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RIGHT TO ASYLUM – LEGAL FRAMEWORK IN THE REPUBLIC OF SERBIA

Comments on the Asylum Law of Serbia and Montenegro and the Draft Asylum Law of Serbia

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The Belgrade Centre for Human Rights is an implementing partner in the project ”Protection of Asylum Seekers in the Republic of Croatia and the Region ” headed by the Croatian Law Centre and financed by the European Commission (AENEAS programme) and UNHCR. Within the framework of this project, the Belgrade Centre decided to prepare a publication to present its opinion about the building of the asylum system in the Republic of Serbia at the legislative level.

The state authorities have not yet presented the Draft Asylum Law for public debate. The Belgrade Centre for Human Rights had an opportunity to get acquainted with the most recent Draft Law which contained imprecise formulations and was not in line with the international standards and the domestic legal system. As the functioning of the future system of asylum seekers protection will largely depend on legal framework, the Belgrade Centre for Human Rights believes it would be most pertinent to dedicate this year's „policy paper" to the analysis of the existing Asylum Law of Serbia and Montenegro and Draft Asylum Law of the Republic of Serbia. The idea is to offer certain recommendations for improvement of the texts and forward them to the members of the Working Group of the Ministry of Interior and other competent authorities with a view to influencing the quality of the legal framework in this phase when there is still time for corrections and refinement of the text.

The present document was drafted by Ružica Žarevac, LL.M. and Lana Budimlić. The opinions presented herein do not necessarily present the opinions of the European Commission, UNHCR nor the Croatian Law Centre. The Belgrade Centre for Human Rights is the only party responsible for them. Should you need any additional information, wish to give your views on the legislation or offer a comment on the present document, please do not hesitate to write to the Belgrade Centre for Human Rights: Beogradska 54/III, 11000 Belgrade, or our associate Ružica Žarevac (ruzica@bgcentar.org.yu, +381 64 824 6508). Your comments and suggestions related to the content of the document or the current legal framework of protection of asylum seekers in Serbia would be most welcome.

I. INTRODUCTION

I. 1. First steps towards establishment of a legal asylum system in the Republic of Serbia

The Republic of Serbia, as a state successor of the State Union Serbia and Montenegro (hereinafter: SCG), ratified numerous international treaties which have direct or indirect relevance to the issues of asylum. Serbia is a state signatory of the 1951 UN Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, the International Covenant on Civic and Political Rights, UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment, European Convention for Protection of Human Rights and Fundamental Freedoms, European Convention for Prevention of Torture, Inhuman or Degrading Treatment or Punishment, UN Convention on the Right of the Child and other relevant international treaties. Consequently, the state has an obligation to implement these documents adequately into its legal system and to apply them consistently.

The Charter on Human and Minority Rights and Fundamental Freedoms[1] guarantees a foreign citizen right to asylum in Serbia if he has a founded fear of persecution for reasons of his race, colour, sex, language, religion, ethnic affilitation, membership of a certain group or political opinion. The right so guaranteed extends the possibility of protection of refugees also in respect of persecution for reasons of sex, colour and language, which is not a condition for acquisition of refugee status according to the 1951 UN Convention Relating to the Status of Refugees. The Convention prescribes that the asylum system would be defined by a separate legal act.

The SCG Assembly adopted the Asylum Law of Serbia and Montenegro[2] on 21 March 2005 rendering ineffective the part of the 1980 Law on Movement and Stay of Aliens that regulates the right to asylum and status and stay of refugees (Art. 44-60). The Law on Asylum has no practical value since it does not prescribe the procedure nor does it appoint authorities competent for the procedure of granting asylum. It is a framework law (so called „umbrella law") which contains only the basic principles of international law delegating detailed regulation of this area to the then member states. Since it is only a framework law which cannot be applied in practice, each member state was to adopt a separate law to define this matter in detail in order to create conditions for fuctioning of the asylum granting system. The then member states established Working Groups tasked with drafting respective laws on asylum. Following the dissolution of the State Union, Montenegro adopted its Law on Asylum of Montenegro in June 2006, while the Working Group in Serbia is still working on the draft.

Pending adoption of the law and relevant by-laws and the establishment of adequate institutions at the level of the State Union member states, UNHCR Mission is mandated with deciding on applications for granting asylum, taking care of asylum

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[1] There is no agreement within the experts on the status of the Covenant in the present legal system, following the termination of the State Union, although they tend to agree that it should remain in force.

[2] *Official Gazette of SCG*, 12/05

seekers in Serbia and Montenegro and providing adequate international protection to them i.e. a state that would receive them.[3]

I.2. Responsibilities of the State undertaken in the context of European integrations

The area of legal protection of asylum seekers and refugees **tražilaca azila i azilanata** must be considered in the context of European integration of Serbia. At the time of existence of Serbia and Montenegro, the experts of the European Union had taken the stand that the SCG progress in the area of asylum is essential and one of the fundamental prerequisites for further negotiations on accession of Serbia to European Union (hereinafter: EU).[4] At the time of accession into the Council of Europe in April 2003, SCG committed itself to adopt legislation that would enable the implementation of the Geneva Convention Relating to the Status of Refugees from 1951 and the Additional New York Protocol from 1967 within one year from the date of accession into this international organisation. Regretfully, Serbia remains the only country in the region that has not established a legal system of asylum protection.

In the chapter of the National Strategy of Serbia for Accession of SCG to the European Union dated June 2005,[5] relating to visas, asylum and migrations, the Government of the Republic of Serbia stipulated adoption of the Law on Asylum of the Republic of Serbia aligned with the international standards as one of its key obligations. It was concluded that following the enactment of the Law, a series of by-laws would need to be adopted, the most efficient way to ensure translators for various foreign languages would need to be found, trainings of border police and other competent bodies organised. Since there was no adequate reception centre for asylum seekers, the need for establishment of an efficient procedure and adequate capacities for reception and accommodation of asylum seekers was particularly emphasized.

The decision on the European Council on Principles, Priorities and Conditions contained in the European Partnership with Serbia and Montenegro dated 30 January 2006,[6] proclaims the adoption and implementation of the Law on Asylum, and improvement of the capacities and infrastructure of the reception centre for asylum seekers and refugees as short term priorities (1–2 years).

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[3] It is doing it on the basis of a 1969 „gentleman“ agreement.

[4] *Commission Staff Working Paper, SERBIA AND MONTENEGRO, Stabilisation and Association Report 2004* (Com (2004) 206 final. The next SCG Stabilisation and Association Report for 2005 notes that no progress has been made in respect of passing republican asylum laws and ascertains continous absence of adequate reception centres for asylum seekers and refugees, since the existing ones have limited capacities and inadequate infrastructure.

[5] The integral text of the National Strategy of Serbia for Accession of SCG to the EU may be downloaded at the internet site of the EU Integration Office http://www.seio.sr.gov.yu/upload/documents/Strategija.zip

[6] The decision of the Council of the EU of 30 January 2006 on principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo, according to the UN SC Resolution 1244 of 10 June 1999 and termination of the decision 2004/520/EC, 2006/56/EZ, pp. 10; the text can be downloaded at www. seio. sv. gov. org./dokumenti/

The Government of the Republic of Serbia adopted a Plan of Implementation of Priorities of the European Partnership on 7 April 2006.[7] Further to priorities identified in the area of visas, border control and migrations, the proclaimed short term aims were also enactment of the Law on Asylum and pertaining by-laws at the level of the member state of Serbia, conclusion and implementation of the readmission agreements,[8] improvement of the capacity and infrastructure of the reception centre for asylum seekers and refugees as well as construction of a Reception Centre for Asylum Seekers. A donation of EUR 200,000 was received from UNHCR for the latter. The Ministry of Interior was appointed a competent state agency.[9] However, it is problematic that the Plan does not stipulate accurate timeframes for the adoption of an adequate legal framework but only identifies obstacles to its enactment: lack of funds and professional experience. The Belgrade Centre for Human Rights considers that the lack of funds cannot justify for a several decades-long failure to fulfill obligations that the state has assumed on the basis of international treaties it ratified. It is evident that there are not sufficient specialised trainings, but the state is not taking any necessary corrective measures. There is no record that the State has organised a training of this kind. UNHCR Mission in Serbia organised numerous seminars. An absence of continuity of trainings and permanence of functions of employees attending them has been noted. It often happens that an official of the Ministry of Interior attends 2-3 seminars on asylum and is, subsequently, transferred to a new position that has nothing to do with aliens and asylum. The indicated unprofessional approach of the state authorities to significant issues of formulation of state policy in the area of migrations and asylum indicates that they are either unaware of the relevance thereof or are not sincerely committed with strong political will to honour the internationally undertaken committments. 484

Although noting insufficient expertise of its departments in the area of asylum in its strategic documents, Serbia nevertheless opted that the Working Group for drafting the law consist only of the members of the Ministry of Interior. Interestingly, the Working Group stipulated that the Commissioner for Refugees be given certain competencies, although they had consulted neither the Commissioner nor the other competent ministries on the viability of their ideas in due time.

However, the Plan contains one, to say the least, strange statement to the effect that the draft law on asylum has been finalized. The Government adopted the Plan on 7 April. Therefore, the draft had to be finalized in March at the latest. Although there were working versions of the draft at that time, it was not finalized even by September 2006. One of the most recent versions was presented on 30-31 May at the meeting of UNHCR and the members of the Working Group which was attended, at the insistence of UNHCR, by several officials of the Commissioner for Refugees and the Belgrade Centre for Human Rights. The members of the Working Group were alerted to numerous solutions in the Draft that were not in accordance with the international standards. It was also emphasized that it would be irrational for Serbia, should it be an independent state

[7] The integral text of the Plan of the Government of the Republic of Serbia can be downloaded at the http://www.seio.sr.gov.yu/upload/documents/EP/final_pep2006%20lat.pdf

[8] Thus far 15 such agreements have been concluded while four more are in the signing phase.

[9] The Plan of the Government of the Republic of Serbia for implementation of the European Partnership of 7 April 2006, within chapter VIII Judiciary, Freedom and Security - 8.1 Visas, Border Control, Asylum and Migrations, items 8.1.5 and 8.1.6.

