Series
Reports
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HUMAN RIGHTS IN SERBIA AND MONTENEGRO 2003

LEGAL PROVISIONS, PRACTICE AND CONSCIOUSNESS IN THE STATE UNION OF SERBIA AND MONTENEGRO COMPARED TO INTERNATIONAL HUMAN RIGHTS STANDARDS

Belgrade Centre for Human Rights
Belgrade, 2004

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Abbreviations

AEPS	Act of Enforcement of Penal Sanctions
AI	Amnesty International
ANEM	Association of the Independent Electronic Media
Basic CC	Basic Criminal Code
BCHR	Belgrade Centre for Human Rights
BIA	Security and Information Agency
B&H	Bosnia and Hercegovina
CAA	Center for Antiwar Action
CAT	Committee against Torture
CESCR	International Covenant on Economic, Social and Cultural Rights of 16 December 1966
CeSID	Center for Free Elections and Democracy
CC	Criminal Code
CoE	Council of Europe
Constitutional Charter	Constitutional Charter of the State Union of Serbia and Montenegro
CPC	Criminal Procedure Code
CPT	Committe for the Prevention of Torture
CSCE	Conference for Securuty and Cooperation in Europe
CUPS	Centre for Advanced Legal Studies
DOS	Democratic Oposition of Serbia
DPS	Democratic Party of Socialists
DS	Democratic Party
DSS	Democratic Party of Serbia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court for Human Rights
EU	European Union
FPRY	Federal People's Republic of Yugoslavia
FRY	Federal Republic of Yugoslavia
Federal Constitution	Constitution of the Federal Republic of Yugoslavia of 27 April 1992

GSS	Civic Alliance of Serbia
HC	Helsinki Committee for Human Rights in Serbia
HLC	Humanitarian Law Center
Human Rights in Yugoslavia 1998	Human Rights in Yugoslavia 1998, Belgrade Centre for Human Rights, Belgrade, 1999
Human Rights in Yugoslavia 1999	Human Rights in Yugoslavia 1999, Belgrade Centre for Human Rights, Belgrade, 2000
Human Rights in Yugoslavia 2000	Human Rights in Yugoslavia 2000, Belgrade Centre for Human Rights, Belgrade, 2001
Human Rights in Yugoslavia 2001	Human Rights in Yugoslavia 2001, Belgrade Centre for Human Rights, Belgrade, 2002
Human Rights in Yugoslavia 2002	Human Rights in Yugoslavia 2001, Belgrade Centre for Human Rights, Belgrade, 2003
HR Charter	Charter on Human and Minority Rights and Civil Liberties
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights of 16 December 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights of 16 December 1966
ICG	International Crisis Group
ICRC	International Committee of Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILO	International Labour Organisation
IWPR	Institute for War and Peace Reporting
"KLA"	"Kosovo Liberation Army"
KFOR	Kosovo Forces
LCEMP	Elections of Members of Parliament Act
LMFR	Marriage and Family Relations Act
LGAP	General Administrative Procedure Act

Montenegrin Constitution	Constitution of the Republic of Montenegro of 13 October 1992
Montenegro	Republic of Montenegro
MOC	Montenegro Ortodox Church
MUP	Ministry of Interior
NATO	North Atlantic Treaty Organisation
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organisation for Security and Co-operation in Europe
PSEA	Penal Sanctions Enforcement Act
REC	Republic Electoral Commission
RTS	Radio Television of Serbia
SaM	Serbia and Montenegro
SDB	State Security Service
SDP	Social Democratic Party
Serbia	Republic of Serbia
Serbian Constitution	Constitution of the Republic of Serbia of 28 September 1990
SFRY	Socialist Federal Republic of Yugoslavia
Sl. glasnik RS	Službeni glasnik Republike Srbije (Official Gazette of the Republic of Serbia)
Sl. list RCG	Službeni list Republike Crne Gore (Official Gazette of the Republic of Montenegro)
Sl. list SRJ	Službeni list Savezne Republike Jugoslavije (Official Gazette of the Federal Republic of Yugoslavia)
Sl. glasnik SRS	Službeni glasnik Socijalističke Republike Srbije (Official Gazette of the Socialist Republic of Serbia)
SNP	Socialist People's Party
SPC	Serbian Orthodox Church
SPS	Socialist Party of Serbia
SRCG	Socialist Republic of Montenegro
SRS	Serbian Radical Party
UN	United Nations
UN doc.	United Nations document
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees

