and detention centres, only isolated cases of excessive use of force. He also said some ten cases of excessive use of force have been reported, that some

721 *Report 2005,* II.2.2.1.

722 http://www.hlc-rdc.org/uploads/editor/naknada%20stete%20zbog%20torture.pdf.

were being addressed within the MoJ and that some perpetrators have been prosecuted.[723]

Director of the Penal Sanctions Enforcement Directorate Boro Marić said in mid-August that "overcrowdedness" was the greatest problem of Serbian prisons, which can accommodate up to 6,000 people. Around 9,000 people were, however, serving their sentences and as many as 5,000 were waiting to be called in to serve their sentences at the time.[724] At the presentation of the Niš Human Rights Centre report "Monitoring Conditions in KPZ Niš", Damir Joka explained that the prisons were overcrowded because increasingly grave crimes were being committed wherefore their perpetrators were being convicted to longer prison sentences, which has, in turn, led to an increase in the number of prisoners serving their sentences.

2.8.4. Situation in Psychiatric Institutions. – The security of the psychiatric ward staff and patients became a priority after a patient of the Čačak Hospital psychiatric ward, Radoje Radovanović killed Vojislav Ratković with a fire extinguisher.

Attempted murders and suicides are frequent in such institutions and they must be staffed with professional guards, not only janitors. Kovin Psychiatric Hospital Director Dr. Milan Milić said that the reception room of his hospital, which has 600 patients, is staffed with merely one janitor and two doctors. (*Večernje novosti*, 7 May, p. 6)

Twenty-two-year old Milutin Milosavljević went missing on 23 August from the Home for Children and Adults with Mental Disabilities in the Belgrade suburb of Sremčica. His parents were notified that he had gone missing only after four days. The youth's body was found in the Lipovica forest at Belgrade in early November and identified after the analysis of his DNA. The Forensic Medicine Institute conducted an autopsy and established that he had not died a violent death.[725]

2.9. Prohibition of Slavery, Status akin to Slavery and Smuggling of Humans

Serbia made a step forward in combating human trafficking and smuggling in 2008, judging by reports of media, non-governmental and international organisations.

According to the report issued annually by the US State Department Office to Monitor and Combat Trafficking in Persons,[726] Serbia is a source, transit, and destination country for women and girls trafficked transnationally and internally for

723 http://www.glas-javnosti.rs/clanak/drustvo/glas-javnosti-27-06-2008/mucenja-nisu-tipicna-za-srpske-zatvore.

724 http://www.blic.rs/hronika.php?id=53460, http://www.kurir-info.rs/clanak/kurir-20-05-2008/zatvori-u-srbiji-prebukirani.

725 http://www.blic.rs/beograd.php?id=65434.

726 See http://www.state.gov/documents/organization/105659.pdf.

the purpose of commercial sexual exploitation. Serbia has been categorised as a Tier 2 country which has worked on suppressing human trafficking but needs to invest additional efforts and adopt new measures to that aim. The report states that internal sex trafficking of Serbian women and girls continued to increase, comprising more than 75% of trafficking cases. The Report expresses concern that some children continue to be trafficked into forced labor or forced street begging. Although the authors of the Report praise the efforts invested by the legislative and executive authorities to combat human trafficking, they also define the chief challenges Serbia faces: inefficient judiciary, mild penal policy and the persisting problem of correctly identifying the victims.

NGO ASTRA data show that the identification of the victims is still the main problem in effectively tackling human trafficking in Serbia. The post-identification process is burdened by the inadequate reintegration programmes, lack of adequate programmes at the national level which would encompass victims belonging to especially vulnerable or sensitive social groups, including underage victims.[727] The BCHR failed to obtain any data on courts awarding redress to human trafficking victims for violations of their rights.

NGOs remained the most active in the fields of prevention and education[728] although the state authorities' involvement increased during the year, notably in the protection of victims and the criminal prosecution of human traffickers.

With the exception of "Nude Facts",[729] no other campaign aiming to avert clients and/or potential clients of victims of human trafficking was recorded in 2008.

2.9.1. Trafficking in Humans. – According to ASTRA data, 269 victims of human trafficking, 106 of whom children, were discovered from 2002 to October 2008. The SOS hotline received over 8000 calls from 1790 clients in the same period (ASTRA, 16 October). ASTRA has recorded a significant increase in human trafficking since 2004 (*Politika*, 10 March, p. 10). Sexual exploitation remained the predominant purpose of human trafficking, but attention must also be paid to trafficking in children into forced street begging and in men for the purpose of labour exploitation. (ASTRA, 5 June)

Serbian police have alerted to the increase in human trafficking for the purpose of labour exploitation, citing in example cases of Serbian workers who had gone to the United Arab Emirates to work and then called the Serbian police asking for help and claiming they were being tricked and exploited.[730] The Vranje Border Police Section for Foreigners, Suppression of Illegal Migration and Human Traf-

727 BCHR archives data.

728 See ASTRA E-bulletins 15, 16 and 17 at www.astra.org.yu.

729 ASTRA launched a broad public preventative and proactive campaign in June 2008. The message "Report!" appealed to the citizens to report to the competent bodies any information or suspicions they had.

730 BCHR archives data.

ficking in mid-2008 saved two nationals of Serbia from human trafficking for the purpose of forced labour. The two men had been resold, abused and exploited in Macedonia for 23 years.[731]

The Montenegrin police in June found a family from Aleksinac taking 24 children – its own and their relatives' – to beg in the streets of Budva. Nineteen of the 24 children found in the truck were minors, between two and seventeen years of age. Police data show that around 400 beggars from Serbia and Montenegro spend the summer seasons begging in Budva; the police say it is difficult to prove suspicions that street begging is organised.[732]

Not all trials of human traffickers ended in their convictions.

The Novi Sad District Court in April passed a first-instance verdict convicting Ljiljana Đurić, Dušan Manojlović, Radoje Đurić and Radoslava Đurić to 15 years' imprisonment altogether and acquitting Gordana Djuric for the crime of human trafficking. The Court advised the victim to file a civil suit to claim damages. (ASTRA, 23 April)

The Belgrade District Court in October launched in investigation and ordered the one-month custody of Safet and Fajik Cucek, Slaviša Vidojević and Sevdija Markišić suspected of forcing, threatening and tricking a number of women, abusing their difficult living circumstances, canvassing, transporting and holding them imprisoned for the purpose of sexual exploitation and promising them a salary or part of the proceeds and valuable gifts. In the 2006-2008 period, the accused advertised sexual services under the guise of massage.[733]

The Belgrade District Court Organised Crime Chamber in November sentenced a nine-member crime group to a total of 24 years in jail for human trafficking and forcing victim MT to prostitution. The Court ordered that 5,500 Euros of the group's criminal proceeds be confiscated.[734].

The Third Municipal Court in Belgrade in December halted the proceedings against Zdravko Lalović, charged with unlawful deprivation of liberty and mediating in prostitution, and Mladan Dalmacija, charged with aiding and abetting mediation in prostitution, because the statute of limitations expired for their crimes. Two Moldovan women, AM and MM, were the damaged parties in the trial. The first main hearing, to have been held on 27 December 2002 and attended by the damaged parties as well, was adjourned, just like the three following hearings. In May 2003, the authorities established that Mladen Dalmacija was at large. After his extradition by Italy in 2007 on organised crime charges, the Court scheduled the main hearing ten or so times, but held only two sessions. The statute of limitations expired in mid-December. (ASTRA, 12 December)

731 "Brothers as Slaves (Braća kao robovi)", *Politika*, 21 July, p. 12.

732 "Kids Shipped in Truck to Beg in Budva (Kamionom vozili decu da prosjače u Budvi)", *Blic*, 26 June, p. 20.

733 "Suspects of Trafficking in Custody (Pritvor osumnjičenima za trafiking)", *TANJUG*, 6 October.

734 "Group Convicted for Human Trafficking", *BETA*, 14 November.