(as it subsequently happened), to have two asylum laws and that the principles laid out in the framework law should be included into this Draft thus making one consistent text of the Law.

The state authorities have not as yet presented the Draft Law on Asylum for public debate (it remains dubious whether they would do it at all in view of the recent practice to adopt laws urgently with no public or professional debate). The Belgrade Centre for Human Rights had an opportunity to familiarise itself with the latest Draft Law which contained imprecise formulations and was neither in accordance with the international standards nor the domestic legal system. As the functioning of the future system of protection of asylum seekers will largely depend on legal solutions (as well as subsequent implementation), the Belgrade Centre for Human Rights believes it would be most pertinent to dedicate this years' «policy paper» to the analysis of the present Draft Law, to offer certain recommendations for improvement of the text and by forwarding them to the members of the Working Group of the Ministry of Interior and other competent agnecies, to try and influence establishment of an improved legal framework at the stage when there is still time for corrections and improvements of the text.

II. ANALYSIS AND RECOMMENDATIONS

Serbia became an independent state following the referendum in Montenegro and proclamation of its independence on 3 June 2006. In view of this development it would be irrational to keep the existing structure and have one framework law (the SCG Law on Asylum), certain regulations of which have already grown obsolete and inapplicable in view of the dissolution of the State Union, and a second law that would elaborate on and stipulate the procedure and bodies competent in the process of asylum seekers' protection. Repetitions of articles and inconsistencies of certain solutions have already been noted in the existing framework Law and the Draft Law. A single integrated, consistent law that would comprehensively define the area of asylum seekers' protection in the Republic of Serbia is called for. At the same time this would be an opportunity to corrborn the flaws made in the current SCG Law on Asylum and create a coherent system. The team of the Belgrade Centre for Human Rights would like to draw attention to certain regulations of the SCG Law on Asylum that need to be harmonised with the international standards when drafting a comprehensive text.

II.1. ANALYSIS OF THE SCG LAW ON ASYLUM

II.1.a) Definition of Asylum.- Asylum is defined as right to stay and protection given to a person who has been granted refugee status or another form of protection stipulated by the law (Art. 2), being temporary and humanitarian protection. Temporary protection is granted "in case of a large-scale influx of persons from the state where their life, safety or freedom are being threatened by the general violence, external agression, internal conflicts, gross violations of human rights or other circumstances that seriously disturb public order and peace, and due to the large-scale influx there is no possibility to conduct an individual refugee status determination procedure" (Art. 22, para. 1). On the

other hand, an alien may be granted humanitarian protection if in case of his return to the country of origin he would be subjected to torture, inhuman or degrading treatment or his life, safety or liberty would be threatened by general violence, external agression, internal conflicts, gross violations of human rights or other circumstances that seriously disturb public peace and order (Art. 23). We believe that the term „humanitarian“ protection should be replaced by „complementary“ or „subsidiary“, because these are adequate translations of the terms recognized in international and comparative law.

In comparative law, humanitarian i.e. complementary protection is most often equated to asylum, while temporary protection is granted pending granting asylum or until the time that the reasons for this protection cease to exist. It is granted because, due to large-scale influx of aliens it is not possible to respond to each asylum application adequately and efficiently. On the basis of the definition of asylum, the temporary protection seems to be equated to asylum, but a later regulation on temporary protection (Art. 22) stipulates that the aliens enjoying such protection have a right to submit an asylum application and that the rights enjoyed by the refugees would be recognized to the *largest extent* in accordance with the current social, economic and other capacities (paras. 2 and 3, our italic). Consequently, the meaning of the term "asylum" should have been formulated more clearly in line with the intention of the legislator. The Article 15 of the Law relating to witholding of refugee status should also be better worded, because the present formulation is not in accordance with the Convention Relating ot the Status of Refugees.

II.1.b) Appeal on the first instance body decision.- The asylum application is decided by a competent body in a legally defined procedure (Art. 3, para. 2). The competent body shall grant refugee status to an alien if it ascertains that his fear of persecution on the grounds of race, colour, sex, language, religion, nationality, membership of a particular social group or political opinion in the country of origin is justified and that this person is not able or does not want to avail himself of the protection of the state of his origin (Art. 3, para. 3). If ascertained that the person does not fulfill conditions for recognition of refugee status, the competent body shall *ex oficio* review whether there are grounds for granting humanitarian or complementary protection (Art. 4). If dissatisfied with the decision of the first-instance body, an alien may lodge an appeal to the competent body of a member state which is independent in respect of the body that decided in the first instance (Art. 9, para. 2). The Law is silent about the suspensive effect of an appeal which should be its main characteristic in order to give it sense (see more in the analysis of Article 7 of the Draft Law on Asylum, pp. 13).

II.1.c) Principle of non-refoulment.- The person who has not been granted asylum shall leave the territory of Serbia and Montenegro or else be forcibly removed therefrom (Art. 16). The Law also stipulates deportation of a refugee for reasons of security and public order (Art. 17, para. 1). Deportation may be exercised only on the basis of a decision passed in a statutory procedure, and the refugee has the right to present evidence to the contrary, appeal and to appoint a representative (para. 2). The Law prescribes that noone should be deported or returned to the territory where his life or freedom would be endangered due to his race, religion, nationality, membership of a particular social group or political opinion (Art. 6, para. 1). However, this regulation does not apply to the persons who may be reasonably believed to threaten the security of the state or who have been convicted for a serious criminal act by a legally effective court decision due to

which they constitute danger to the safety and public order of the state (Art. 6, para. 2). This is the principle of "*non refoulment*" and an exception to the principle, which is in line with paragraphs 1 and 2, Article 33 of the Convention Relating to the Status of Refugees.[10] However, Serbia also ratified the European Convention for Protection of Human Rights and Fundamental Freedoms, and the protection guaranteed in Article 3 of this Convention is wider than the one ensured by the Convention Relating to the Status of Refugees. The European Court for Human Rights, despite of the expressed understanding for the problems faced by the states when protecting their societies from terrorist violence, believes that the Convention prohibits torture in the absolute sense, irrespective of the behaviour of the victim. Therefore, the responsibility of the state which deported an alien onto the territory of the state where he may be subjected to torture is always reviewed. Regardless of how dangerous or unwanted are the activities of such an individual, they may not constitute basis for deportation.[11] That is why paragraph 2, Article 6 of the Law on Asylum should have been limited as it cannot provide for situations which would invoke responsibility of the state on the basis of Article 3 of the ECHR. The Draft Law on Asylum attempted to compensate for this flaw by its Article 6 saying that „Noone shall be deported or returned to the territory where there is a risk of him being subjected to torture, inhuman or degrading treatment or punishment ». These two articles should be integrated into a single article.

II.1.d) Detention.- The Article 12 stipulates that the person seeking asylum shall not, *as a rule*, be punished for illegal entry or stay, if he without delay submits an application and presents valid explanation for his illegal entry or stay (our italics). Paragraph 2 of the same Article stipulates that the person may be detained in accordance with the law when this is necessary. According to the Article 31 of the Convention Relating to the Status of Refugees, punitive regulations shall not be applied on such a person while detention shall be resorted to only exceptionally. An even more restrictive measure is detention of minors stipulated in Article 25: "Minors seeking asylum and minor refugees shall not *in principle* be detained" (our italics). UNHCR guidelines do not recommend this measure at all, and it is especially unclear why would a minor refugee be detained with respect to the procedure of this status determination or enjoyment of this right. The measures of limiting movement are acceptable when necessary, but this possibility should not be equated with detention.

II.2. ANALYSIS OF THE DRAFT LAW ON ASYLUM OF THE REPUBLIC OF SERBIA

The Analysis and Comments to the Draft Law on Asylum will follow the structure of the proposed law per separate sections. Analysis will be provided of the articles of the Draft the Belgrade Centre team objects to in such a way that the disputed article will be cited first, and then followed by comment and recommendations.

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[10] See also the judgments of the European Court of Human Rights *Cruz Varas et al v. Sweden* (App. No. 15576/89, pp. 69–70) and *Vilvarajah et al v. United Kingdom* (App. No. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, pp. 107–108).

[11] *Chahal v. United Kingdom,* App. No. 22414/93, pp. 80.

II.2.a. GENERAL PROVISIONS

Subject Matter of the Law

Article 1

This Law shall govern the competence, more specific conditions, and the procedure for acquisition, exercise and cessation of the right to asylum in the Republic of Serbia.

Although introductory article bearing no great significance on the way of regulating the right to asylum, the formulation is quite clumsy so it should be polished stylistically and grammatically.

Definitions of Terms

Article 2

The basic terms used in this Law shall mean the following:
***asylum procedure** shall be understood to mean a procedure, governed by this Law, for acquisition and cessation of the right to asylum and other rights of asylum seekers;*

***UNHCR** shall be understood to mean the Office of the United Nations High Commissioner for Refugees;*

***a safe country of origin** shall be understood to mean a country whose national an asylum seeker is, and if the person concerned is stateless, a country where that person had previous residence, which has ratified and applies international treaties on human rights and fundamental freedoms, where there is no danger of persecution for any reason which constitutes a ground for recognition of refugee status or grant of subsidiary protection, whose citizens do not leave their country for those reasons, and which allows international bodies to monitor the respect for human rights;*

***a safe third country** shall be understood to mean a country which observes international principles pertaining to the protection of refugees enunciated in the Refugee Convention, where an asylum seeker had resided, or through which he/she had passed, immediately before he/she arrived in the territory of the Republic of Serbia and where he/she had an opportunity to submit an asylum application, where he/she would not be subjected to persecution, torture, inhuman or degrading treatment, or sent back to a country where his/her life, safety or freedom would be threatened;*

A list of safe countries of origin and safe third countries shall be determined by the Government of the Republic of Serbia (hereinafter: the Government) by virtue of its act;

***a family member** shall be understood to mean a minor child, adopted child or step-child, who are not married, the spouse provided that the marriage was contracted before arrival in the Republic of Serbia, as well as a parent or an adoptive parent legally obliged to support him/her;*

Notwithstanding the above, the status of a family member may be recognized to other persons as well, while particularly taking into account the fact that they were supported by the person recognized as a refugee or granted humanitarian protection;

***an unaccompanied minor** shall be understood to mean an alien under 18 years of age who was unaccompanied by parents or guardians on his/her arrival in the Republic of Serbia, or who*

became unaccompanied by parents or guardians after arriving in the Republic of Serbia, provided that he/she is not married.