UNICEF	United Nations Children's Fund
UNOHCRH	The Office of the United Nations High Commissioner for Human Rights
Universal Declaration	Universal Declaration of Human Rights, UN General Assembly resolution 217 A (III) of 10 December 1948
UNMIK	United Nations Interim Administration Mission in Kosovo
VJ	Army of Yugoslavia
YUCOM	Lawyers Committee for Human Rights

Preface

The *Human Rights in Serbia and Montenegro 2003* is published by the Belgrade Centre for Human Rights in an attempt to offer to the national and international public and abroad a survey of the actual exercise and enjoyment of internationally guaranteed human rights in Serbia and Montenegro. The Centre's aim has been to examine as thoroughly as possible the legal regulation, exercise, enjoyment, limitations and violations of human rights and the most important factors influencing the human rights situation in the country.

This is the sixth in a series of reports on human rights published by the Centre since 1998.[1] It can be perused with reference to the other five, especially if the reader wishes to investigate the origins of the latest events and compare the present situation with that before the changes in 2000.

The report is divided into four sections.

The first section describes and examines constitutional provisions, laws and regulations dealing with human rights, and compares them with international standards and the obligations of Serbia and Montenegro under international treaties. This section is based on comprehensive data collected by the Centre.

Section two deals with the practical enjoyment of human rights in the country. The need to provide a full picture made it necessary not to rely only on the Centre's own research, but also to systematically survey the national media and collect all available reports produced by relevant human rights organisations. The sheer mass of data, often conflicting, did not always allow the authors to reach final conclusions, but all sources have been conveyed in full, giving to the reader material to arrive at his/her own conclusions.

As in its reports for 1998, 2000, 2001 and 2002, the Centre conducted in late 2003 its survey of the perceptions of citizens' of human rights and their related attitudes on a large sample of respondents; the findings are given in section three.

A comprehensive annual report on the human rights situation in a country and society cannot be produced without covering the broader issues affecting the enjoyment of human rights. Section four therefore includes concise presentations of the topics deemed to be most important: the state of emergency proclaimed in spring, the International Criminal Tribunal for the Former Yugoslavia, the situation in Kosovo, and the status of refugees and internally displaced persons.

1 Until 2003 under the title *Human Rights in Yugoslavia*.

Work on the report began on 1 January 2003 and ended on 20 January 2004. As a rule, factual research covers the period until 15 December 2003.

The Centre expresses its gratitude to all those who collaborated in the production of this report for their hard work and devotion, especially to contributors outside its staff.

Introduction

The Federal Republic of Yugoslavia, created on 27 April 1992, became the State Union of [its two former republics] Serbia and Montenegro when a Constitutional Charter was adopted on 4 February 2003. One of the new Union's first acts was the adoption of a Charter on Human Rights and Minority Rights and Civil Liberties, from which it proceeds that in the field of human rights Serbia and Montenegro can still be seen as a single legal entity. Serbia and Montenegro is a single person in international law, which means that it has the same obligations under international treaties by which the FRY was bound, including those documents guaranteeing and protecting human rights.

The most important events in Serbia and Montenegro for the cause of human rights and democracy since the Second World War took place in September and October 2000, after elections for parliament and the federal president.[2] Dr Vojislav Koštunica, the candidate of the Democratic Opposition of Serbia (DOS), beat incumbent Slobodan Milošević in the presidential vote on 24 September, but Milošević and his regime yielded power only after mass protects were staged on 5 October 2000.

Given the separation of jurisdictions between the federal state and the republics, the opposition's victory and the political change were not complete without changes in Serbia. Elections for the Serbian Parliament were held on 23 December 2000 and resulted in an overwhelming victory for the DOS. A new Government of Serbia was elected in January 2001, with Zoran Djindjić as its head. A major rift which appeared in the DOS after Koštunica's Democratic Party of Serbia (DSS) stepped out of it also affected the Parliament and Government. Serbia was shaken to the core after Djindjić was assassinated on 12 March 2003. Members of the underworld are being blamed for the murder, but its political background remains unclear. The trial of the men accused of the shooting began in December 2003. The assassination itself was immediately followed by a state of emergency in Serbia lasting 42 days.