There are no official data on trafficking in human organs in Serbia. However, Internet advertisers with a Serbia web page on their domains have been running a large number of ads of people offering parts of their body for an adequate fee or buying human organs. There is no information about investigations of either persons trading in organs or the owners of the domains publishing such ads.[735]

Trafficking in human organs made the headlines after additional information appeared corroborating HRW's allegations of abductions and transfers of people from Kosovo to Albania after the 1998-1999 conflicts. An unidentified number of people were reportedly transferred to the so-called yellow house at the Albanian town of Burrel, where their internal organs were extracted by doctors and then flown out of Albania. HRW stated that the majority of the victims were Serbs who had gone missing after UN and NATO deployment in Kosovo, but the victims also included women from Kosovo, Albania, Russia and other Slav countries.[736]

The public was astounded in August when Ministry of Labour and Social Policy State Secretary Željko Vasiljević said that "the state ought to import more than 100,000 women from Asia to marry Serbian bachelors. This would resolve Serbia's demographic problems. The project ought to be implemented by a state authority." The Minister of Labour of Social Policy immediately sharply condemned the statement, saying that such conduct would not be tolerated, that it did not reflect the views of the Ministry and that such a possibility had never been considered.[737]

2.9.2. Smuggling of Humans. – The Organised Crime Chamber of the Belgrade District Court, chaired by judge Radmila Dičić Dragićević, convicted the ringleader of an international crime group involved in smuggling humans Vesel Jakup to three and a half years in jail, and his cohorts Muhamed Fezliu to two years and eight months in jail and Selimon Sadiku and Ramadan Rexhepi to two years' imprisonment each. They were found guilty of smuggling Turkish, Albanian and Chinese nationals across the administrative border with Kosovo in 2007. Some members of this group used to fight in the KLA. The other members of the 12-person group – some of whom used to be members of the Scorpions unit – have been handed down the following prison sentences: Zvonko Bijelić was convicted to 34 months in jail, Zoran Dodić to 30 months in jail, Ivica Djordjević to 22 months in jail, Saša Krstić and Milivoje Borišev to 18 months in jail each, Blagoje Zavrić to 10 months in jail, while Žarko Bijelić and Gordana Majstorović were convicted to five months in jail each.[738]

735 See also *Report 2005*, II.2.4.4.

736 "Kosovo/Albania: Investigate Post-War Abductions, Transfers to Albania – Official Dismissals Premature", Human Rights Watch, 5 May 08.

737 "Minister of Labour and Social Policy Rasim Ljajić Publicly Apologises for State Secretary Željko Vasiljević's Statement", *B92*, 1 September.

738 "Scorpions and KLA Trafficked Humans", *Blic*, 30 December, p. 17.

2.10. 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 2008 as well. The year was marked by problems related to media privatisation and the allocation of frequencies to radio and TV stations, an increase in the number of attacks and pressures on media and journalists and grave violations of professional standards.

According to the South East European Media Organisation (SEEMO), the financial status of journalists in Serbia is disastrous and media continue suffering from pressures exerted by political parties and major capitalists. Pressures on journalists writing about corruption and privatisation are even greater than in the Milošević era (*Blic*, 19 June, p. 11).[739]

2.10.1. Privatisation of Media and Allocation of Frequencies. – The problem in the privatisation of local electronic media in minority languages appeared due to the different definitions of the word 'founder' in the Acts on Local Self-Government and the City of Belgrade on the one hand and in the Information and Broadcasting Acts on the other. The authorities decided to suspend the privatisation of such media in early 2008 (*Politika*, 25 March, p. 9). The Local Self-Government Act allows local governments to be founders of media and thus maintain their influence on local media (*Danas*, 29 March, p. 4). On the other hand, new owners of privatised local electronic media have more often than not halted minority language programmes. For example, the new owners of Radio Subotica are under no explicit obligation to keep broadcasting minority languages programmes, which would be partly funded by the local self-government.

A consequence of the insufficiently regulated media privatisation was that only 38% of the new owners ever had anything to do with media before buying their own. Privatisation simultaneously led to deterioration in the status of both the media and the journalists. According to the Vojvodina Press Association, around 400 media have stopped operating and around 1,500 people have lost their jobs after the outlets were privatised. (*Politika*, 4 March, p. 7)

Allocation of frequencies did not pass without problems either. The Republican Broadcasting Agency (RBA) Council issued a total 467 licences to radio and TV stations by end 2008 and thus completed the allocation of frequencies.[740] A total of 776 electronic media outlets were left without frequencies and had to stop broadcasting by 1 September. However, various problems led to appeals of RBA decisions, mostly by media broadcasting in minority languages, from TV Preševo (*Danas*, 28 August, p. 7), to Radio Bačka Topola, which was served with the RBA decision after the expiry of the deadline for appeal and only one day before the expiry of the deadline by which

739 Similar assessments were also voiced at the International Press Institute (IPI) World Congress held in Belgrade in June (*Politika*, 19 June, p. 9).

740 *RBA Council* Statement of 29 December 2008 www.rra.org.yu.

it had to get off the air (*Danas*, 4 September, p. 17). Radio Sombor was first issued a licence and then its licence was revoked. (*Danas*, 15 September, p. 16)

2.10.2. Attacks, Threats and Obstructions of Journalists and Media. – The murder of journalists Milan Panić and Slavko Ćuruvija and the alleged suicide by journalist Dada Vujasinović remained unresolved in 2008. A new ballistic report published in the Vujasinović case indicates that she was probably killed (*Danas*, 17 December, p. 27, and *NIN*, 18 December, p. 10). However, the Belgrade District Court rejected the motion for additional expertise because it found that the motion did not clearly specify why these investigative actions were necessary. (*Politika*, 20 December, p. 9)

Most of the attacks on journalists in 2008 went unpunished. The majority of them took place during the protest against Kosovo's declaration of independence in Belgrade in February, when 150 people were injured. The protesters physically attacked the journalists of *B92, FoNET, Beta, Blic, TV Studio B, Večernje novosti* and *RTS*, as well as foreign reporters. Press associations and part of the public called on the President and the Prime Minister to ensure state protection of the journalists (*Beta* 2008 annual chronology, 12 December; *Blic*, 29 February, p. 3 and 8 March, p. 5). The police in February prevented a group of hooligans from attacking *RTV B92* (*Politika*, 22 February, p. 19). Similar but less drastic incidents accompanied the protests against the arrest of Radovan Karadžić. (*Danas*, 26 July, p. 4)

Notwithstanding public condemnations of attacks on journalists, *B92 TV* cameraman Boško Branković was beaten up and the camera of *FoNET*s photographer Zoran Jovanović was broken at the protest staged by nationalist organisations and the SRS on 24 July (*Blic*, 25 July, p. 5). In early August, the Third Municipal Prosecution Office in Belgrade filed charges against Milan Savatić, Stevan Milićević and Nikola Lazić for attacking Branković and ordered their custody. (*Danas*, 5 August, p. 3)

Journalists were in 2008 also physically assaulted at the administrative crossing at Medveđa (*Blic*, 27 February, p. 2), in Novi Sad (*Kurir*, 30 April, p. 4 and *Danas*, 17 June, p. 5 and 16 July, p. 25), in Novi Pazar (*Kurir*, 17 July, p. 4), Bela Crkva (*Blic*, 20 July, p. 10), Belgrade (*Kurir*, 29 July, p. 4), Kragujevac (*Kurir*, 31 May, p. 3), Kraljevo (*Danas*, 13 August, p. 29), Kruševac (*IJAS Dossier*, No. 25, p. 47) and Zaječar (*Kurir*, 14 and 16 July, p. 10). Two assailants in Zaječar were sentenced to two months in jail each. This was the first time the court treated an assault on a journalist as an assault on an official. (*Blic*, 29 July, p. 17 and *Kurir*, 1 August, p. 10)

Attacks on media offices and equipment were recorded in 2008 in the following towns Bujanovac (*Blic*, 22 January, p. 14), Kragujevac (*Danas*, 21 May, p. 7), Niš (*Kurir*, 8 May, p. 6), Belgrade (*Danas*, 3 April, p. 5 and *IJAS Dossier*, No 25, p. 48), Kuršumlija (*Blic*, 24 November, p. 15 and *Danas*, 27 November, p. 37) and Novi Pazar. (*Kurir*, 5 May, p. 5)