A safe third country and a safe country of origin. The Belgrade Centre for Human Rights would like to draw attention to several flaws in defining these important concepts. The Belgrade Centre has always opposed mechanical use of the concept of a safe country of origin and a safe third country. Although it cannot be said that the legislator has opted for an entirely automatic use, certain significant elements relative to its application call for clarification since the inadequate application of these concepts i.e. wrong interpretation thereof could lead to serious practical problems.

The majority of European countries, primarily countries members of the European Union, recognize in their legal acts and apply return of asylum seekers to „safe countries“. However, there are no unified criteria for identification of a safe country of origin or a safe third country. It is key that a qualification of a certain country as safe be based on reliable, objective and updated information from various sources. We believe the existence of fixed lists of safe countries of origin for all persons seeking asylum in all circumstances not to be a good solution. The situation in one country may change suddenly, unexpectedly.Whatsmore, the fact that one country is a safe country of origin or a safe third country for one group of persons does not mean that an individual cannot experience persecution or inadequate protection, even if that is a Western European country deemed to be democratic. Thus for instance, Austrian laws did not protect defectors or individuals who invoked conscientious objection, even if faced with execution in the country of origin.[12] On the other hand, a person who was a member of ETA, was deported from France to Spain, because the French authorities believed, on the basis of one of the CPT reports, that at the time of deportation there existed no serious reasons to believe that the man would be subjected to abuse, which did actually happen upon his return.[13] It is key that this concept not be applied automatically as basis for rejection of individual asylum claims, but be evaluated relative to the merits of each individual case i.e. that each applicant be given the possibility to demonstrate that a certain country cannot be regarded a safe country of origin in a concrete case. The part of the Article related to the safe country of origin of stateless persons should be defined more precisely so that the «country where that person had previous residence » be related only to the country of former residence and not all the other countries where this person used to reside. The solutions given in laws of some countries in the region are much more suitably and precisely defined. Thus for instance, Article 9 of the Law on Asylum of the Republic of Macedonia, when defining a safe country of origin states „a state where ....stateless persons which have in it the *last* habitual *residence*“ (N.B.), while the paragraph 2 of this Article enables the applicant to prove that the country of origin cannot be regarded as safe in his case („*An applicant for recognition of the right to an asylum may prove in the course of the procedure that the country of origin is not safe for him*“).

The situation is similar also in respect of identification of a safe third country, i.e. deportation into the country on the list of „safe third countries“. Just as with the previous concept, it is of paramount importance that each applicant be given a possibility to present all the facts relevant to his case and prove that a certain country is not safe in

[12] Nuala Mole, Asylum and the European Convention on Human Rights, Council of Europe, 2000, pp. 31
[13] See *Irruretagoyena v. France (*judgment*)*, Appl. No. 32829/96

view of the circumstances in which he finds himself. Later on, in Article 29, the legislator sets down that the application may be refused if „the applicant has arrived from a safe third country except if proving that it is not safe for him“ (para. 1, item 5). It is correct that such an application not be rejected as unfounded (although there had been suggestions to that effect), because neither the merits of the case nor the facts relevant to a positive or negative decision upon the application are examined here. Rather, the application is rejected as unacceptable (inadmissible) since the individual should have, purportedly, sought protection in another country that he transited through or resided in on his way to the country where he had submitted his asylum application. This Article also leaves the possibility of challenging the assumption about a safe third country which was necessary and is very commendable.

It is questionable that the law defines the concept establishing it on a unilateral decision of the state to invoke the competency of a third country in deciding an asylum application and not on a bilateral agreement or an explicit acceptance of reception of another country. The legislator forgets that the primary responsibility for providing protection lies with the state where the application has been submitted. The application of the concept of „a safe third country“ may result in endangering the applicant himself but also in responsibility of the state. First, the so called „bouncing back“ effect or „refugees in orbit“ may occur whereby the applicants are returned from one allegedly safe third country into another and *ad infinitum*, because each subsequent country refuses to deal with the application by specifically invoking this concept. This may lead to responsibility of the state on the basis of Article 3 of the European Convention on Human Rights, because the European Commission for Human Rights concluded that repeated deportation of an individual without documents, whose country of origin is unknown or refusal to accept him may, in certain circumstances, result in problems related to the prohibition from inhuman or degrading treatment.[14] In order to avoid these phenomena, the EU Dublin Convention also aimed at identifying a state that would be responsible to review the application. The UN High Commissioner for Refugees also considers this practice to be contrary to the principle whereby „an asylum seeker may not be returned to another state to apply for asylum in it, except if that state does not agree to receive him onto its territory as an asulum seeker and review his application”.[15]

An even bigger problem would appear if an asylum seeker were transferred from one country to another in a way that not one of them would examine the merits of his application, but only rejects or deports him into a third country automatically so that he is finally returned into the country of origin. Should he there be exposed to persecution or torture, Serbia could be held responsible in line with the international treaties relating to the protection of human rights regardless of invoking the Dublin Convention or another treaty related to the concept of a safe third country.[16]

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[14] See *Giama v. Belgium*, Appl. No. 7612/76, Yearbook 23 (1980) 428.

[15] See „The „safe third country“ policy in the light of international obligations of countries vis-à-vis refugees and asylum-seekers, UNHCR, London, July 1993, para. 4.2.14.

[16] See *T.I. v. United Kingdom*, Appl. no. 43844/98 (judgment of 7 March 2000) , «*Indirektno proterivanje u ...drugu zemlju, koja je takođe zemlja potpisnica, ne utiče na odgovornost UK da osigura da podnosilac zahteva neće, zbog odluke da se izvrši proterivanje, biti izložen postupanju koje je suprotno čl. 3...Niti se UK može automatski osloniti...na aranžmane ugovorene Dablinskom konvencijom u vezi s raspodelom odgovornosti među evropskim zemljama u pogledu rešavanja zahteva za azil...*« (prevod autora).

If already opting for application of the concpet of „a safe third country“, Serbia should not apply it mechanically but either apply the interpretation of UNHCR that a safe third country is the one where the individual was granted protection or to carefully, with the assurance that the individual would be accepted into the territory as an asylum seeker, examine whether such a state may provide a certain form of protection in a concrete case i.e. whether it offers all procedural guarantees in the course of the procedure.

A family member. Although the law itself leaves the possibility that other persons, except those narrowly identified in the first part of the definition, be recognized as family members, the Belgrade Centre nevertheless appeals on the Working Group to review the possibility of including, into the definition of family members, other persons who lived in the same household or were fully or partially supported by the asylum seeker/refugee,[17] and above all that the definition does not be limited to families founded before abandoning the country of origin. We believe that in this situation marriage and the common law marriage should be equated as done in the, for instance, Swiss law or proposed by the EU Directive.[18]

An unaccompanied minor. We believe that the status of an unaccompanied minor should not be conditioned by this person not being married. Serbia has ratified the Convention on the Rights of the Child the Article 22 of which binds the states to provide appropriate and humanitarian assistance to all minors seeking asylum, irrespective of their personal status. The state authorities should bear in mind that some minors may not have entered into marriage of their own volition in view of the cultural values of the nation they come from, and that they might be seeking protection for possibly similar reasons (e.g. stoning for marital infidelity, etc.). Should a minor be accompanied by an adult spouse, this condition would be acceptable, but then also only under the condition that the quality of marital relations had been examined previously, because the principle of the «best interest of the child» must be respected that would be violated if e.g. special protection to the person forced into marriage was to be withdrawn.

Application of Laws and International Law

Article 3

The asylum procedure in the Republic of Serbia shall be conducted in keeping with the provisions of this Law.

To the issues related to the procedure referred to in paragraph 1 of this Article, which are not regulated by this Law, the regulations shall apply, which govern general administrative proceedings.

To the basic principles and conditions for the acquisition, and the reasons for cessation, of the right to asylum, fundamental rights and obligations of asylum seekers, refugees and persons granted humanitarian or temporary protection, the Law on Asylum of Serbia and Montenegro shall also apply.

[17] The Handbook states that in practice other family members such as elderly parents refugees, etc are also taken into account. UNHCR, *Handbook*, para. 185. See also EXCOM, Conclusions No. 24 (XXXII) Family Reunification, 1981, paras. 5 and 88 (L), 1999., para (ii).

[18] Council Directive 2003/ 86/EC of 22 September 2003 on the right to family reunification

To the issues related to the scope, content and type of the rights and obligations of asylum seekers, refugees and persons granted humanitarian protection, unless otherwise provided for by the Law referred to in paragraph 3 of this Article or this Law, the regulations shall apply, which govern the movement and stay of aliens.

The provisions of this Law shall be interpreted in accordance with the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees and universally accepted rules of international law.

This Law shall not apply to refugees who were granted that status under the Law on Refugees (Official Gazette of the Republic of Serbia, nos. 18/92 and 45/2002).

In case of integration of the texts of the Law on Asylum and the Draft, the para. 3 of this Article should be deleted. In respect of para. 4 the application of the current Law on Stay and Movement of Aliens on the status of asylum seekers and refugees **tražilaca azila i azilanata** should be analysed because this is an obsolete law from 1980 which is not entirely applicable. Therefore, it should not be blindly relied on.

Paragraph 5 established the rule that this Law would be interpreted only in line with the above mentioned Convention and the generally accepted rules of the international law. First, it is not clear what is understood as generally accepted rules of international law. It may be assumed that the legislator had in mind the generally accepted principles of international law; in any case this narrowing of the source of law would be inappropriate. As already said at the beginning of this document, Serbia ratified other numerous international treaties related to protection of human rights which this Draft must be harmonised with. It has also concluded and ratified numerous bilateral agreements (e.g. on readmission) that bear certain significance for this matter. In the process of EU accession, Serbia should work on harmonization of its legislature with *aquie communitaire*. Finally, the Constitution of Serbia is the highest legal act in the hierarchy so this Law should be interpreted in line with it.