The worsening political crisis led to failed presidential elections and the calling of a parliamentary vote in Serbia for 28 December 2003. The final results, announced on 30 December, showed that the biggest single party is now the extreme right-wing Serbian Radical Party, with 82 of the Parliament's 250 seats. The Radical Party was in the ruling coalition until the 2000 democratic shift together with the Socialist Party, which won 22 seats in the December 2003 ballot. The parties of the

2 For earlier periods, see introductory sections on *Human rights in Yugoslavia in 1998*, *1999*, *2000*, *2001* and *2002*, BCHR, 1999, 2000, 2001, 2002, 2003.

old regime did not gain enough votes to form a government on their own. The DSS gained 53 seats and the Democratic Party 37.[3] The G17 Plus, a newly-formed party of liberal orientation created out of a non-governmental organisation with the same name, won 34 seats, and a coalition of the Serbian Renewal Movement (SPO) and the Nova Srbija (NS) took 22. The SPO was one of the first anti-Milošević parties created in the early 1990s, but was not a DOS member. The NS was created when its leader Velimir Ilić broke away from the SPO. The results make it possible for the former opposition parties, usually called the "democratic bloc", to form a majority government, but consultations had not been completed by the end of the year and Serbia entered 2004 without a new government.

The unresolved status of the FRY and Serbia within it was, together with the parliamentary crisis in Serbia, an obstacle to the badly-needed constitutional reform in Serbia, for which a number of unofficial proposals were published, including one drafted by an independent expert group attached to the Belgrade Centre for Human Rights.[4]

Changes in Montenegro took a different course. After the ruling Democratic Party of Socialists (DPS), which had broken its ties with the regime in Serbia in 1997, decided to boycott the federal presidential and parliamentary vote on 24 September 2000, Montenegro was together with an elected candidate of the Serbian opposition represented in the federal parliament by deputies of the Socialist People's Party, political allies of the defeated Slobodan Milošević! This co-habitation slowed down reform processes in the FRY, particularly the adoption of necessary laws on co-operation with the International Criminal Tribunal for the Former Yugoslavia (ICTY). In elections held in Montenegro, power was retained by the DPS, which, in spite of its declared goal of an independent Montenegro, took part in negotiations with the Serbian Government which led to the establishment of the State Union.

Insufficient voter turnout in the December 2002 presidential vote in Montenegro led to a repeat vote on 9 February 2003, with the same outcome; early in March, the Montenegrin Parliament altered the Act on the Election of the President, abolishing the turnout minimum requirement of 50% of the electorate. Filip Vujanović, the candidate of the ruling coalition, won at a vote held on 11 May, replacing Milo Đukanović, the head of the DPS, who then assumed the post of Prime Minister.

Apart from the establishment in December 2003 of a consultative parliamentary working group, the Council for Constitutional Questions, no work was done in Montenegro during the year on a new constitution which would be in harmony with the Constitutional Charter of the State Union of Serbia and Montenegro. Montene-

3 The DS contained candidates from another three former DOS parties: The Civic Alliance of Serbia (GSS), the Democratic Centre (DC) and the Social Democratic Union.

4 *Ustavna rešenja za Srbiju i Jugoslaviju – Constitutional Reform in Serbia and Yugoslavia* , Belgrade, BCHR, 2001.

gro continues to enforce some laws adopted at federal level before 5 October 2000, although those laws have been changed by the Parliament of the FRY.

Abandoning in 2000 its unfruitful insistence on international continuity from the former Socialist Federal Republic of Yugoslavia (SFRY), the FRY was then admitted to the UN and some of its specialised institutions. The FRY soon also returned to the Organisation for Security and Co-operation in Europe (OSCE). On 3 April 2003, Serbia and Montenegro was admitted to the Council of Europe, and on 26 December it ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Non-governmental organisations, whose contributions to the democratisation of the country and roles in the replacement of the former regime in Serbia are well recognised, operated in conditions more favourable than those existing before October 2000, but the change was more in the sphere of practice than law. Work on a draft law on non-governmental organisations began in Serbia in 2001 (in co-operation with representatives of the relevant institutions), but no bill had gone before Parliament by the end of 2003.

Based on UN Security Council Resolution 1244, which ended the 1999 NATO intervention against Yugoslavia, Kosovo and Metohija remains a part of Serbia and Yugoslavia, albeit under an international administration; however, the authorities of Serbia and Montenegro have no real powers in the province.[5]

5 See IV.3.

Summary

I. Legal Provisions Related to Human Rights

1. The law of Serbia and Montenegro (SaM) meets international human rights standards in most areas. Another significant improvement was the adoption in 2003 of the HR Charter as an integral part of the Constitutional Charter. This act provides for its direct implementation, thereby overcoming the problem of normative discrepancies between other norms and the HR Charter. Moreover, the Constitutional Charter stipulates the precedence of international treaties and custom over national law and the direct application of ratified international human rights treaties.