A bomb went off in *TDI Radio* in Belgrade (*Politika,* 1 March, p. 12), an explosive device was found in the offices of the tabloid *Kurir* (*Kurir*, 18 October,

p. 3). Media were also targets of anonymous bomb hoaxes in Belgrade (*Kurir*, 5 June, p. 4, *Politika*, 12 April, p. 22), Kikinda (*Danas*, 26 May, p. 28) and Novi Sad. (*Danas*, 16 June, p. 25)

Journalists and their families were frequently threatened even by death in 2008. Threats were received by the journalists of *Nedeljni telegraf* (*Politika*, 26 March, p. 12), *Kurir* (*Kurir*, 10 March, p. 5), *RTV Bor* (*Kurir*, 16 July, p. 6), *TV Jedinstvo* in Novi Pazar (*Danas*, 20 June, p. 33), *Večernje novosti* (*Danas*, 8 August, p. 33), *Vranjske novine* (*Danas*, 8 and 20 November, p. 21), *B92* (*Politika*, 22 February, p. 19), newspaper *Zrenjanin* (*Danas*, 20 September, p. 33), *Radio Apatin* (*Danas*, 16 May, p. 18), the Aleksinac *RTV Alt* (*Politika*, 29 December, p. 8) and the sports reporter of *RTS.* (*Kurir*, 22 May, p. 20)

The Serbian Orthodox Church was also involved in two media-related incidents in 2008. Šumadija Bishop prohibited Kragujevac Dečija TV's coverage of events in the churches and monasteries because he was dissatisfied with its reports (*Kurir*, 5 July. p. 6). Metropolitan of Montenegro and the Littoral Amfilohije prohibited Bishop of Zahum and Herzegovina Grigorije from appearing on *TV B92*, which he qualified as the most pro-DS and anti church station in the Balkans. (*Večernje novosti*, 19 and 20 December, pp. 8 and 5)

The Loznica Court in February convicted a former policeman to six months' imprisonment for incurring grave physical injuries to a journalist of *Večernje novosti* in 2005. (*Politika*, 22 February, p. 19)

The Valjevo Municipal Court in May sentenced the former director of the newspaper *Napred* to four months in jail/one-year probation for preventing his workers from realising their right to a strike in 2005 and 2006. (*Kurir*, 8 May, p. 6)

2.10.3. Trials of and Pressures on Journalists. – A number of journalists were on trial in 2008. The case of Željko Bodrožić, a journalist of *Kikindske Novine*, was finally closed.[741] The Ministry of Justice and Bodrožić signed an agreement compensating him 800,000 dinars for non-material damages and the costs of the proceedings and fines he had paid (*IJAS Dossier*, No 24, p. 4 and *Blic*, 19 June, p. 11). Bodrožić was taken into custody in March for failing to pay an 18,000-dinar fine to lawyer Dmitar Šegrt, which he paid in the end with the help of the state. Bodrožić had paid a total of 520,000 dinars in fines. (*IJAS Dossier*, No 23, p. 14, *Danas*, 20 March, p. 33, *Danas*, 17 April, p. 18)

A number of journalists were tried for insults or libel in 2008. The Sremska Mitrovica Municipal Court sentenced journalist Hanibal Kovač to three months in jail for insulting two Šabac judges in a trial he had no idea was being conducted against him. Kovač had been sentenced to an 18,000-dinar fine *in absentia* but was not notified thereof and the court amended the conviction to imprisonment under the explanation that Kovač had refused to pay the fine. (*Danas*, 3 November, p. 28)

741 See *Report 2007*, II.2.12.2.

Courts also fined the following for insult: the Kragujevac weekly *Svetlost* (*Danas*, 10 October, p. 33), *Blic* office in Leskovac (*Blic*, 22 March, p. 14), owner of *RTV Pink* Željko Mitrović (*Kurir*, 15 October, p. 4), *Kurir* journalist Dragoljub Petrović (*Politika*, 22 November, p. 10 and *Vreme*, 27 November, p. 35). Courts acquitted the following on insult charges: *Politika*'s Niš correspondent (*Politika*, 28 January, p. 12) and *Kurir* journalist Dragana Manojlović. (*Kurir*, 20 October, p. 6)

The Supreme Court of Serbia Criminal Law Department in December adopted a legal position on libel and insult which is in accordance with European views on the two offences (*Politika*, 18 December, p. 1). The opinion caused euphoric reactions of those who thought it meant that the offences would no longer be penalised, but the Supreme Court explained that freedom of speech, not decriminalising libel and insult, was at issue. (*Politika* 19 December, p. 8)

The first sentence characterising an article as hate speech was passed in June. The First Municipal Court n Belgrade qualified as hate speech a bogus ad published in the daily *Glas javnosti* in 2006 and calling for a boycott of the IDEA supermarkets (*Beta*, 6 November and *Kurir*, 8 November, p. 14).[742] The tabloids published articles spreading hate towards homosexuals (*Kurir*, 24 May, p. 1, *Kurir*, 24 December, p. 6), Albanians (*Kurir*, 2 March, p. 1), Croats (*Kurir*, 2 July, p. 5), Europe (*Kurir*, 12 June, p. 1) and anti-Fascists. (*Kurir*, 7 October, p. 5)

The Chief Editor of *Politika* Ljiljana Smajlović was dismissed in *Politika*. She claimed her dismissal was politically motivated (*Danas*, 2 October, p. 4). On the other hand, she explained that she had sacked commentator Ljubodrag Stojadinović for "revealing an official secret" i.e. for allegedly revealing the salaries in *Politika.* (*Politika*, 3 October, p. 5)

The RBA advertised the positions in the *RTS* Management Board in July although the terms in office of the current members expire in 2011 (*Kurir*, 4 July, p. 3). *RTS* filed a criminal report against the RBA, which withdrew the ad ten days later and dismissed the RBA Council Chairman and his deputy. (*Blic*, 5 July, p. 4; *Danas*, 14 and 30 July, pp. 4 and 5)

The Director General of *RTV Vojvodina*, Dina Kurbaševski Vranješević, and most of the station's senior management were sacked in December. OSCE and SEEMO protested against the lack of a serious explanation for the dismissals. (*Večernje novosti*, 27 December, p. 6)

2.10.4. Unprofessional Conduct by Journalists and Media. – Unprofessional and unlawful conduct by journalists and media gained in frequency in 2008. The arrest of one of the main ICTY indictees Radovan Karadžić caused an avalanche of such conduct, above all in the media: "Who Sold out Radovan" (headline in *Kurir* on 23 August), "Curse is the Message to the Traitors" (headline in *Kurir*, 6 August), "Serbian Cattle Arrests Radovan" (front page of *Pravda*, 22 July). *Večernje novosti*

742 See II.2.5.2.2.

ran a pro-Karadžić feuilleton entitled "Radovan Karadžić – from Myth to The Hague". The tabloids anathemised President Tadić, blaming him for the arrest. In their frantic search of sensationalism and exclusive information, media published a lot of unchecked information about Karadžić's private life; hardly any mentioned the war crimes he stands accused of.

In late March, *Politika* published an article about the will of late Belgrade Mayor Nenad Bogdanović, claiming he had left behind at least 20 million Euros worth of property. President Tadić asked *Politika* to submit all information and any evidence it possessed to the relevant bodies so that they could investigate whether Bogdanović had committed a grave crime. Chief Editor Smajlović qualified his request as the authorities' attempt to interfere in the daily's editorial policy and front-paged Tadić's letter (*Blic*, 29 March, p. 2 and *Politika*, 3 and 4 April, pp. 7 and 9). No further information on this case was published by the end of the reporting period.

Publishing and broadcasting photographs of victims was another form of unprofessional media conduct that occurred in 2008. On 22 August, for instance, the tabloid *Kurir* front-paged a close-up of a chopped off human head and, on 20 October, of a woman who had committed suicide. On 31 August, it published a close-up photograph of a killed pregnant woman on page 11. The Ministry of Culture filed a criminal report against the tabloid for publishing the photograph of the chopped off head (*Kurir*, 23 August, p. 4), but proceedings against *Kurir* were not instituted by the time this report went into print.