Family Unity

Article 5

The competent authorities shall take all the measures at their disposal to safeguard family unity during the asylum procedure, as well as upon the granting of the right to asylum.

Persons granted asylum shall have the right to family reunification, in keeping with the provisions of this Law.

The persons who have been granted asylum have, according to this Law, the right to family reunification in accordance with this Law. Later in the text, in Article 44 this rule has been elaborated in a way that when the refugee so requires, the Asylum Office will also recognize refugee status to the member of his family outside the territory of the Republic of Serbia, if there are no statutory reasons for witholding this status. Domestic laws contain no other legal principles relative to this institute although each country

would be liable to adopt and apply a fair and effective system for acting upon requests for family reunification. According to the ECRE recommendation, this procedure should be undertaken without delay and should not last longer than six months.[19]

Even though domestic legal regulations in certain provisions equalize the status of refugees and of a person enjoying humanitarian (complementary) protection, this is not the case in respect of the right to family reunification. We consider these individuals to be in a very difficult situation and in need of international protection also, so they should be enabled automatic access to the family reunification procedure immediately upon being granted the status.[20] We believe that the state should take care of family unity also when granting temporary protection,[21] and not only in justified cases, as provided for by the law. In respect of the UNHCR EXCOM Conclusion No. 22 (XXXII), paragraph (B) (2)(h), UNHCR maintains that the right to family reunification should be ensured in all cases and not only conditioned “in justified cases ”.

Non-refoulement

Article 6

No person may be expelled or returned to a territory where there is a risk that he/she would be subjected to torture, inhuman or degrading treatment or punishment.

It has already been said that this Article should serve as addendum to the Article 6 of the Law on Asylum of SCG, i.e. that they should be integrated into a single article in a new, coherent law. In any case, this Article is not well formulated, because not a single international treaty requires cumulative existence of all forms of torture so that the conjuction „and“ should be replaced by conjunction „or“ so as to read: „...torture, inhuman or degrading treatment or punishment“.

Right to Appeal

Article 7

Appeals against decisions of the Asylum Office shall be decided upon by the Asylum Commission.

The reason for this provision on the right to appeal being included into the general provisions of this law remains elusive. Still, should this Article remain in general provisions, the most important characteritic of this law – suspensive effect of the appeal – should be added. Bearing in mind that the Law on Administrative Procedure is dulu applicable on this law and that the appeal to the second-instance body in administrative proceedings does not defer execution of a first-instance decision, this right would remain stripped off its most important characteristic – prevention from deportation that might lead to violation of the principle of non-refoulement. We believe that a stand should be

[19] Position of Refugee Family Reunification by ECRE, June 2000, http://www.ecre.org/files/family.pdf
[20] *Ibid*. Similar arguments may be found in ECRE positions
[21] See e.g. UNHCR EXCOM Conclusion No. 22 (XXXII), paragraph (B) (2)(h)

taken in the same article about the possibility of engaging in administrative proceedings i.e. due application of the Law on Administrative Procedure.

We would like to remind the authorities of the Recommendation R(98)13 of the Council of Europe and the case *Jabari v. Turkey*,[22] that were of exceptional relevance to this area. The Recommendation R(98)13 of the Council of Europe recommends to the states to provide an effective legal remedy to asylum seekers, whose request for granting refugee status had been rejected and who may be subject to deportation into a country which as they claim will be subjecting them to torture or inhuman or degrading treatment or punishment. In order for the legal remedy to be deemed effective in the sense of Article 13 ECHR, the state should provide the following guarantees:

- when the authority is a judicial body or if it is a quasi-judicial or administrative body it is clearly identified and composed of members who are impartial and who enjoy guarantees of independence (para. 2.1);
- that this authority be competent to decide on existence of criteria stipulated in Art. 3 of the Convention and to provide adequate satisfaction (para. 2.2);
- that the effective remedy is accessible to the rejected asylum seeker (para. 2.3); and
- ***that the execution of the deportation order is suspended until passing of the decision mentioned in paragraph 2.2*** (para. 2.4).

The law in Turkey was such that there was a preclusive timeframe for submission of asylum applications amounting to five days only, and the filing of an appeal to the second instance body had no suspensive effect in case of decision on deportation. In the case *Jabari v. Turkey*, which related precisely to the application of the above mentioned legal regulations, the European Court of Human Rights concluded that automatic and mechanical application of such a short timeframe for submission of an asylum application was not complementary to the protection of fundamental values proclaimed in the Article 3 ECHR. At the same time the Court emphasized that

"*in view of the irreversible nature of damage that could have arisen should the risk of torture or abuse materialize as well as the significance accorded to Article 3, the concept of an effective legal remedy in line with Art. 13 requires independent and exhaustive examination of an appeal ... as well as the possibility of suspension of execution of the challenged measure".*[23]

II. COMPETENT AUTHORITIES

Asylum Office

Article 8

With respect to asylum applications and the cessation of that right, a competent organizational unit of the Ministry of the Interior (hereinafter: the Asylum Office) shall conduct the procedure and take all decisions in the first instance.

Persons conducting the asylum procedure in the Asylum Office shall be specially trained for the performance of these tasks.

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[22] *Jabari v. Turkey*, Appl. no. 40035/98, judgment of 7 Nov. 2000

[23] *Ibid*. para. 50

The Minister of the Interior, by virtue of his/her act, shall more specifically define terms and criteria pertaining to all the persons performing tasks in the Asylum Office.

Asylum Commission

Article 9

The Asylum Commission shall comprise Chairman and eight members appointed by the Government for a four-year term.

In the budget of the Republic of Serbia an appropriation shall be made for the work of the Asylum Commission.

Such person may be appointed Chairman or member of the Asylum Commission who is a citizen of the Republic of Serbia, has a university degree in law and a minimum of five years of working experience practicing law and who is familiar with regulations in the field of human rights.

The Asylum Commission shall be independent in its work and shall pass decisions by a majority of the total number of members.

The Ministry of the Interior shall ensure the performance of technical and administrative tasks for the Asylum Commission.

Within 30 days from the date of the appointment of its members, the Asylum Commission shall pass Rules of Procedure. The Rules of Procedure shall more specifically govern the decision-making method of the Asylum Commission, the scheduling of its meetings and other issues of relevance to the work of the Asylum Commission.

Asylum Center

Article 10

Pending the adoption of the final decision on asylum applications, asylum seekers shall be provided with accommodation and basic living conditions in the Asylum Center. The Government shall establish one or more asylum centers by virtue of its act.

The operation of the Asylum Center shall be managed by the official who is at the helm of the Commissariat for Refugees, and who shall regulate by virtue of his/her act both the internal organization and conditions of accommodation in the Asylum Center, with the approval of the official managing the republican administrative authority in charge of internal affairs.

The Belgrade Centre for Human Rights shall not comment on the decision of the Working Group to appoint administrative bodies as the only competent bodies nor shall it in this paper yet again strive to present its vision of the best structural system, but would nevertheless like to urge the Working Group to review once again the possibility of introducing specific jurisdiction of the courts. According to this Draft, the Asylum Office in the first instance, and the Asylum Commission in the second instance are the competent bodies in the process of deciding on the asylum application.

Asylum Office – The Office has been conceived as an organisational unit of the Ministry of Interior; the systematization of jobs and selection criteria to be subject of a separate act of the minister in charge. Although it is the unit of the Ministry of Interior, we believe it would not be good for this Office to be part of police i.e. that its employees be former police officers, primarily due to the delicate and specific nature of the procedure they would be conducting. It is precisely in view of the specific nature of the procedure that the systematization of jobs should be made carefully, continuous trainings planned in the area of asylum and refugees, timely and reliable collection of information as well as in the area of interviewing methods and techniques in view of a sensitive multicultural environment.

Asylum Commission – The Asylum Commission is to consist of a chairman and eight members appointed by the Government for a four-year term. The Working Group has never explained the reasons for opting for a nine-member Commission. The four-year term of office is probably linked to the length of MPs mandates i.e. expected mandate of the Government which may give rise to suspicion as to the independence of operation of this body. According to the Law, the members are selected by the Government but nothing has been said as to who proposes them. Bearing in mind the work on previous models of laws, the Belgrade Center for Human Rights expresses fear that the Working Group had MOI in mind as a proposer of members since this Ministry also provides administrative support and although the Draft speaks of an independent body. In this respect we consider that the Ministry of Interior should be excluded from the process of proposing members of the second-instance Commission with a view to ensuring minimum procedural guarantees of asylum seekers to a fair and efficient procedure because this body is the one in charge of investigating the legality of the first-instance administrative decision passed by an MOI body. For the same reason, we believe it to be a bad solution that the Ministry of Interior perform administrative tasks for the Commission. If the Law itself proclaims it an independent body the funds for operation of which are to be ensured in the budget of the Republic of Serbia, then the Office should have a separate administrative and technical department. As for the selection criteria, even though the Centre does not object to members being law practitioners, in view of the specificity of the procedure and direct contact with asylum seekers, we consider that the presence of persons of other professions could be beneficial (eg. psychologist or possibly sociologist).

Asylum Centre – Pending final decision on asylum application, the asylum seekers will be provided with accommodation and basic living conditions in an Asylum Centre to be managed by the head of the existing Commissioner for Refugees, who also regulates, with the approval of the minister of interior, the internal organisation and accommodation conditions. One characteristic of the domestic legal system is to prescribe a certain law but not the method of implementation i.e. funding of the implementation. Therefore, an additional paragraph on funding of exercise of these rights should be added while it would be most appropriate for the funds to be earmarked in the budget of the Republic of Serbia.

Still, not all the asylum seekers will necessarily be accommodated in the Asylum Centre. One group among them will be those who, in view of their financial situation, will wish to be accommodated elsewhere while the other will be those persons who, in view of their permanent or current vulnerability, require alternative accommodation (eg..

persons with vulnerable health, elderly persons in need of specific care, pregnant women, victims of trafficking, etc.). The method of implementation of the latter exception and its financing by the state should be envisaged.