2. However, the charter and ratified human rights treaties have seldom or never been directly applied. Together with a great number of contradictory provisions, structural deficiencies in the legal system and the insufficient independence of the judiciary, this leads to the conclusion that SaM law still does not guarantee an adequate protection of human rights. In particular, the principle of rule of law has not yet been fully secured in SaM.

3. The legal system still does not secure effective legal remedies for human rights violations, primarily due to insufficiently independent judiciary. In 2003 not enough was done on the reform and improvement of the judiciary. Again Serbia has made changes and amendments to existing legislation, introducing provisions that violate the principle of separation of powers as well as the independence and impartiality of the judiciary.

In addition, there are difficulties in the functioning of some courts. The Court of Serbia and Montenegro was not established within the given time-period and the cases of the former Federal Court and Federal Constitutional Court are therefore still pending. The Constitutional Charter has also abolished the military judiciary, but the status of the cases initiated before military courts is unclear. The military judiciary is still partly functioning, while some of its cases have been transferred to civilian courts. This contributes to legal insecurity.

4. Legal insecurity in Montenegro is particularly problematic. Namely, since the adoption of the Resolution on the Protection of Rights and Interests of the Republic of Montenegro and its Citizens (*Sl. list RCG*, No. 37/00),[6] Montenegro has discontinued the application of acts and other legal provisions adopted subsequently on the then federal level. Hence the new federal laws, particularly important from the perspective of human rights (such as the Code of Criminal Procedure) are

6 This Resolution was declared unconsitutional by the Federal Constitutional Court (*Sl. list SRJ*, No. 17/01) in 2000, which did not influence Montenegro to discontinue its application.

not applied in Montenegro, leaving in force the old restrictive acts. Furthermore, there is no act that would determine which former federal acts are actually valid in Montenegro.

5. The Code of Criminal Procedure, which entered into force by the end of March 2002, provides more comprehensive guarantees to suspects, accused and defendants in criminal proceedings. However, this code also contains some institutes in contravention of international standards. For instance, it still allows compulsory detention, which is contrary to the European Convention of Human Rights (ECHR).

6. Additional legal provisions relating to organised crime were adopted in 2003, especially during the state of emergency. Despite the legitimate public interest to regulate the jurisdiction and procedure for offences containing elements of organised crime, some provisions are controversial from the aspect of human rights. Among others, provisions were adopted on 60 days detention for suspects without the possibility of judicial control. The Serbian Constitutional Court has suspended the application of these provisions, which were subsequently removed from the Act by the Parliament.

7. Some provisions of the Montenegrin Act on Misdemeanours on the proceedings before misdemeanours tribunals are not in keeping with Articles 5 and 6 of the ECHR.

8. Provisions of the SaM Act on Administrative Proceedings, stipulating that these proceedings shall be held *in camera* and only exceptionally be public are not in keeping with the right to public hearing provided by Article 6 ECHR.

9. Some grounds prescribed for banning organisations, as well as provisions on prohibition for persons convicted of criminal offences to form political and trade union organisations are in contravention of international standards. This also pertains to the prohibition of strike for employees in government agencies, professional soldiers and policemen in Montenegro.

10. With regard to minority rights, the adoption of the HR Charter was an important step, since it contains an entire chapter on the rights of minorities. Together with the Protection of Rights and Freedoms of National Minorities Act, adopted in February 2002, this constitutes a solid basis for the enjoyment of minority rights in SaM. In Serbia, however, guarantees the Serbian Constitution is in fact usually applied: they provide a narrower scope of minority rights. Moreover, no special remedies exist for the protection of minority rights guaranteed by the HR Charter, thus making them in most cases mere verbal declarations.

II. Human Rights in Practice

Apart from the period of the state of emergency, there have been some improvements in 2003 in regard to the enjoyment of human rights, although burdened with numerous difficulties. Especially, little has been done to reform and

consolidate institutions which should play a major role in the protection of the rights of individuals.

The main problems in 2003 continue to include the lack of determination to prosecute human rights violations perpetrated in the past, cases of discrimination, torture and trafficking in human beings:

1. There was an obvious lack of political will in the SaM to look into serious violations of human rights and humanitarian law which took place in the 1990s.

2. There were still cases of brutal police torture used as a coercive tool in investigations. Only a few investigations and criminal proceedings were initiated in cases of suspected police brutality.