The tabloid *Press* published a series of photographs of a sexually abused 12-year-old girl (*Press*, 15 October, p. 10), *Večernje novosti* the photographs of an abused minor, her mother and her father who is suspected of the crime (19 January, p. 22), while the tabloid *Alo* front-paged a photo of a sick and sexually abused girl (21 November). A similar photograph was also shown on *TV B92*. One of the gravest incidents occurred on 16 May, when *Večernje novosti*, *Kurir*, *Press* and *TV Avala* published a photograph of a naked twelve-year-old girl who had been abused. (*Danas*, 17 June, p. 5)

RTS Director General Aleksandar Tijanić's conduct has frequently been qualified as disrespect of professional and other codes. He slapped LDP official Miloš Luković after a trial because the latter loudly criticised him. Tijanić said the slap was a "pedagogical measure"; the then Prime Minister Vojislav Koštunica spoke out in support of Tijanić, saying he was "not only a Director but a journalist as well". (*Kurir*, 28 March, p. 2 and *Danas*, 29 March, p. 4)

The Advertising Act was violated by *TV Avala* and *TV B92,* which broadcast the founding convention of Tomislav Nikolić's Serbian Progressive Party without clearly indicating that the SNS had rented the airtime. (*Kurir*, 24 October, p. 8)

2.11. Domestic Violence

The group monitoring domestic violence within the Monitoring and Reporting the Activities of Legal Institutions in Serbia project asked the municipal courts in Serbia for access to information of public importance related to proceedings involving the commission of offences in the Criminal Code (Art. 114 (2, 7 and 8), Art. 181 (2, 3 and 5), and Arts. 194 and 197) and the Family Act (Art. 197). To ensure an as comprehensive analysis of the jurisprudence as possible, the monitors asked the courts to also provide them with copies of the final decisions.

2.11.1. Vrbas Municipal Court

2.11.1.1. Criminal Proceedings. – On the basis of the facts listed in the two verdicts (forwarded by the Court), this Court can be criticised the most for the penalties it handed down to the offenders. The victims were not adequately protected in either case.

In the first case, the offender was sentenced to four-month imprisonment or 1-year probation and the Court confirmed that the offender was fully aware of his actions and that he had a prior record. The Court, however, did not issue a restraining order although the injured party stated that she had been exposed to physical and verbal violence for 15 years. The explanation of the sentence starts by saying that the offender was "able to understand what he had done, that he was aware of his crime and had wanted to commit it on a number of occasions by his insolent and ornery conduct"... but it ends ignoring the frequency of the violence and its goal – to incur injuries to the victim. The analysis of all the facts in the verdict leads to the conclusion that the victim has not been afforded adequate protection.

In the second case, the son committed violence against his mother whilst suffering from diminished mental capacity. Like the offender in the first case, he was frequently violent against his mother and had a prior criminal record. He also has a medical record in the Neuro-Psychiatric Ambulance in Vrbas. Although the Court established that he was constantly violent, that he had been diagnosed with an undefined psychosis characterised by aggression and introversion, the Court ordered that he remain at liberty but undergo out-patient psychiatric treatment. The Court did not take into account the offender's psychological state or the fact that he and his mother lived in the same house, whereby its verdict has allowed for the violence to continue. At the end of the explanation, the Court highlighted as crucial the fact that the offender "is not married, has no children and is unemployed". It did not, however, explain how these three facts justify the lack of protection of the victim.

2.11.1.2. Civil Proceedings. – The verdicts passed in civil proceedings differ amongst each other to a great extent, but most of them have the following in common: the plaintiffs sought that the defendants be issued a restraining order, both with respect to themselves and their underage children. The Court refused to issue

retraining orders with respect to the children because it established that the relationships between the fathers and the children had not been disrupted. The court decisions were supported by court expert opinions.

Of the five civil law verdicts, BCHR monitors would like to highlight the case in which an ex-husband brought charges against his wife for being violent towards their underage children.

The Court established that the defendant "used spanking as a pedagogical measure" and that she had thus incurred haematomas to one child. The Court, however, rejected the request of the plaintiff to strip the defendant of her parental rights for the time being because it did not think that such a move would be in the interests of the child. It based its decision on the statements of witnesses and the reports of court experts: a specialist, the AP of Vojvodina Institute for the Health Protection of Children and Youth expert team, the Social Centre, and a court expert in medical psychology. In its explanation, the Court stated that the plaintiff's request was rejected because an "inadequate form of punishment and correction of conduct in the form of an isolated incident" was at issue. The BCHR monitors are of the opinion that the Court should have taken a decision in the child's best interests and that, although it took into account the experts' reports, it omitted to ensure the further protection of the children in this case. Given that the defendant stated that she occasionally resorted to spanking as a pedagogical method, the Court should have ordered the Social Centre to supervise her for a specific period of time, because the frequency of spanking is not obvious in the verdict explanation. Statements by most witnesses – that the children are "neat, clean and well looked after" – do not lead to the conclusion that they have not been exposed to physical or psychological violence. The plaintiff appealed with the Novi Sad District Court, which upheld the Vrbas Municipal Court decision.

2.11.2. Titel Municipal Court

The responses from the Titel Municipal Court leave doubt about whether only criminal proceedings (under Art. 194 of the Criminal Code) were conducted in the 1 January 2007–1 April 2008 period in that Court, or whether it had also conducted civil proceedings but failed to provide the BCHR monitors with copies of the verdicts or information about them.

Criminal Proceedings. – In the explanations of all its final verdicts, the Court qualified prior criminal record as the aggravating circumstance, but it did not take it into consideration when handing down the judgment, because "a long period of time has elapsed since the last conviction". It is unclear why a fact is listed as an aggravating circumstance if it does not impact on the stringency of the penalty.

The Court has taken an odd view on alleviating circumstances as well. For instance, the age, any age, of the offender is always taken as an alleviating circumstance, in one judgment, the panel took "old age" as an alleviating circumstance due

to the "inability of the person to commit graver violence due to his age", in another, the perpetrator's "middle age" was perceived as a mitigating circumstance, while, in a third judgment, the court listed the offender's "youth" and "inexperience" as the extenuating circumstance.

2.11.3. Bečej Municipal Court

The verdicts of the Bečej Municipal Court lead to the conclusion that it, like all Serbian courts, has a mild penal policy (suspended sentences were pronounced against the offenders in 10 of the 12 criminal cases).

The Bečej Municipal Court forwarded information on 12 criminal verdicts and one civil settlement.

The fact that the explanations of the verdicts are extremely detailed and that the important facts were fully established are very encouraging. Apart from the statements of the defendants, injured parties and witnesses, the verdict explanations also cite the opinions of the medical experts, social centres and outpatient health clinic reports.

In nearly each case, the Court established particular, rather than general, extenuating circumstances. The only verdict that warrants criticism is the case in which the court found the *conduct of the injured party, who has been provoking the offender* to be an alleviating circumstance (although it sentenced the offender to imprisonment).

Two offenders were sentenced to imprisonment by final verdicts. In the first case, the court delivered a sentence of six-month imprisonment to the defendant who had committed domestic violence on a number of occasions over a longer period of time. The time he spent in custody was reckoned as imprisonment and he did not need to stay on in prison when the final verdict was brought. Such a mild penalty was pronounced because of the effects of the conduct of the injured party.

A sixteen-month imprisonment sentence was delivered against a defendant who had already been convicted on a number of occasions (aggravating circumstance) for crimes not related to domestic violence (alleviating circumstance). When it was determining the penalty, however, the Court took into account the manner in which he had committed the crime (use of a dangerous implement – razor) and the intent to incur bodily injury.

2.11.4. Senta Municipal Court

The Senta Municipal Court forwarded information on final decisions taken in a large number of criminal proceedings but no data on any civil proceedings related to domestic violence.

The Senta Court in two cases ordered the defendants to pay 10,000-dinar fines. Comparison of established facts in the decisions sentencing the offenders to probation, fines and court warnings does not allow for drawing a clear distinction

between the relationships between the offenders and the victims, or between the offenders' intents and the consequences of their crimes. The difference between the pronounced penalties is, however, a big one.