III. PRINCIPLES OF THE ASYLUM PROCEDURE

Principle of Providing Information and Legal Aid

Article 11

An alien who has expressed an intention to seek asylum in the Republic of Serbia shall be entitled to be informed about his/her rights and obligations in the course of the entire asylum procedure.

An asylum seeker shall have the right to free legal aid and representation by UNHCR and NGOs which have been given approval for that by the republican administrative authority in charge of internal affairs.

According to the Draft, an alien who has expressed an intention to seek asylum in the Republic of Serbia shall have a right to be informed about his rights and responsibilities in the course of the entire asylum procedure and the person seeking asylum shall have the right to free legal aid and representation by UNHCR and NGOs which have been approved for that by the republican administrative authority in charge of internal affairs.

Alhtough the intention to provide certain rights is commendable, this Article has been formulated rather unclearly with certain flaws, and therefore requires re-writing. First, it is not correct to talk about the right „in the course of the entire asylum procedure“, because the process of deciding on the asylum application is probably what the legislator had in mind. This Article also guarantees the right but fails to set out the role of the state in provision of the above rights, i.e. the way in which this right would be exercised. It is not clear whether the state intends to undertake certain steps so as to inform the asylum seekers of their rights or whether it will only enable access to these persons by other organisations interested in doing so. At the same time, it is not clear whether the state would secure funds for provision of free legal aid to asylum seekers by the interested organisations approved by the Ministry or if the state does not plan to provide funds, but only intends to allow contact of the asylum seekers with some organisations that would have projects of free legal aid provision. In any case, the way in which this Article has been formulated sounds as if the state is literally setting down the resonsibilities of UNHCR and other organisations. It remains unclear how will the asylum seekers exercise their right to free legal aid or receive the necessary information about their rights if not a single NGO is able to provide free legal aid i.e. not one donor expresses interest in supporting a project of this kind (which is very realistic in view of the fact that previous donors stopped projects of free legal assistance provision in Serbia).

On the other hand, free legal aid and representation will be provided only by the non-governmental organisations «which have been given approval for that by the republican administrative authority in chare of internal affairs». The Belgrade Centre for Human

Rights is very concerned about this formulation which authorises the Ministry of Interior to issue approvals to NGOs in absence of prescribed conditions that the NGOs should fulfill in order to receive such approvals. It should be noted that Serbia has not yet adopted a Law on Provision of Legal Assistance and that this issue is subject of heated debates.

The Belgrade Centre could agree to the formulation earlier proposed by UNHCR, reading: «A person seeking asylum shall be entitled to free legal aid and shall be informed of his/her rights and responsibilities in the asylum procedure, possibility to contact UNHCR and persons providing free legal aid and humanitarian agencies engaged in protection of refugees». The Article 16 of the Law on Asylum of Slovenia could serve as a good example. The Slovenian law stipulates existence of a refugee advisor and defines the scope of legal assistance and financing from the budget.

Principle of Free of Charge Interpretation

Article 12

An asylum seeker who does not understand the official language of the procedure shall be provided with free services of interpretation into the language of the country of origin, i.e. the language he/she can communicate in.
An asylum seeker may engage an interpreter of his/her own choice and at his/her expense.
The principles set out in paragraphs 1 and 2 of this Article shall be applied mutatis mutandis to the interpreters for deaf-and-dumb and blind persons.

The Belgrade Centre has terminological objections to this Article. Although the Centre welcomes acceptance of the responsibility of provision of free interpretation into the language of the country of origin of an asylum seeker, it would like to draw attention to the event that the asylum seeker does not speak well enough the language of the country of origin so as to be able to communicate in it successfully, which is an important precondition for conduct of an efficient and fair procedure. Therefore, the Centre would fully agree with UNHCR proposal that the term «language of the country of origin» be replaced by the term «mother tongue».

The phrase „interpreter for deaf-and-dumb and blind persons " does not exist in our legal system, and should be replaced by an adequate phrase.

Principle of Gender Equality

Article 15

It shall be ensured that an asylum seeker is interviewed by a person of the same sex, i.e. provided with an interpreter of the same sex, unless it is not possible or is associated with disproportionate difficulties for the body conducting the asylum procedure.

The principle set out in paragraph 1 of this Article shall be explicitly applied in the cases of searches, body checks, registration and other actions in the procedure, which are carried out on an asylum seeker.

The principle of respect of sex (and not gender equality in this case) has been limited quite unnecessarily. Although it can be assumed that it might be problematic to find an interpreter of the same sex speaking the mother tongue of an asylum seeker in certain situations, we believe there is no room for limiting the right of the person to be heard by the person of the same sex and not only in certain stages as is indicated in paragraph 2 hereof, but in all the stages of the procedure. At the same time, the Article 26 of the Law on Asylum of SCG guarantees these rights in the following way:

(1) Asylum seekers in Serbia and Montenegro shall be treated in a gender-sensitive manner in all the stages of the asylum procedure.

(2) A person seeking asylum shall have the right to request an interview with an official of the same sex, and to request an interpreter of the same sex.

In case of passing a new, integrated law, the third paragraph of this Article should be inserted too whereby the «female asylum seekers accompanied by male relatives shall be informed of their right to make an asylum application in their own name".

Principle of Confidentiality

Article 18

The data on an asylum seeker obtained in the course of the asylum procedure shall constitute an official secret and access to them shall be allowed only to persons authorized by law.

The data referred to in paragraph 1 of this Article shall not be disclosed to the country of origin of an asylum seeker, unless he/she has to be forcibly returned to the country of origin upon the completion of the procedure and refusal of his/her asylum application. In that case, the following data may be shared:

1) *identification data;*
2) *data on family members;*
3) *data on documents issued by the country of origin;*
4) *address of the permanent residence;*
5) *fingerprints, and*
6) *photographs.*

Article 18 of the proposed Law should be more accurate as it deals with the data relating to the personality of the seeker of asylum protection. At the same time, prohibition on sharing of data should also apply to the persons who have been granted asylum. We consider that the Law should more accurately define the legally authorised persons who may have access to these information i.e. the conditions thereof and the information that may be shared with third countries and international agencies i.e. in the process of transfer to a so called safe third country. At the same time, there had been proposals urging for more caution in respect of the procedure of taking fingerprints and photographs and for establishment of a separate database Thus for instance, para. 2,

Article 99 of the Law on Asylum of Switzerland stipulates a databank for fingerprints and photographs without stating identity, while the paragraph 7 thereof establishes also the obligation to destroy these information in the case when asylum had been granted, maximum ten years following rejection of the asylum application, withdrawal thereof, classification of an asylum application, failure to take the case into consideration i.e. for persons in need of protection maximum ten years following their entry into Switzerland.

IV. PROCEDURE IN THE FIRST INSTANCE

Intention to Seek Asylum

Article 19

An alien may, verbally or in writing, express his/her intention to seek asylum to an authorized officer of the Ministry of the Interior, during the border check on entry in the Republic of Serbia, or inside its territory.

An alien who has expressed an intention to seek asylum shall be put on record and referred to the Asylum Center where he shall report within 72 hours.

If an authorized official of the Ministry of the Interior, in the case referred to in paragraph 1 of this Article, suspects that there exists one of the reasons for the restriction of movement as laid down in Article 47 of this Law, he/she shall escort the alien to the Asylum Center.

An alien who has expressed an intention to seek asylum shall not be punished for unlawful entry or residence in the Republic of Serbia, provided that he/she files an asylum application without delay and offers a reasonable explanation for his/her unlawful entry or residence.

With respect to this Article, heed must be paid to the method of implementation. Escort of persons should be conducted in a way that will not constitute inhuman or degrading treatment in view of the circumstances of the asylum seeker. Bearing in mind that some earlier proposals stipulated that an asylum application must be made immediately or within 5 days, we would like to emphasize that the term „without delay ” needs to be properly interpreted depending on the circumstances of the case. It may well happen that a person is not able to submit an application for a couple of weeks because he/she is a victim of trafficking, etc.

Registration

Article 21

Upon arrival in the Center, an authorized officer of the Asylum Office shall register an alien and his/her family members.

The registration shall include:

1) *establishing identity;*
2) *taking a photograph;*
3) *taking fingerprints, and*

4) *temporary seizure of all identification papers and documents which can be of relevance in the asylum procedure, on which a certificate shall be issued to an alien.*

An alien who is in possession of a passport, an identity card or some other identification document, residence permit, visa, birth certificate, a travel ticket or another document or some official communication of relevance to the asylum procedure, shall be obliged to submit them at registration or when filing an asylum application, but not later then prior to his/her interview.

Upon the completion of the registration an alien shall be issued with an identity card for asylum seekers.

An alien who deliberately hinders, avoids or does not agree to the registration referred to in paragraph 1 of this Article may be forcibly removed from the territory of Serbia and Montenegro.

The Law stipulates registration upon arrival at the Asylum Center. However, this Article proposes a very rigid measure in case that an alien »*deliberately hinders, avoids or does not agree to registration*«. According to para. 4 hereof, such a person may be forcibly removed from the territory of Serbia. We believe unjustified such a rigorous measure that may lead to flagrant violation of the principle of *non-refoulement*; a more reasonable measure should be taken.

Initiating the Procedure for Granting Asylum

Article 22

The procedure for granting asylum shall be initiated by submitting an asylum application to an authorized officer of the Asylum Office on a prescribed form, within 15 days from the day of the registration, and in justified cases, at the request of an alien, the Asylum Office may extend this time limit.

Before the submission of an asylum application, an alien shall be informed of his/her rights and duties, especially of the rights to residence, a free interpreter, legal aid and access to UNHCR.

An alien shall lose the right to reside in the Republic of Serbia if he/she unjustifiably fails to abide by the time limit referred to in paragraph 1 of this Article.

The Draft Law provides for the procedure for granting asylum be initiated by submission of an asylum application to an authorised officer of the Asylum Office on a duly prescribed form within 15 days from the date of registration, while this timeframe may be extended by the Asylum Office at the request of an alien in reasonable cases. However, paragraph 3 prescribes that an alien shall lose the right to residence in the Republic of Serbia in case of unjustified overstepping of this timeframe. This is yet another inadequate and rigorous measure, for as UNHCR noted, an alien may have a permit on some other grounds so this measure could possibly apply only to an alien who was granted residence permit on the basis of the asylum application.