3. Discrimination was tolerated by inefficient prosecution of offenders. Very few suspected cases of discrimination were investigated. The majority of the victims of ethnically motivated discrimination in 2003 were still Roma.

4. In 2003 more attention was given to the trafficking in human beings cases, which continued to be one of the biggest and most serious problems. Particularly alarming is the absence of criminal proceedings in a case of trafficking in human beings in Montenegro, where there were allegations of involvement of some high government officials.

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The chronic weaknesses of the system of protecting human rights in Serbia and Montenegro, described in this as well as all earlier reports of the Belgrade Centre for Human Rights, were even more pronounced during the state of emergency. Violations of the prohibition of torture represent a constant problem which was even worse during the state of emergency, when the police were granted wider powers and judicial control of detention was absent. The weaknesses of the judicial system, its questionable independence and the pressures exerted on it by the executive branch were even greater during the state of emergency.

III. Human Rights in the Consciousness of Citizens

Attitudes towards human rights were strongly influenced by concerns about the economic situation, primarily about unemployment and low standard of living, problems perceived as priority. *The right to work and choice of employment* was the right the respondents were preoccupied the most with. *The right to work* was most frequently found at the top of the list, as the human right most frequently thought to be jeopardized in SaM, although the *right to life, right to security and freedom* and *equality before the law* were perceived as the three most important rights. Low standard of living and unemployment were mentioned most frequently as endangering the right to life of citizens of Serbia and Montenegro, the human right which was evaluated as the most important one.

Awareness about individual rights varied from one right to the other, but a common element in all domains was the attitude that protection of rights in Serbia and Montenegro was rather formal than effective in practice: at the same time, interviewed citizens showed an awareness of the right to fair trial and lacked confidence in courts. They were aware of the right to freedom of thought but believed that the media were controlled, and that the independent media were in a minority; they were aware of the political rights but believed that elected politicians did not represent the interests of citizens; they knew that there were laws punishing acts of violence against women and children, as well as that slavery and forced labour were forbidden but believed that the relevant institutions hardly cared of these problems.

The majority of respondents shared the opinion that, in principle, implementation of human rights in Serbia and Montenegro was in jeopardy, but also that they somehow managed to enjoy either all or at least the majority of their human rights. While just one in five citizens thought that human rights were not jeopardized, somewhat more than one third claimed to enjoy all their human rights and the same percentage claimed to be able to enjoy the majority of their human rights.

The conclusion is that lack of confidence in institutions concurs with the major problem of the legal system in SaM – instability and weakness of institutions.

I
LEGAL PROVISION RELATED TO HUMAN RIGHTS

1. Human Rights in the Legal System of Serbia and Montenegro

1.1. Introduction

The present report discusses the legislation of Serbia and Montenegro (SaM) covering the civil and political rights guaranteed by international treaties to which SaM is a party, in particular the International Covenant on Civil and Political Rights (the ICCPR) as the main instrument in this field. In addition, the legislation is compared with the European Convention on Human Rights and Fundamental Freedoms (ECHR), signed by SaM on 3 April 2003. and with the standards established by the European Court of Human Rights (ECtHR) by its jurisprudence.[7] Standards established by other international treaties that deal in more detail with specific human rights, such as the UN Convention against Torture and the Convention on the Rights of the Child, are also taken into consideration.

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

- whether a particular right is guaranteed;
- if so, how it is formulated in national legislation and to what extent the formulation differs with respect to that contained in the ICCPR and ECHR;

7 The State Union of Serbia and Monegro was admitted to the CoE on 3 April 2003. See more on http://press.coe.int/cp/2003/178a(2003).htm. One of the obligations the SaM has accepted is to ratify the ECHR within one year from the moment of admission to the CoE.

- whether the guarantees of a certain right in national legislation and their interpretation by the state authorities ensure the same meaning and scope as the ICCPR and ECHR;
- whether the restrictions on rights envisaged by SaM law are in accordance with the restrictions the ICCPR and ECHR allow;
- whether effective legal remedies exist for the protection of rights.

Since this report was prepared in 2003, it considers only legislation that was in effect up to 15 December 2003.