The Court in one case sentenced the offender to probation and, in the other, issued the offender a court warning, although their victims had suffered identical injuries in an identical manner. The only difference between the two offenders is that the former had already been convicted albeit not for domestic violence. BCHR monitors' research into domestic violence cases, however, indicates that prior convictions are rarely taken as aggravating circumstances, which again testifies of the lack of uniformity of jurisprudence in Serbia.

The question arises on how much significance the Court attaches to the intent of the offender, especially if it clearly established that s/he was "intent on committing the crime and aware of his/her act". One verdict states that the offender had used a knife during the commission of the crime and that he had committed it with intent. This offender was, however, handed down a suspended sentence although the law envisages between three months and three years of prison for such a crime. The explanation does not shed light on how the nose injury was incurred – with a knife or in another manner. Given that a knife, which is a weapon/dangerous implement was used and that there was intent to commit the crime, BCHR monitors are of the opinion that probation is an inadequate penalty in this case.

2.11.5. Valjevo Municipal Court

Importance of Medical Evidence in Court Proceedings. – Presentation of evidence in court proceedings related to domestic violence raises the question whether medical evidence is as important as witness statements. The judges, whose trials BCHR monitored, vary in opinion on that issue. They, however, most often take decisions on the basis of their own assessments of the witness statements and the conduct of the victims and the offenders. There is little clear and unambiguous evidence they have at their disposal. The course of the proceedings and the determination of the penalties depend the most on the view of the judge and his/her understanding of violence. Can, however, a judge's view play the decisive role in the sentencing in face of indisputable medical evidence?

Medical evidence is deemed relevant only if the victim saw a doctor immediately after having been subjected to violence, if his/her injuries have been recorded and if the doctor drafted a report on them. Court expertise and expert opinions can be made during the proceedings on the basis of already established bodily injuries. Another problem must be highlighted here, however – victims of violence are most often unaware of the importance of concrete evidence, medical in this case, and the importance of seeing a doctor immediately.

The below verdict explanations by the Valjevo Municipal Court corroborate BCHR monitors' conclusions related to medical evidence.

A defendant accused of incurring bodily injuries i.e. domestic violence against his partner was sentenced to 10 months in prison or two-year probation. The witness and defendant's statements would lead to the conclusion that there had been no violence, merely a verbal conflict, and that the victim had sustained injuries because the defendant "only pushed her" and she hit herself on the door jamb. The witness, the mother of the defendant, confirmed that that had indeed been the case. On the other hand, court expert reports and medical evidence showed that the victim had sustained bodily injuries to the face in the form of haematomas. By comparing the victim's statements and the medical evidence, it was established that the defendant and the witness gave false testimonies.

The judge dismissed the charges stating that the defendant had already committed domestic violence against the victim, by using a hammer to hit the victim on the knee. There was no evidence to corroborate this allegation and the victim had not sought medical assistance after the fact.

A defendant in another case pleaded innocent in a similar manner. He stated that he had only "grazed the victim's brow with a key chain accidentally" and that he had committed no other physical violence. The statement of the victim, corroborated by the presented medical evidence, indicated that the violence had occurred. The court experts confirmed that the victim had sustained light bodily injuries – that she had cuts, contusions and scrapes on her face and head. The defendant was sentenced to five months in prison or two-year probation, and the Court cited the fact that the injured party had not joined in the criminal prosecution as an alleviating circumstance. Failure to join in criminal prosecution cannot be a mitigating circumstance, especially if the victim gave a statement on having been subjected to violence, which was corroborated by other facts. The court is obliged to punish the perpetrator of the crime and protect the victim *ex officio*.

2.11.6. Šabac Municipal Court

Various facts are used as arguments to highlight extenuating circumstances. All those facts are apparently conducive to the recurrence of violence, not its elimination. For instance, there is no justification for sentencing an offender to probation because he was temporarily of diminished responsibility, if that temporarily diminished responsibility was the consequence of inebriation.

One verdict stated that the offender had been under the influence of alcohol when he incurred the victim light and grave bodily injuries (concussion and broken nose). Medical documentation and psychiatric expertise corroborated the injured party's statement. The verdict explanation leads to the conclusion that the offender often drank alcohol and was undergoing treatment at the time of the trial. Even the fact that the police found a knife on the offender did not prompt the Court to sentence him to a graver penalty than probation.

Two other verdicts are also indicative. In the first case, the (recurrent) perpetrator was sentenced to six months in jail or three-year probation for slapping his

daughter, strangling her and threatening her. The second offender was sentenced to 30 days in jail or one-year probation for hitting his victim with his fist, tearing her hair out, fracturing her nose, and incurring her haematomas and contusions. In both cases, the victims had been subjected to violence for several years.

One of the offenders stated that he "was aware that he was endangering (his victim's) tranquillity by resorting to violence ... which is what he wanted". This leads BCHR monitors to wonder whether remorse is equated with admission and the conscious volition to commit violence.

2.12. Peaceful Assembly

The protests that ensued after Kosovo's declaration of independence and the arrest of Radovan Karadžić were without doubt the most striking events related to the freedom of peaceful assembly in 2008.

The rally staged in response to Kosovo's declaration of independence was held in Belgrade on 21 February under Government auspices and attended by eminent public figures. The rally was accompanied by riots, during which the US Embassy was set on fire, a number of other embassies were damaged and over 200 persons were injured. A Novi Sad student, Zoran Vujović, died in the US Embassy after scores of protesters broke into the building, demolished it and set it on fire. Apart from the US, UK, Slovenian, German, Turkish, Croatian, Belgian, Canadian and Bosnian embassies, the protesters also attacked the offices of foreign banks and companies. They also vented their wrath by attacking McDonalds restaurants and *TV B92*. The protesters were extremely hostile towards the cameramen, photographers and journalists, whom they physically attacked and threatened.

The police reacted with a two-hour delay. The gendarmerie stood by and watched the protesters' savagery throughout the protest and threw tear gas to push them back at the very end. Foreign diplomats complained that the police, reportedly with the tacit support of Koštunica's government, had failed to undertake energetic measures to prevent and quell the incidents. The attacks on the embassies prompted the UN Security Council to sharply condemn such vandalism and the Serbian authorities for failing to take the necessary steps to prevent the incidents.

The rally was a prime example of the gross abuse of the right to peaceful assembly. Groups of vandals were organised with the sole aim of inflicting material damage under the guise of a peaceful rally.

SRS and several nationalist organisations began staging rallies as soon as ICTY indictee Radovan Karadžić was arrested. The groups did not report the rallies to the competent police stations as required by the law. The central rally, organised by the still united SRS and New Serbia, was held on 29 July. It turned into a rampage of soccer fans and SRS followers who hurled firecrackers, torches and stones

at the police. Many policemen and journalists were injured in the attacks. The MIA filed a number of criminal reports.[743]

Quite a few protesters were injured as well. Ranko Panić, an SRS sympathiser from Mladenovac, succumbed to the injuries he sustained at the rally. Six policemen were suspended and are facing disciplinary proceedings for abuse of post. The Minister of the Interior formed a working group, which is to establish the facts and circumstances under which the protesters and policemen were injured and establish who is responsible for Panić's death in cooperation with the prosecutors.[744]

The SRS and nationalist organisations continued staging daily rallies after the incidents. Despite police presence, the protesters continued clashing with journalists in the heart of Belgrade and. *TV B92*'s cameraman Boško Branković's shank bone was broken.

Although the number of people demonstrating against Karadžić's arrest dwindled over time, the nationalist groups staging the protests continued abusing the right of peaceful assembly, by blocking traffic in the heart of Belgrade every day. The rallies went on for several months and were often attended by merely several scores of protesters. The police, however, failed to react and prevent them from blocking the traffic. Belgrade Mayor Đilas ended the daily agony by publicly appealing to the police to regulate the traffic and keep the protesters off the streets and on the sidewalks. It was only then that the police began filing misdemeanour reports against the organisers of the rally.

There was a major public debate in October on what kinds of rallies ought to be prohibited.