First-instance Decision of the Asylum Office

Article 24

After conducting the procedure the Asylum Office shall pass a decision on:

1) *granting an asylum application and recognizing refugee status or according humanitarian protection to an alien;*
2) *rejection an asylum application and ordering an alien to leave the territory of Serbia and Montenegro within a set time limit, unless he/she has some other ground for residence.*

The decision referred to in paragraph 1 of this Article shall also apply to refugee's family members who have not submitted asylum applications.

In the legally defined cases, the Asylum Office shall take a decision on the suspension of the asylum procedure.

According to the Draft, the Asylum Office may pass a decision endorsing an application, rejecting an application and suspending the procedure in certain circumstances. We believe that another paragraph must be added here which would provide for a situation when a first-instance body refuses an application as inadmissible. As earlier explained, it is very important to distinguish between a decision on inadmissibility of an application when the merits of the case are not examined, but the decision is based on the fact that a certain admissibility criteria (mostly procedural, etc) are not fulfilled, and the decision on rejection when an application is rejected because a conclusion is reached, on the basis of evaluated facts and evidence, that there are no grounds to grant asylum. This distinction is relevant for in the case of return of an alien into a third country, it may spur a chain of returns and that not a single country enters into a examination of the merits of the application convinced that Serbia had already done it prior to rejecting the application whereas the reality is that it had been rejected without going into the merits.

The Belgrade Centre would like to support two proposals given by UNHCR. In view of the fact that this procedure is subject to the Law on Administrative Procedure, in the case of silence of administration the decision would be deemed to have been negative. We agree with UNHCR's conclusion that the Law on Asylum should explicitly exclude the application of the regime of silence of administration in view of the specificity of the procedure, as well as that it would be practical to define a deadline for passing of the decision since the timely decision is extremely important both for the asylum seeker i.e. refugee and the state itself.

Rejection of an Asylum Application

Article 26

The Asylum Office shall issue a decision on the rejection of an asylum application of an alien if it has established that the claim is unfounded or that there are statutory reasons for the denial of refugee status.

The reason for the decision referred to in paragraph 1 of this Article shall be cited.

Unfounded Asylum Applications

Article 27

An asylum application shall be considered unfounded if it has been established that a person who filed the application does not meet the requirements prescribed for the recognition of refugee status or grant of humanitarian protection, and in particular:

1) *if the asylum application is based on untruthful reasons, fraudulent data, forged identification papers or documents, unless he/she can cite valid reasons for that;*
2) *if the statements in the asylum application regarding the facts of relevance to the decision on asylum contradict the statements made in an interview with that asylum seeker or other evidence gathered in the course of the procedure (if, contrary to the statements in the application, it has been established in the course of the procedure that the asylum application was submitted for the purpose of postponing deportation, that the asylum seeker has come for purely economic reasons, etc.);*
3) *if the asylum seeker refuses to make a statement regarding the reasons for seeking asylum or if his/her statement is unclear or does not contain information indicating persecution,*
4) *if an asylum application which the asylum seeker had submitted in another country that complies with the Convention relating to the Status of Refugees was refused, and the circumstances upon which the application was based have not changed in the meantime, or if he/she has already filed an asylum application in another country observing the Convention relating to the Status of Refugees;*

The Asylum Office shall give a reasoned decision rejecting an asylum application of an alien upon establishment that the application is unfounded or if there are statutory reasons for exclusion from refugee status. Certain conflusion between rejection and refusal of an application is evident in the formulation of Art. 27.

The Belgrade Centre would like to comment on the reasons stipulated in 3) and 4), because it had repeatedly in its comments and presentations drawn attention of the members of the Ministry of Interior to two important elements:

- the fact that the person seeking asylum is not prepared to speak of the reasons for seeking asylum, that the statement is not sufficiently clear or that the statement given during the first interview is not the same as the one given at a later date, does not automatically constitute an arrogant unwillingness to cooperate or present the truth. If an alien had truly experienced certain difficulties or persecution, such a conduct may be a consequence of the pain he is suffering, a fear he is feeling (maybe precisely in contact with uniformed persons of state authorities of an unfamiliar country or culture) or other communication problems. In any case, in the situation where a competent body does not review the facts relevant to deciding an application it should not pass a decision on rejection because such a decision short of prior consideration of the merits could have long term negative consequences on the alien, whose all potential applications in other countries would be rejected on the grounds of our rejection which it fundamentally is not.

- the Belgrade Centre would like to urge the members of the Working Group to take note of our earlier comments related to the concept of a safe third country and responsibility of the state (under which conditions it may, finally apply the concept and the nature of the decision in such a case), and would at the same time agree with UNHCR comment that it might be difficult to substantiate decisions to reject an asylum application on the basis of this provision, due to confidentiality of asylum procedures and decisions on cases examined in other states. Such a decision should be made only as one of the elements in the course of deciding on an application, and the competent authority cannot pass a decision on rejection if it had not decided on the meritum previously (distinction between the decision on rejection and on refusal). At the same time, the states have a different legal regime for granting asylum or other protection. The example of Austrian laws has already been mentioned; Croatia, for instance, does not recognize the institute of complementary protection recognized by our law, so their decision on rejection cannot be automatically considered ground for «rejection» of an application.

Submission of a New Asylum Application

Article 28

An alien whose asylum application was previously refused in the Republic of Serbia may file a new application if he/she provides evidence that the circumstances relevant to the recognition of refugee status or granting humanitarian protection have materially changed in the meantime. If he/she fails to do so, the application shall be rejected.

The competent bodies shall reject a new application for asylum of an alien whose application for asylum had been previously rejected in the Republic of Serbia, unless *he can provide evidence* that the circumstances relevant to recognition of the refugee status of granting of humanitarian protection have significantly changed in the meantime (N.B.). Although the justified intention of the Working Group to prevent a possible abuse of the asylum institute is evident, we believe that in certain situations it would be unrealistic to expect the asylum seeker to «provide» new evidence. Therefore, we believe that a lower level of probability would suffice, such as for instance indication of new circumstances and evidence.

Refusal of Asylum Applications on grounds of inadmissibility

Article 29

The Asylum Office shall reject an asylum application without examining the eligibility of an asylum seeker for the recognition of asylum, if it has established:

1) *that the asylum seeker could have received effective protection in another part of the country of origin, unless he/she cannot be reasonably expected to do so in view of all the circumstances,*
2) *that the asylum seeker enjoys the protection of, or receives assistance from, an agency or a body of the Organization of the United Nations, with the exception of UNHCR, or has been granted asylum in some other country;*

3) *that the asylum seeker has the citizenship of a third country;*
4) *that the asylum seeker can receive protection from the safe country of origin, unless he/she can prove that it is not safe for him/her;*
5) *that the asylum seeker has come from a safe third country, unless he/she can prove that it is not safe for him/her;*
6) *that the asylum seeker has deliberately destroyed a travel document, an identification paper or some other written official communication which could have been of relevance to the decision on asylum, unless he/she can quote valid reasons for that.*

The Asylum Office shall not reject an asylum application before they have questioned the asylum seeker with respect to the circumstances referred to in paragraph 1 of this Article.

The Belgrade Centre for Human Rights has a series of objections to this Article since, according to the Draft, the Working Group opted for application of certain regimes that should not be applied automatically without examining the merits of the application when passing a decision to refuse an asylum application.

Para. 1- The Working Group has opted for the possibility of refusing an asylum application without examining whether the person seeking asylum fulfills the conditions for recognition of asylum in case that there purportedly exists the possibility of relocation within the country of origin. We would like to stress several illogicalities and point out to the necessity of changing this paragraph:

◦ The question is posed as to the way in which the competent authority could establish whether another part of the country of origin is safe short of dealing with the essential establishment of the facts and basis for granting asylum? We consider this almost impossible although we do not deny the possibility for such a solution to appear in the course of examination of relevant facts. What would be the basis for an automatic drawing up of such a conclusion? Were the situations in which armed conflict is taking place in one part of the territory and not in another what the Working Group had in mind? Or the situations whereby the non-state or paramilitary formations operate on one part of the territory only?

The Belgrade Centre emphasises that the conclusion cannot be drawn automatically. Should there exist fear from the state agencies, it should be taken into account that they can act on the entire territory of their state. On the other hand, if the actors are non-state the question is posed whether the state is capable of providing an efficient protection from such groups at all. We would like to recall several cases before the European Court of Human Rights wherein the Court examined this problem.

In the case *Chahal v. United Kingdom*,[24] the minister of interior passed a decision to deport Chahal to India (country of origin) for reasons of national security. Chahal submitted an application for political asylum, claiming that he would be persecuted and tortured in India because of his political activities, and particularly so by the Punjab police. United Kingdom rejected Chahal's application for political asylum for reasons of national security considering he should nevertheless be deported to India, where security guarantees would be given to him in the regions in India where he would not be endangered by certain police bodies. However, the Court concluded on the basis of evidence presented that the elements in Punjab police are used to act in violation of

[24] *Chahal v. United Kingdom*, Appl. No. 22414/93, judgment of 15 Nov.1996

human rights of the suspect militant Sikhs and are fully capable of fulfilling their objectives in the parts of India far away from Punjab.

In the case *Hilal v. United Kingdom*,[25] the UK government maintained that even if assumed that Hilal was threatened in Zanzibar, he would be able to live inland Tanzania where the situation, from the aspect of human rights protection, was much safer. The Court was not assured that the possibility of flight from Zanzibar to inland Tanzania offered reliable guarantees relative to the risk from abuse. The Court invoked, *inter alia*, the institutional links between the police in that part of Tanzania and the police in Zanzibar and the possibility of extradition of persons, which meant that they could not be relied upon in the sense of securing protection from cruel treatment (pp. 67-68).

Even if the Working Group decided to retain this concept, we believe that the burden of proof should be on the state, that consultations with the asylum seeker would be conducted wherein he would be given the possibility to express his opinion and present possible evidence opposing the statements of state authorities.