1.2. Constitutional Provisions on Human Rights

The goals of Serbia and Montenegro, according to the Constitutional Charter of the State Union of Serbia and Montenegro (hereinafter: Constitutional Charter; *Sl. list SCG*, No. 1/03) from 4 February 2003, are respect of human rights of all persons within its jurisdiction, as well as respect and promotion of human dignity, equality and the rule of law (Art. 3, Constitutional Charter). As an integral part of the Charter, the Charter on Human and Minority Rights and Civil Liberties (hereinafter: HR Charter; *Sl. list SCG*, No. 6/03) was adopted on 28 February 2003.[8] Both constitutions of member states devote separate chapters to human rights and fundamental freedoms (Chapter II of the Serbian Constitution; Section II of the Montenegrin Constitution). In addition to civil and political rights, the HR Charter and the Constitutions of member states also guarantee economic, social and cultural rights, including the right to work, social security, health care, and education.

Member states regulate and protect human rights on their territory (Art. 9 (1), Constitutional Charter; Article 2 (3), HR Charter) while the State Union monitors their implementation and guarantees protection if it is not provided by the member states (Art. 9 (3), Constitutional Charter). The Constitutional Charter prescribes that the level of protection of human and minority rights attained cannot be downgraded (Art. 9 (2)).

The HR Charter represents great progress in the field of normative regulation of human rights. A final draft of the Charter was evaluated as "excellent" by the European Commission for Democracy through Law of the CoE (Venice Commission).[9]

The Act for Implementation of the Constitutional Charter (*Sl. list SCG*, No. 1/03) prescribes that the Constitutional Charter is to be applied from the day of its

8 The Charter on Human and Minority Rights was based on a Draft Constitution of Serbia crea ted

9 See "Comments on the draft Charter on Human and Minorty Rights and Civil Liberties" (Opinio n No. 234/2003), by Mr Jan E. Helgesen of 2 April 2003 on http://www.venice.coe.int/docs/2003/CDL(2003)010fin-e.html.

adoption and promulgation in the Federal Assembly, unless the Act itself determines otherwise in respect to specific provisions of the Constitutional Charter (Art. 1). The Constitutional Charter prescribes the obligation to harmonise all laws of the State Union and the member states (Art. 51) and the Act deals with the application of former federal laws, as well as with the deadlines for the harmonization of all legislation with the Constitutional Charter. According to the Act, former federal laws which remain within the legislative jurisdiction of the State Union are to be "applied as legal acts of the State Union of Serbia and Montenegro except in those parts which are in collision with provisions of the Constitutional Charter (Art. 20 (1)). Their harmonization with the Constitutional Charter must be completed within one year from the entry into force of the Constitutional Charter (Art. 20 (3)). Those federal regulations which are no longer in the legislative jurisdiction of the Union are to be applied as general acts of member states (except in those areas which are already regulated by the member states) unless they are in collision with provisions of the Constitutional Charter (Art. 20 (4)). In addition, the member states are due to harmonize their Constitutions, laws and other regulations with the Constitutional Charter and ratified international treaties; the Constitutions within six months from the entry into force of the Constitutional Charter, and until 31 December 2003 for all other legislation.

In spite of the explicit provisions of the Constitutional Charter and the Implementation Act the Constitutions of member states have not been harmonized with the Constitutional Charter within the prescribed time, and most other regulations are not likely to be either. However, the existence of contradictory norms regulating human rights, which can otherwise have grave consequences, can be circumvented by the correct application of the Constitutional Charter and the Implementation Act. The provision that those regulations which are in collision with the Constitutional Charter are not to be applied (Art. 20 (1), Act on Implementation) and in particular the provisions that ratified international treaties on human rights are *directly* applicable (Art. 10, Constitutional Charter; Art. 2 (2), HR Charter) allow us to overcome the adverse effect contradicting legal norms can have on the protection of human rights. Because the human rights from the HR Charter and international treaties are enjoyed directly, the disharmony of some provisions with the HR Charter and international law is not an issue. What remains to be seen is whether the authorities of the State Union and the member states will in practice act in accordance with the Constitutional Charter.

1.3. International Human Rights and SaM

The State Union of Serbia and Montenegro is bound by all international human rights treaties ratified by the former SFRY and the FRY. In its Preamble, the former Federal Constitution spoke of the "unbroken continuity of Yugoslavia,"

and the federal authorities undertook to abide by all the international commitments of the former Yugoslavia.[10] On 8 March 2001, the FRY made a declaration that it considered itself a successor to certain treaties to which the former Yugoslavia was a party, including human rights treaties, and acceded to the Genocide Convention.[11] According to the interpretation of the Human Rights Committee, all the states that emerged from the former Yugoslavia would in any case be bound by the ICCPR since, once the Covenant is ratified, the rights enshrined in it belong to the people living on the territory of the state party irrespective of whether it broke up into more than one state.[12]

According to the Constitutional Charter, ratified international treaties and generally accepted rules of international law have primacy over the law of the State Union and member states (Art. 16). Thus, international treaties and generally accepted rules of international law (i.e. rules of international customary law) have the highest position in the legislative hierarchy. It is clear that in the case of collision between norms of internal and international law the latter should prevail. In addition, the Constitutional Charter (Art. 10) and the HR Charter (Art. 7) both contain provisions about the direct applicability of international treaties on human and minority rights.