A group rallied round neo-Nazi organisations scheduled a march through Belgrade on 11 October. In response, various organisations and civic groups organised an anti-Fascist rally on the same day. At the insistence of the prosecution office and under great public pressure, the police decided to ban the Fascist rally. Explicit threats against Police Minister Ivica Dačić appeared on the Internet fora of the organisations National Formation and Blood and Honour after the police prohibited the march.[745]

Notwithstanding the ban, the followers of the Fascist movement rallied and marched through Belgrade alongside the anti-Fascists. Police kept the two groups separated, took 30 or so neo-Nazis into custody and filed two criminal and thirteen misdemeanour reports against the participants in the neo-Nazi march.

The neo-Nazi march brought to the fore the need to regulate such assemblies and avoid incidents like the one on 11 October. Police Minister Dačić and Local Self-Government and Administration Minister Milan Marković said a working

743 *B92*, 29 July, www.b92.net.

744 MIA Statement, 16 September 2008, www.mup.sr.gov.yu.

745 *Blic*, 17 October, www.blic.rs.

group would be set up to draft a law prohibiting neo-Nazi rallies given that such rallies have been declared high-risk events posing a threat to public order.

2.13. Economic, Social and Cultural Rights

2.13.1. Unemployment. – According to the latest National Employment Service (NSZ) data, the number of jobless in Serbia fell from 875,000 to 733,000 since the beginning of the year. The unemployment rate is, however, still high and stands at 18.8%. Over 25% of the unemployed are over 50. Half of the jobless have been searching for employment for over two years. Women, who generally have more trouble finding a job, account for 55% of the unemployed (*Blic,* 28 September, p. 11). Between 200 and 300 thousand people in Serbia are earning a living by working for employers who have not registered them and are not paying their employment contributions, NSZ Director Vladimir Ilić warned at a press conference (*Danas,* 7 November, p. 4). Officially, 2,296 companies across Serbia ceased to exist in 2008; 25,668 shops were deleted from the Business Registry Agency books in the same period (*Večernje novosti,* 18 October, p. 5). The global financial crisis has served as an excuse to dismiss over 700 employees and a similar fate awaits at least another 100,000 people, above all those working in privatised companies, who may well lose their jobs in 2009. (*Danas,* 13 November, p. 11)

2.13.2. Protection at Work. – Sreten Krstić was killed while working on an apartment building construction site in the heart of Valjevo. The builder does not possess a construction licence and the competent inspection suggested that the building be razed two years ago. The raze order has not been enforced because the Valjevo municipality lacks the funds. (*Večernje novosti*, 23 February, p. 23)

Radoslav Vulić was killed in an accident on a construction site in Kruševac. The Head of the Rasina District Republican Inspection Jugoslav Veljković said that all the circumstances of the accident would be investigated to establish whether the builder had undertaken all the precautionary safety measures. (*Večernje novosti*, 29 March, p. 13)

Homes near the shooting ground of the Zastava Arms Plant in Kragujevac were hit by bullets when the staff fired from rifles and machine-guns to check their precision. (*Politika*, 7 June, p. 18)

Three men were killed at three constructions sites in three Serbian cities in one day in October. In Priboj, Njegoš Pejatović succumbed to the injuries he sustained when he fell off the roof that caved in, while his colleague Slavko Trtović sustained grave injuries. Svetislav Dogandžić was killed in Kragujevac when the crane cable split into two. In Vrnjačka Banja, Siniša Jovanović was killed when earth caved in on him while he was digging a canal. (*Večernje novosti*, 22 October, p. 18)

Tikomir Perić, an employee of the plant Ede-Pro was seriously injured in an explosion of the company's anti-hail rocket facility. Investigation showed the accident was caused when the machine used to fill the rockets with th explosive mixture broke down. (*Večernje novosti*, 11 November, p. 19)

2.13.3. Mobbing. – In 2007, the Victimology Society of Serbia Info and Victim Support Service received a total of 117 calls from persons complaining of having been subjected to emotional, physical or sexual harassment at work, all three forms of abuse or other forms of violence. Most of the callers, 108 of them (78 women and 30 men) reported that they had been exposed to mobbing by their superiors, junior staff or colleagues. Seven of the callers (six women and 1 man) claimed they had been physically threatened at work and two women complained that they had been subjected to sexual abuse at work. In four cases, the callers claimed that they had been exposed both to physical and emotional harassment. The female victims of sexual abuse were also exposed to emotional harassment; one female caller reported physical abuse alongside sexual and emotional harassment at work.[746]

Although there were more media reports on mobbing in 2008 than in the previous year, 65% of the polled women still feel the media do not report enough on this phenomenon. As many as 76% of the women in Serbia have never even heard of the word 'mobbing'.[747]

The importance of media reports on mobbing is corroborated by the data of the Stop Mobbing Association, which usually receives 6 or 7 calls a day and as many as 20 calls on the days the media run stories on mobbing. Statistics show that one out of two employed Belgraders has been subjected to harassment at work at least once in their lives. Most victims of mobbing are overqualified for the jobs they are doing. Not many are actually physically or sexually abused; most are exposed to innuendos, sexual allusions, blackmail, et al. The majority of the victims are women. (*Blic*, 17 August, p. 4)

According to the analysis of the calls received by the Vojvodina Alliance of Independent Trade Unions hotline for victims of mobbing, as many as 80% of the employees have emotional problems at work because they are exposed to mobbing, and two-thirds of them have considered changing jobs because of it. According to the data, 44% of the people complaining of mobbing are over 50 years old, whilst 20-30-year olds complain of mobbing the least (4%). Mobbing is more frequent in the private sector (68 of the reported cases) and is used to pressure the employee into quitting his or her job. Women are more frequently exposed to mobbing than men (56%). Employees with high-school education accounted for 68% and those with college education for 28% of the victims of mobbing. (*Politika*, 22 November, p. A17)

746 More in: M. Kovačević-Lepojević, D. Radaković, *Analiza rada Službe u 2007. godini*, Temida, 2008, pp. 81–101.

747 BCHR survey Labour Rights and Discrimination – Awareness and Attitudes of Women in Serbia, accessible at www.bgcentar.rs.

Two dismissed female workers of the private Leskovac textile company *KSK Kloting* called a press conference at which they accused the factory owner and management of exploitation and mobbing. They claimed that they were "harassed, insulted and discredited" while they worked in the factory. The company representative denied accusations of staff abuse and chicanery and said that the two workers "were dismissed because they were idling and failing to fulfil their work norms". (*Danas,* 8 November, p. 21)

Eighteen employees of the Gornja Toponica Special Psychiatric Hospital near Niš went on a hunger strike on 7 May, demanding the dismissal of the Hospital Director Milan Stanojković because he mobbed them. Health Minister Tomica Milosavljević dismissed Stanojković and appointed psychiatrist Božica Ivić Acting Director.[748]

Labour inspectors have to date failed to register any of the many cases of mobbing reported to associations providing support to victims of emotional abuse. (*Blic,*17 August, p. 4)

Court Judgments. – Media reported on two court judgments related to mobbing in 2008. The first was pronounced by the Jagodina Municipal Court on 3 September 2008. The court applied the existing provisions in the criminal legislation and sentenced editor of the local weekly *Novi Put* Zoran Milovanović to four months in jail or two-year probation for the crime of abuse and harassment by an official i.e. for mobbing. The prosecution office raised the charges against Milovanović after a journalist of the paper, Ivana Delić Janković, filed a claim against him. The second instance court upheld the Jagodina Municipal Court's judgment. (*Politika,* 16 October, p. A12 and *Danas*, 5 December, p. 25)

The Bačka Palanka Municipal Court pronounced head of the South Bač District Darija Šajin guilty of mobbing and sentenced her to 14 months in jail or four-year probation for harassing six workers at the time she headed the Bač Municipal Administration. The court found that she "abused the staff and denigrated their human dignity" on a number of occasions in 2005.[749]

Draft Anti-Mobbing Act. – A draft law prohibiting abuse at work was presented in October 2008 and was being publicly debated at the end of the reporting period. It prohibits all forms of abuse at work or related to work. In terms of this law, abuse entails all active or passive forms of conduct towards an employee or group of employees by the employer, another employee or group of employees, which is repetitive and aims to violate or does violate the dignity, reputation, personal and professional integrity, health or status of the employee, and causes fear or creates a hostile, humiliating or abusive environment or leads to the isolation of the

748 http://www.naslovi.net/2008-05-23/b92/stanojkovic-ispitati-strajk-gladju/682702; http://www.naslovi.net/2008-05-14/b92/prekinut-strajk-u-toponici/671506.