◦ With respect to items 2) and 3), paragraph 1, it does not suffice to rely mechanically on the fact that the asylum seeker had already been granted asylum in another country or that he has a citizenship of a third country. The quality of protection that this state can offer should be examined, for if the state is no longer able to offer effective protection then the status he enjoys there is not relevant in the sense emphasized by the Working Group.

◦ The comments to paras. 4) and 5) have been explained in parts related to Articles 2, 26 and 27.

◦ The Belgrade Centre for Human Rights would like to support UNHCR opinion that this para. 6 should read «deliberately destroys, hides or damages his passport, personal document or any other document or proof relevant for the procedure *with the intention of preventing establishment of the facts in his case*». It is widely known that the persons who later seek asylum cross borders illegally in order not to be apprehended by the authorities of the country of origin, that they frequently destroy documents for fear their identity may be revealed prior to their arrival to some country they deem to be safer, i.e. that the human traffickers require them to do so. Therefore, we believe this concept should be limited to those situations only when a person destroys documents in bad faith in order to prevent establishment of real facts in his case.

Para. 2– This paragraph has, through negligence most likely, been formulated completely incorrectly, because should it remain as it is, it would be denying the possibility of conducting an interview with an asylum seeker, prior to deciding on the possible refusal. Therefore, the second negation in the paragraph should be deleted in order for it to read: *«The Asylum Office shall not refuse an asylum application prior to interviewing the person seeking asylum in respect of the circumstances mentioned in para. 1 hereof»*.

Suspension of the Procedure and Restoration to the Original Position
Article 30

The procedure for granting asylum shall be suspended ex officio if an asylum seeker:

[25] *Hilal v. United Kingdom,* Appl. No 45276/99 judgment of 6 March 2001

1) *withdraws his/her asylum application;*
2) *despite having received a duly served summons, fails to appear for an interview without providing a valid reason for doing so, or if he/she declines to make a statement;*
3) *without a valid reason, fails to notify the Asylum Office of a change of address within three days from the said change, or if he/she prevents the service of a summons or another written official communication in some other way;*
4) *leaves the Republic of Serbia without the approval of the Asylum Office.*

In its decision to suspend the procedure, the Asylum Office shall set a time limit within which an alien who has no other ground for residing in Serbia and Montenegro must leave Serbia and Montenegro, and if he/she fails to do so, he/she shall be forcibly removed, in accordance with the law regulating the stay of aliens.

An asylum seeker may, within three days from the date when the reasons have ceased to exist for which he/she failed to respond to the summons for an interview, or to report a change of address in a timely manner, submit a proposal for restoration to the original position.

A decision on the proposal for the restoration to the original position shall be taken by the Asylum Office.

According to Article 30, the procedure for granting asylum may be suspended when the applicant directly withdraws therefrom or when purportedly from his conduct a conclusion may be drawn that he is not interested in the procedure itself (fails to come to an interview, declines to make a statement, leaves Serbia without persmission of the Asylum Office). This Article displays illogicality and a very strict regime. Thus for instance, the asylum seeker is expected to inform the authorities of the change of address within three days, while a longer timeframe has been stipulated for other citizens. The assumption taken in that case is that he is doing it with a view to prevent service of a summons or other written official communication, although it seems illogical that he would do it in order to suspend the procedure. The Working Group leaves a very short timeframe of three days only from the date of cessation of reasons due to which he/she failed to respond to the summons for an interview or untimely registration of the change of address for submission of a proposal for restoration to the original position. It may be disputed whether the right to seek restoration to the original position is also given to the asylum seeker who has left the country for one or two days without the permission of the Asylum Office and then come back, because this situation is not mentioned. We believe this timeframe to be extremely curt, and propose that the Working Group review the possibility of stipulating a longer timeframe.

Time Limit for Appeal

Article 31

An appeal against first-instance decisions issued in the asylum procedure shall be lodged within eight days from the date of receipt of the first-instance decision.

An appeal against first instance decisions taken in the asylum procedure is lodged within eight days from the date of receipt of the first-instance decision. We consider this to be

yet another short and strictly established time limit taking into account the specific nature of the procedure, current functioning of legal protection in Serbia as well as the negative consequences of the established situation on the life and the rights of an asylum seeker. According to the current regulations whereby the procedure for granting asylum is conducted by UNHCR in Serbia, this deadline is 30 days.
Even more important is the mandatory nature of the suspensive effect of an appeal which is mentioned neither in Article 7 nor here (see detailed comment on Art. 7).

V. TEMPORARY PROTECTION

Temporary Protection

Article 32

When statutory requirements have been met for the provision of temporary protection the Government may take a decision in an urgent procedure, which shall contain an assessment of the situation in the country from which its citizens, i.e. stateless persons with permanent residence in that country, come en masse, as well as the number of persons to whom temporary protection may be accorded, commensurate with social, economic and other capacities of the Republic.
Temporary protection may also be accorded to those persons who lawfully resided in the Republic of Serbia at the time when the decision referred to in paragraph 1 of this Article was issued, but their residence right expired before the cessation of the reasons for the provision of temporary protection, if other statutory requirements have been met.

The Asylum Office shall carry out the registration of persons enjoying temporary protection by applying measures referred to in Article 21, paragraph 1, items 1), 2) and 3) of this Law.

Within the number referred to in paragraph 1 of this Article the Asylum Office shall issue individual decisions on the granting of temporary protection.

Temporary protection is an extraordinary measure and may last up to one year, and if the reasons for temporary protection continue to exist, it may be extended.
Aliens to whom temporary protection has been granted shall have the right to submit an asylum application.

Cessation of Temporary Protection

Article 33

Temporary protection shall cease upon the expiry of the period for which it was granted, or when the reasons for which it was granted have ceased to exist, on which a decision shall be issued by the Government.

Notwithstanding paragraph 1 of this Article, temporary protection may cease to an alien on the basis of a decision by the Asylum Office, if it has been established that in his/her case reasons exist for which refuge status may be denied.

Rights and Obligations of Aliens Granted Temporary Protection

Article 34

An alien who was granted temporary protection shall have the right:

1) *to residence in the period of validity of temporary protection;*
2) *to a personal document confirming his/her status and residence right;*
3) *to health care in keeping with the regulations governing health care for aliens;*
4) *to free primary and secondary education in public schools in keeping with a separate regulation;*
5) *to legal aid on the terms prescribed for asylum seekers;*
6) *to freedom of religion, on the same terms which apply to the citizens of the Republic of Serbia;*
7) *to accommodation, in conformity with a separate regulation.*

An alien who has been granted temporary protection shall be equal in terms of obligations with persons who have been recognized as refugees.

The Law prescribes that when the conditions provided for statutory requirements for granting temporary protection have been met, the Government of Serbia may, using emergency procedure, pass a decision on the situation in the country wherefrom a large-scale influx of citizens may be expected, and may pass a decision on the number of persons to whom temporary protection may be accorded commesurate with social, economic and other capacities of the Republic. Temporary protection may last maximum up to one year and it may be extended if the reasons for temporary protection persist. Temporary protection shall cease upon expiry of the period for which it had been granted or when the reasons for which it was granted have ceased to exist. The decision thereon shall be passed by the Government but it has also been provided that it may cease due to same reasons for which refugee status may be witheld, on the basis of the decision of the Asylum Office.

The Belgrade Centre recognizes potential financial problems that the state could face in case of large-scale influx of vulnerable persons from neighbouring countries, but in no way can it support the idea that a certain number of persons be accorded protection and the others denied protection depending on the social and economic capacities of the state. Such a conduct of the state could challenge its responsibility vis-à-vis international law and above all, the mass violation of the principle of *non-refoulement*. As UNHCR suggests in these situations urgent assistance of other states should be sought in line with the principle of burden sharing and international solidarity.

Temporary protection is protection granted immediately in case of need, without individual examination of each concrete case and only later, independently of this status, may an asylum application be submitted. Consequently, this type of protection cannot be subject to a regime applying to refugees, and particularly not the provisions relating to witholding refugee status, as the Working Group had intended.

According to the EU Directive[26] and the Recommendations of the Committee of Ministers of the Coucil of Europe, temporary status should not last in excess of one year or maximum two years. If the Article 32 first states that it may last *maximum up to* one year and may be extended in case of need, it should be harmonised with the Directive.

EXERCISE OF RIGHTS AND RESPONSIBILITIES OF PERSONS SEEKING ASYLUM, REFUGEES AND PERSONS GRANTED HUMANITARIAN PROTECTION (Articles 35-43)

The state would, by virtue of this Law, guarantee certain rights to asylum seekers and refugees. However, their scope, method of implementation, competent authorities and the provision of funds for their implementation have not been defined. If the legislator had already decided to regulate these rights in detail by a by-law then the he should have authorised the Government or another authority to pass a corresponding by-law. The Belgrade Centre regrets the fact that the Working Group was comprised of MOI representatives only and not also of other ministries and bodies that will be competent in issues of asylum or that they had not at least been consulted in the course of draft preparation.

The Belgrade Centre would like to support UNHCR's proposal to accord the persons granted humanitarian (complementary) protection the same rights as those granted to refugees, for their need for international protection is as strong and most often, as durable as that of refugees.

VIII. RESTRICTION OF MOVEMENT

Reasons for Restriction of Movement

Article 47

The movement of asylum seekers may be restricted by virtue of a decision of the Asylum Office:

1) *for the purpose of establishing identity,*
2) *for the purpose of preventing the spreading of contagious diseases,*
3) *on account of undermining the rule of law and implementation of measures undertaken for its maintenance or establishment,*
4) *due to a suspicion that an asylum application was filed with a view to avoiding deportation,*
5) *if there exist reasonable grounds to believe that an asylum seeker is a threat to national security, or if an enforceable court ruling has been passed against him/her for a serious criminal offence, on account of which he/she constitutes a threat to public order.*

[26] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in case of mass influx of displaced persons, see http://ec.europa.eu/justice_home/news/prot_tempo/documents/dir-2001-55-ce_en.pdf

Measures for Restriction of Movement

Article 48

Restriction of movement shall be implemented by means of:

1) *accommodation at the Shelter[27] for Aliens;*
2) *prohibition of movement outside the Asylum Centre;*
3) *prohibition to leave a particular address; and*
4) *prohibition of movement outside a designated area.*

Restriction of movement shall be in force for as long as there exist reasons set out in Article 47 of this Law, but not for longer than six months.