It is important to emphasise that although the former Constitution of FRY prescribed that ratified international treaties represented an integral part of the internal legal system and thus were higher in the legal hierarchy than both federal and republican statutes, the courts and state authorities in general paid little heed to internationally guaranteed human rights. Even now there are difficulties in respect to the application of international customary law by the national courts.

The former Yugoslavia ratified all the major international human rights treaties, including the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination, International Convention on the Elimination of Discrimination against Women, Convention on the Rights of the Child, Convention on the Prevention and Punishment of the Crime of Genocide, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see Appendix I). In 2003, the SaM completed and presented first

10 Yugoslav Mission to the United Nations note to the UN Secretary-General, UN doc. A/46/ 915 (1992).

11 Multilateral Treaties Deposited with the Secretary-General of the United Nations http:/ /www.un-treaty.un.org/ENGLISH/bible/englishinternetbiblr//historicalinfo.asp.

12 "The rights enshrined in the Covenant belong to the people living in the territory of the State Party. Once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State Party, *including dismemberment into more than one State* ... (italics added). See para. 4, General Comment No. 26(61) on issues relating to the continuity of obligations under the ICCPR, *Committee on Human Rights*, UN doc. CCPR/C/21/Rev.1/Add. 8, 8 December 1997.

reports after democratic changes to the UN treaty bodies – the report under the ICCPR and International Covenant on Economic, Social and Cultural Rights.[13]

It also made a declaration recognizing the competence of the Committee against Torture to receive and consider individual communications and communications by states parties under Articles 22 and 21, respectively, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. And, on 22 June 2001, the FRY ratified both the Optional Protocol to the International Covenant on Civil and Political Rights – thereby making it possible for its citizens to seek redress from the UN Human Rights Committee – and the Second Optional Protocol to the Convention, the goal of which is the abolition of the death penalty.[14]

On the basis of Article 14 (1), the Federal Government on 7 June 2001 made a declaration whereby it recognised the competence of the Committee on the Elimination of Racial Discrimination to receive and consider individual and collective complaints against violation of the rights guaranteed by the Convention on the Elimination of All Forms of Racial Discrimination.[15] Pursuant to Article 14 (2), the Federal Government designated the Federal Constitutional Court as the court competent to receive and consider submissions by individuals or groups in the jurisdiction of the FRY who allege to be victims of violation of the rights guaranteed by this Convention, after all other legal remedies provided by national law have been exhausted.

1.4. Amnesty and Pardon for Criminal Offences in Connection with the armed conflicts in Former Yugoslavia

The federal Amnesty Act applies to persons who up to 7 December 2000 avoided participating in the wars in the territory of former Yugoslavia (*Sl. list SRJ*, No. 9/01), or, more precisely, men who committed the criminal offences of refusing to bear and use arms (Art. 202, Federal Criminal Code – Federal CC),[16] failed to respond to call up, avoided military service (Art. 214), avoided military service through self-infliction of injury or deceit (Art. 215), went absent without official leave or deserted from the armed forces (Art. 217), avoided recruitment registration and medical examinations (Art. 218), and failed to fulfill material obligations (Art. 219). The Act also grants amnesty to persons who in the period from 27 April 1992 to 7 October 2000 committed or were suspected of having committed criminal

13 UNOHCHR, *Quaterly Report*, 1 Avgust – 31 October, str. 6.

14 *Sl. list SRJ* (*Međunarodni ugovori*), No. 4/01.

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

16 *Sl. list SFRJ*, Nos. 44/76, 36/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 54/90, and *Sl. list SRJ*, Nos. 35/92, 16/93, 37/93, 24/94.

offences such as hindering the struggle against the enemy (Art. 118), armed rebellion (Art. 124), calling for a forcible overthrow of the constitutional order (Art. 133), seditious conspiracy (Art. 136) and defaming the reputation of FRY (Art. 157). Criminal proceedings against these persons were dropped, or they were released if already serving sentence and their convictions were deleted from the records. The Act does not apply to persons accused or convicted of the criminal offence of terrorism (Art. 125).