749 Novi Sad daily *Dnevnik*, 18 October 2008, accessed at www.dnevnik.co.yu.

employee or his or her severance of the labour contract or resignation at his or her own initiative. The law prohibits encouragement of or incitement to abuse and abuse of employers or responsible officials.

The draft law foresees an in-house procedure for protection from abuse (mediation) and court protection if the employee is dissatisfied with the in-house protection from abuse. The burden of proof shall rest on the employer if the plaintiff proves probable his or her allegations of abuse. The draft commendably provides for exemption from payment of court taxes for launching civil proceedings related to abuse at work, which is expected to considerably facilitate the launching of such proceedings. The draft law envisages three categories of fines for mobbing, ranging from 40,000 to one million dinars.

2.13.4. Poverty and Living Standards. – According to data collected by the team implementing the Poverty Reduction Strategy, South-East Serbia is the most stricken by poverty – 13.3% of its population are impoverished and most of them live in rural communities (which are in general destitute and in which one out of three citizens are poor). Belgraders are struck by poverty the least – only 3.1% of the capital's population is indigent. East Serbia is also hit by poverty – 10.1% of its population are poor, but, in this part of the country, poverty is more widespread in urban settlements. Lack of education and unemployment are the chief causes of poverty in Serbia (*Politika*, 1 April, p. 8). Seven percent of Belgrade children (23,000) live below the poverty line. They are merely a fraction of the group of around 300,000 boys and girls living on the brink of existence in Serbia. Roma children, children with development problems or without parental care and children – victims of negligence and ill-treatment are the most vulnerable. Only 10% of the children in impoverished families attend kindergarten and pre-school. Only 13% of Roma children complete elementary school. (*Večernje novosti*, 22 September, p. 24)

In mid-January, a couple by the name of Dragoljub and Ljubinka Petrović in the town Lapovo died of poverty, hunger and cold. They lived in a rundown house, without electricity, water or heating (*Politika*, 14 January, p. 9). Vladanka Đurđević and her son Slađan, who had lived in a condemned house unfit for humans and even missing a wall in the village of Šantarovac at Jagodina, died of hunger (*Blic*, 1 February, p. 17). Deaths caused by hunger, poverty and cold had until recently been extremely rare in Serbia.

According to a research conducted by the Belgrade Institute of Sociological Research, 50,000 of the labour active population make up the upper class, 800,000 the middle class, while 2.5 million belong to the the lower i.e. impoverished class. (*Politika*, 18 March, p. 8)

2.13.5. Pensions. – At the initiative of the Party of United Pensions of Serbia, which conditioned its participation in the ruling coalition by an increase in pensions and had the promise included in the coalition agreement, the Serbian Gov-

ernment passed a Decree on a 10% increase in pensions as of October. The increase amounted to 17% once the pensions were harmonised with the increases in average pay and inflation. The authorities said the Pension and Disability Insurance Act would be amended to ensure that pensions cannot fall under 70% of the average salary in Serbia by end 2009. (*NIN,* 4 September, p. 28)

2.13.6. Education. – The Statistics Bureau data show that over 227,000 citizens of Serbia have completed between one and three grades of elementary school, while 898,847 had between 4 and 7 grades of elementary education. Serbia is the only state in Europe which has recorded a decrease in the number of university graduates in the past 15 years. Only 7% of Serbia's residents are college graduates. Of the 7.5 million citizens of Serbia (discounting Kosovo), 1.2 million have not completed elementary education and 3.5% are totally illiterate. (*Vreme*, 15 May, p. 5)

The Education Ministry announced that the invalid textbooks published by private companies could not be used in school and that around 100,000 issues of such textbooks for 1-5th grades would be replaced with the textbooks published by the state Institute for Textbook Publishing and Teaching Aids (*Danas*, 18 September, p. 6). Private publishers claimed they had possessed the necessary licences for their textbooks at the time they offered them to schools and the parents paid for them, but that the Education Ministry subsequently revoked the licences after an *ad hoc* check of all textbooks printed by private publishers (*Blic*, 27 September, p. 8). Parents had to spend between 6 and 12 thousand dinars on textbooks and school supplies per child in 2007 and an extra 4,000 dinars or so in 2008. (*Blic*, 8 August, p. 8)

The adoption of the amendments to the Higher Education Act halted the protest of Belgrade University students. At the suggestion of the Education Ministry, the Government proposed lowering the number of credits students need to enrol in the following academic year and continue their studies at the expense of the state. (*Večernje novosti*, 24 October, p. 7)

Junior students of German at the Belgrade College of Philology signed a petition demanding the replacement of a teacher because of his arrogant and inappropriate behaviour and disrespect of rights guaranteed by the Bologna Charter. (*Blic*, 29 October, p. B2)

An English teacher in the Bor High School was suspended after she slapped a pupil. (*Politika*, 11 March, p. 18)

Twenty-three professors, 33 students and over 30 go-betweens have been charged with corruption, abuse of post, forgery of documents and incitement to crime in the so-called *Indeks* (College Gradebook) scandal. A number of the professors worked at the Kragujevac, Niš, Belgrade and Novi Sad law schools have been accused of charging students between 500 and 750 Euros for giving them a passing grade at an exam; a college diploma costs between 12 and 16 thousand Euros. The professors are charged with a total of 159 crimes – 114 bribery and 45 abuse of of-

ficial post counts.[750] The main hearing opened in December 2008 and will continue in April 2009.

2.13.7. Strikes. – Dissatisfied workers continued staging strikes, while trade unions mostly focussed on signing the Genera Collective Agreement and talks on when it would be extended from specific to all employers.[751] The biggest strikes in 2008 were, however, organised by army reservists, veterans of the 1999 war in Kosovo.

Strikes by Army Reservists. – The Government of Serbia passed a decision on the payment of the overdue *per diems* in the form of social contributions to military reservists in specific regions (the Toplica District and part of the Jablanica District) who had staged strikes in late 2007 and early 2008. (*Večernje novosti,* 12 January, p. 6)

All reservists of the Third Army (that had been deployed in Kosovo until June 1999) reacted by launching strikes that spread across Serbia and took various forms.

Around three thousand men, who had fought in Kosovo, protested in the heart of Leskovac and around 1,000 in the centre of Niš, demanding they, too, be included in the Government decision to pay 2 billion dinars worth of war *per diems* to the Toplica and Jablanica District reservists. (*Večernje novosti*, 18 January, p. 6)

Around 40,000 reservists in southern Serbia believe they have the right to be paid extra for the days they spent fighting and some three thousand of them gathered in front of the Serbian Government headquarters in Belgrade in protest. (*Večernje novosti*, 16 August, p. 6). Thousands of reservists came to Belgrade from their hometowns in April, August and September to demand payment of extra *per diems* for participating in the war in Kosovo. The traffic in the capital was blocked every time they staged their strikes. (*Blic,* 11 April, p. B2)

Kuršumlija reservists blocked the local Municipal Court for several days to protest against the delays in the payment of the money the Government had allocated for the fifth instalment of aid to the participants in the war in Kosovo. (*Kurir,* 6 June, p. 7)

The protests of the Third Army reservists and the week-long hunger strike by seven reservists ended in September after the Government and the reservists' united strike committee agreed to set up a working group to review payments of back *per diems.* (*Danas,* 26 September, p. 33)

Workers' Strikes. – Workers of the Zrenjanin plant Šinvoz staged a series of protests in Zrenjanin and Belgrade in January. Although their demands to annul the privatisation of a part of the plant went unanswered, they halted the protests after one of their colleagues died of a heart attack. (*Blic,* 17 January, p. 14)

750 http://www.portalargus.org/vesti/9632.html.