Notwithstanding the above, when restriction of movement was imposed for the reasons stipulated in Article 47, items 2) and 4) of this Law, restriction of movement may be extended for another six months.

An appeal against a decision on restriction of movement shall not have suspensive effect.

Failure to Observe Restriction of Movement

Article 49

A stricter measure for restriction of movement may be imposed on an asylum seeker who has violated the prohibition referred to in Article 48, paragraph 1, items 2), 3) and 4) of this Law.

Although this part of the Draft is entitled „Restriction of Movement“, we believe that the proposed measures and the length of their duration may be treated as „deprivation of liberty “ in the sense of Article 5 of the European Convention for Protection of Human Rights and Fundamental Freedoms and Article 9 of the International Covenant on Civic and Political Rights i.e. constitutional regulation of this matter. In the case *Guzardi v. Italy*,[28] the Court explained that in order to establish whether an individual had been «deprived of liberty» within the meaning of Article 5, a concrete situation needs to be taken into account as well as the whole spectrum of criteria such as type, duration, effect and implementation of a certain measure and that the difference between restriction of movement and deprivation of freedom lies only in the level and intensity and not in the nature and substance.[29] The size of the area in which an individual is detained, degree of social contact that an individual may have, impossibility to leave the place of residence without previously notifying the authorities, the obligation to register imposed on him as well as sanctions applicable in case of breach of these obligations are specially taken into account. In this case, the Court concluded that restriction of movement of Guzardi to the territory of a small island where he had limited social contacts and strict supervision, constituted deprivation of freedom also in the sense of Article 5 ECHR. Bearing in mind that in Serbia restriction of movement of an individual would refer to accommodation in a Reception Centre for Aliens where aliens who illegally cross the border or are awaiting

[27] Shelter or Reception Center for Aliens is the facility for aliens pending deportation from the country.
[28] *Guzardi v. Italy*, Appl. No. 7367/76, judgment of 11 June 1980
[29] *Ibid*. para. 92-93.

deportation are detained i.e. prohibition of movement from other addressess with an obligation to register i.e. supervision, that these measures could last up to six months, i.e. a year and that in the case of breach thereof stricter measures could be applied, our opinion is that this constitutes deprivation of liberty in the sense of Article 5.

The judgment in the case *Amuur v. France*[30] is also very significant. Further to limitation of movement stipulated in the Draft, it was noted that the state authorities detained individuals in the transit zone of the Belgrade Airport. In the case Ammur, the Court decided that "detaining applicants in the transit zone of the airport Orly, Paris is equal in practice, in respect of the suffered restrictions, to deprivation of liberty.[31]

Article 9 **PGP** provides procedural guarantees that will prevent arbitrary and illegal deprivation of liberty. The state signatory must accurately define cases in which deprivation of liberty is justified, as well as ensure judicial control of the lawfulness of detention.

Article 5 ECHR indicates an assumption that everyone has a right to liberty and security and that therefore, a person may be deprived of liberty only exceptionally. This assumption has been emphasized by an imperative requirement of Article 5 that an individual may not be deprived of liberty longer than absolutely necessary and that loss of liberty, if unfounded, should be restored immediately. According to this Article, everyone is entitled to initiate 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. The requirement of lawfulness is interpreted so as to refer to observance of the procedure and the merits alike, so that any detention must be in line both with the domestic law and the ECHR. There is a clear burden of proof on those who deprived an individual of his freedom, to demonstrate not only that the reasons on the basis of which deprivation had occured fall into one of the bases stated in Article 5, but that the use of those authorities may be applicabl in a concrete situation.

The Centre cannot go into appraisal as to whether all the conditions stipulated for deprivation of liberty in Art. 47 would be in line with the reasons set out in para 1, Art. člana 5 ECHR, but considers them quite inaccurately formulated and left to the MOI officials to interpret. Nevertheless, in this part the Centre would like to pay special attention to the solutions that would evidently be in line neither with the domestic legislature nor the international standards.

Prior to argumenting our stand that this solution is not in accordance with ECHR, we would like to recall constitutional and legal guarantees in the Republic of Serbia pertaining to detention.

Constitutional documents in effect on the territory of Serbia guarantee the right to personal freedom and security (Art. 14 Charter; Art. 15 Constitution of Serbia). The Charter stipulates that detention may be ordered only by a decision of a competent court (para. 3, Art. 15). The Law on Criminal Procedure establishes the rule that only a competent court may order detention and only in cases stipulated for by the law and with a reservation of a general provision that it may be done only if the same objective cannot be achieved by another measure (Art. 173 - 175). The decision on ordering detention during investigation is handed over to the person it refers to at the moment of detention

[30] *Ammur v. France*, Appl. No. 19776/92, judgment of 25 June 1996
[31] *Ibid*. para. 49.

and maximum 24 hours from the moment of detention i.e. bringing before the investigative judge. The detainee may lodge a complaint against this decision to the council. The complaint shall be decided urgently – within 48 hours. Duration of detention must be minimum necessary (para. 3, Art. 16).

The Law on Criminal Procedure allows detention of a suspect by the bodies of the ministry of interior or a prosecutor only as an exceptional measure (Art. 264). The person subject to this measure shall enjoy all the rights accorded to a suspect, and especially the right to defence counsel. The body of the ministry of interior or the prosector shall immediately, and within maximum 2 hours issue and serve the decision on detention. *Duration of detention has been limited to maximum 48 hours*. An investigative judge must be promptly informed thereof with the possibility to request that the person be duly brought before him (para.4, Art. 264). The detained person may submit a complaint on the decision on detention. Submission of complaint does not suspend execution. The investigative judge must pass a decision on the complaint within 4 hours from the moment of receipt thereof. Nevertheless, the most important guarantee of the position of the suspect in this situation is the impossibility of his hearing in absence of defence counsel.

According to para. 2, Art 15, Charter „an arrested person shall without delay, and maximum within 48 hours be bought before the competent court. Short of that he shall be released." Systematics of the Law on Criminal Procedure are clear: first, the person whose, otherwise, guaranteed rights and freedoms are being limited in the procedure is given a general guarantee that this would happen only in justified cases, and then, in adequate places, these guarantees are stipulated in detail. The court is *obliged* to conduct the procedure without delay and prevent any possible abuse of rights. At the same time, followint the Constitution of Serbia, even detention ordered by a first-instance court may last maximum up to three months.

In our opinion a conclusion made on the basis of the above presented domestic law is that detention of the asylum seeker by the body of the ministry of interior lasting up to 6 months without any court supervison and review, could be considered contrary to domestic constitutional and statutory guarantees. A decision on detention should be taken by court, even in the second instance, and such a decision should be time limited and subject to periodical review.

The Article 48 rigourously stipulates that the officials of the Ministry of Interior (Asylum Office) may determine measures of „restriction of freedom" by accommodation in the Reception Centre for Aliens, prohibition of movement outside the Asylum Centre, prohibition to leave a particular address and prohibition of movement outside a designated area whereby those restrictions may last up to *six months i.e. one year*. A complaint to the second-instance body – Asylum Commission, which is also an executive and not a judicial body - is allowed but it does not suspend execution.

It is evident from both texts – the French and the English version of para. 1 (f) Art. 5 - that the *deprivation of liberty on the basis of this* sub-paragraph shall be justified only in the course of the extradition procedure. In the case *Ali v. Switzerland* the European Commission for Human Rights established that Ali's arrest due to him not having travel documents was contrary to Art 5(1)(f), because arrest did not have "deportation as an aim". As already said, although the Centre does not wish to put itself in the position of the European Court and assess reasons of Art. 47, it would nevertheless

like to draw the attention of the authorities to the fact that certain reasons for detention are not aimed at deportation, nor other reasons set out in para. 1 Art. 5.

Para.4 Art. 5 ECHR guarantees that "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which *the lawfulenss of his detention shall be decided speedily by a court* and his release ordered if the detention is not lawful." If the decision on detention of a person is passed by an *administrative body* (as is the case here (Asylum office)), then without a doubt Article 5 (4) *binds the state party to enable the person deprived of liberty to take his case to court (*case *Sanches Rice v. Switzerland)*. Although "the court" mentioned in para.4 Art. 5 need not necessarily be a classic court integrated into the standard judicial machinery of the state but may be some other official/body authorised to execute judicial authorities, which is independent of the executive, we believe that the Asylum Office, in a way it has been set out by this Law, does not fulfill the criteria required by the Court in this sense. In the case *De Wilde, Ooms and Versyp v. Belgium,*[32] the Court also said that the detainee must have the right to lodge a complaint to the court when detention resulted from a decision of an administrative body and not of the court, as would be the case here. At the same time, in line with the opinion of the Human Rights Committee, judicial control must be ensured immediately and not only after the decision of the second-instance administrative body.[33]

Furthermore, according to the practice of the Court, as time passes so does the initial reason for pronouncing detention no longer suffice *per se,* but needs to be examined in light of new circumstances.[34] That is why the six months restriction of movement of a person without an interim review could be contrary to Article 5, also bearing in mind that in criminal matters the detained person must be presented before the judge within the shortest possible period. Not even in the most exceptional cases can this period exceed four days, while it need be much shorter in the regular circumstances.[35]

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[32] *Wilde, Ooms i Versyp v.Belgium,* Appl. Nos. 2832/66;2835/66;2899/66, A 12, 1971, pp. 76

[33] *Inés Torres v. Finland*, no. 291/1988 (1990), pp. 7.2.

[34] *Letellier v. France*, App. No. 12369/86 (1991); *Caballero v. United Kingdom*, Appl. No. 32819/96 (2000).

[35] *Brogan et al v. United Kingdom*, Appl. Nos. *11209/84; 11234/84; 11266/84; 11386/85;* A 145, 1978, pp. 33