751 See I.4.18.

Over 1,300 workers of the Kraljevo Magnohrom staged unsuccessful strikes over unpaid salaries first in Kraljevo and then came to Belgrade to protest in front of the Serbian Government headquarters. Together with the army reservists, they caused a total traffic collapse in the capital. They dispersed after a one-day protest and a new offer made by the Capital Investments Minister. (*Danas,* 11 April, p. 4)

Over a thousand workers of the Vranje companies Koštana and Jumko protested in front of the town hall; although they voiced different demands, they mostly insisted on getting their unpaid salaries and better working conditions. They said they would resume the protests if the competent officials did not come to see them. (*Danas,* 6 November, p. 29)

2.13.8. Hunger Strikes. – Three members of the Smederevo factory Želvoz trade union workers movement went on a hunger strike to protest against the alleged unlawful privatisation of the factory. After going without food for three days, they were provided with medical treatment and thrown out of the plant with the help of the security guards. (*Kurir,* 26 January, p. 7)

Čenta elementary school teachers launched a hunger strike in February over problems that they had with the school principal when the Vojvodina School Workers' Trade Union was set up. (*Politika,* 2 February, p. 18)

Thirty or so reservists went on a hunger strike in the Leskovac town hall to express their dissatisfaction with the course of their talks with the Serbian Government representatives. The days-long strike was halted when the Government agreed to pay them the war *per diems* they had demanded. (*Politika,* 21 March, p. 8)

Seven war veterans spent a week on a hunger strike in front of the Government building in Belgrade over unpaid *per diems*. (*Danas,* 26 September, p. 33)

2.13.9. Civic Protests. – Unity, persistence and exceptional civic initiative prevented the construction of a high-rise in place of the only playground and a "green oasis" in a residential block in Belgrade. The battle began on 11 June 2005 when the workers of the Belgrade city company Greenery came at the break of dawn and cut down all the trees in the park. The citizens began staging protests on the treeless playground. They succeeded in preserving the only playground in the area and demanded a change of the regulation plan that envisaged the construction of a building in place of the park. Mayor Dragan Đilas found a compromise solution – the playground will stay where it is and the investor will be issued a licence to build at another location. (*Večernje novosti*, 9 October, p. 24)

The year 2008 was marked by conflicts between investors planning to build the supermarket Vero in the Belgrade municipality of Voždovac and the residents of the nearby buildings who claim that the site had been designated to be their parking lot. The residents' protests led to traffic blockades and frequent clashes with the construction site security. Several people sustained light injuries in the fights. (*Blic,* 11 November, p. B1). Given that neither party is prepared to give up its demands, both talked with the Belgrade Mayor and competent city authorities in the attempt to find a compromise.

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 Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data regarding Supervisory Authorities and Transborder Data Flows, *Sl. glasnik RS (Međunarodni ugovori),* 98//08.
- 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 for the Protection of Individuals with Regard to Automatic Processing of Personal Data, *Sl. list* SRJ (Međunarodni ugovori), 1/92 and *Sl. list SCG,* 11/05.
- 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.
- ILO Convention No. 81 Concerning Labour Inspection, *Sl. list FNRJ (Addendum)*, 5/56.
- ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, *Sl. list FNRJ (Dodatak)*, 8/58.
- ILO Convention No. 89 Concerning Night Work of Women (revised), *Sl. list FNRJ (Dodatak)*, 12/56.
- ILO Convention No. 90 Concerning Night Work of Young Persons in Industry (Revised) *Sl. list FNRJ (Dodatak)*, 12/56.
- ILO Convention No. 91 Concerning Paid Vacations for Seafarers (Revised), *Sl. list SFRJ (Međunarodni ugovori)*, 7/67.
- ILO Convention No. 98 Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, *Sl. list FNRJ (Dodatak)*, 11/58.
- ILO Convention No. 100 Concerning Equal Remuneration, *Sl. list FNRJ (Međunarodni ugovori)*, 11/52.
- ILO Convention No. 103 Concerning Maternity Protection (Revised), *Sl. list FNRJ (Dodatak)*, 9/55.
- ILO Convention No. 105 Concerning Abolition of Forced Labour, *Sl. list SRJ (Međunarodni ugovori)*, 13/02.
- ILO Convention No. 106 Concerning Weekly Rest (Commerce and Offices), *Sl. list FNRJ (Dodatak)*, 12/58.
- ILO Convention No. 109 Concerning Wages, Hours of Work and Manning (Sea), (Revised), *Sl. list SFRJ (Međunarodni ugovori)*, 10/65.
- ILO Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation, *Sl. list FNRJ (Dodatak)*, 3/61.
- ILO Convention No. 121 Concerning Employment Injury Benefits, *Sl. list SFRJ (Međunarodni ugovori)*, 27/70.
- ILO Convention No. 122 Concerning Employment Policy, *Sl. list SFRJ*, 34/71.
- ILO Convention No. 129 Concerning Labour Inspection (Agriculture), *Sl. list SFRJ (Međunarodni ugovori)*, 22/75.

- ILO Convention No. 131 Concerning Minimum Wage Fixing, *Sl. list SFRJ (Međunarodni ugovori)*, 14/82.
- ILO Convention No. 132 Concerning Holidays with Pay Convention (Revised), *Sl. list SFRJ (Međunarodni ugovori)*, 52/73.
- ILO Convention No. 135 Concerning Workers' Representatives, *Sl. list SFRJ (Međunarodni ugovori)*, 14/82.
- ILO Convention No. 138 Concerning Minimum Age for employment, *Sl. list SFRJ (Međunarodni ugovori)*, 14/82.
- ILO Convention No. 140 Concerning Paid Educational Leave, *Sl. list SFRJ (Međunarodni ugovori)*, 14/82.
- ILO Convention No. 144 Concerning Tripartite Consultation (International Labour Standards), *Sl. list SCG (Međunarodni ugovori)*, 1/05.
- ILO Convention No. 155 Concerning Occupational Safety and Health, *Sl. list SFRJ (Međunarodni ugovori)*, 7/87.
- ILO Convention No. 156 Concerning Workers with Family Responsibilities, *Sl. list SFRJ (Međunarodni ugovori)*, 7/87.
- ILO Convention No. 161 Concerning Occupational Health Services Convention, *Sl. list SFRJ (Međunarodni ugovori)*, 14/89.
- European Charter of Local Self-Government, *Sl. glasnik RS,* 70/07.
- European Convention for the Protection of Human Rights and Fundamental Freedoms, *Sl. list SCG (Međunarodni ugovori)*, 9/03.
- European Convention on the International Validity of Criminal Judgments, with appendices, *Sl. list SCG (Međunarodni ugovori)*, 18/05.
- European Convention on Extradition with additional protocols, *Sl. list SRJ (Međunarodni ugovori)*, 10/01.
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Sl. list SCG (Međunarodni ugovori)*, 9/03.
- European Charter on Regional and Minority Languages, *Sl. list SCG (Međunarodni ugovori)*, 18/05.
- Framework Convention for the Protection of National Minorities, *Sl. list SRJ (Međunarodni ugovori)*, 6/98.
- International Convention on the Elimination of All Forms of Racial Discrimination, *Sl. list SFRJ (Međunarodni ugovori)*, 6/67.
- International Convention on the Suppression and Punishment of the Crime of Apartheid, *Sl. list SRFJ*, 14/75.
- International Covenant on Civil and Political Rights, *Sl. list SFRJ*, 7/71.

- International Covenant on Economic, Social and Cultural Rights, *Sl. list SFRJ*, 7/71.
- International Criminal Court Statute, *Sl. list SRJ (Međunarodni ugovori)*, 5/01.
- 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 Anti-Corruption Agency, *Sl. glasnik RS,* 97/08.
- 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 Freezing and Writing Off Overdue Compulsory Health Insurance Contributions, *Sl. glasnik RS,* 102/08.
- 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 Judges, *Sl. glasnik RS,*116/08.
- 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, 116/08.
- 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 Organisation of Courts, *Sl. glasnik RS,*116/08.
- 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.
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