In July 2002 the Amnesty Act (*Sl. list SRJ*, No. 37/02) was adopted, granting amnesty for Yugoslav citizens who in the period from 1 January 1999 to 31 May 2001 on the territory of Preševo, Bujanovac and Medveđa municipalities have committed, or were suspected of having committed criminal offences of terrorism (Art. 125, Federal CC) and seditious conspiracy (Art. 136). Amnesty extends also to those persons who have committed these offences in conjunction with Article 139 (1) and (3) (which incriminate attack against constitutional order, endangering territorial integrity, aiding the enemy, undermining military and defence power (Art. 139 (1)), as well as the attack against constitutional order, accepting capitulation and occupation, endangering territorial integrity, endangering the independence, exerting violence against the highest state bodies, armed rebellion, diversion, sabotage and espionage, endangering and transferring armed groups, weapons and ammunition to the FRY territory during the state of was or immediate threat of war (Art. 139 (3)).

Serbia adopted its own Amnesty Act (*Sl. glasnik RS*, No. 10/01) commuting the sentences of those convicted under the Serbian Criminal Code (Serbian CC). The Act does not apply to those found guilty of rape or unnatural sexual intercourse with a mentally or physically disabled person (Art. 105, Serbian CC)[17] or a person under the age of 14 (Art. 106), or to persons who already have three criminal convictions.

2. Right to Effective Remedy for Human Rights Violations

Article 2 (3), ICCPR:

> Each State Party to the present Covenant undertakes:
>
> a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

17 *Sl. glasnik SRS*, Nos. 26/77, 28/77, 43/87, 6/89, 42/89; *Sl. glasnik RS*, Nos. 16/90, 21/90, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98.

b) To ensure that any persons claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 13 ECHR:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

2.1. Ordinary Legal Remedies

The HR Charter guarantees the right to judicial protection (Art. 9):

Everyone shall have the right to effective judicial protection in the case of violation or denial of any human or minority right guaranteed under this Charter, as well as the right to the elimination of the consequences of such violation.

Anyone who believes that any his/her right guaranteed by this Charter has been violated or denied by an individual deed or action of a State Union institution, or a Member State agency or organisation exercising public powers, shall have the right to lodge a complaint with the Court of Serbia and Montenegro, unless other legal protection is provided in the Member State concerned, in accordance with the Constitutional Charter.

Decisions of international bodies shall be executed and cost thereof shall be borne by the State Union or the Member State concerned, depending on whether a State Union institution, Member State or an organisation exercising public powers has violated or denied any right guaranteed under an international treaty valid in the territory of Serbia and Montenegro.

While Article 18 guarantees the right to legal remedy:

Everyone shall have the right to appeal or some other legal remedy against any decision on his/her rights, duties or legally founded interests.

The relevant provisions of the Serbian Constitution are similar (Art. 12 (4)). In its Article 17, the Montenegrin Constitution guarantees protection of these rights in a "procedure established by law," indicating that judicial protection is not necessarily ensured in all circumstances. However, provided that some other requ-

irements are met, judicial protection is ultimately obtained in this republic through the possibility of constitutional appeal.

In cases of human rights violations, protection can be sought in both civil and criminal proceedings. The choice between these two possibilities depends on the particular right and the manner in which it was violated, as well as the compensation sought. Specific remedies are discussed in the sections dealing with the different rights.

Though criminal proceedings may in some cases be initiated by private citizens, most require action by the public prosecutor. Only if the prosecutor finds no grounds for prosecution and dismisses the case can the injured party assume the capacity of private prosecutor and proceed with his case (Art. 61, Criminal Procedure Code – CPC). In order to preclude action by the victims, public prosecutors in the past frequently failed to institute criminal proceedings for human rights violations committed by government agencies and persons acting in an official capacity. This was particularly evident during the regime of Slobodan Milošević when prosecutors did not take action on such serious abuses as, for instance, torture or degrading treatment by police. Public prosecutors also often failed to notify victims of the dismissal of their complaints within the legally required time-period of eight days (Art. 61 (1), CPC). The victims thereby lost any possibility of pursuing their cases since, under the law, they must act within three months of the day the prosecutor dismisses their complaint or decides to discontinue prosecution (Art. 61 (4), CPC).

2.2. Court of Serbia and Montenegro

The Constitutional Charter of SaM abolished the Federal Constitutional Court was, which *inter alia* protected human rights although the institute of constitutional appeal (such protection still exists in the Montenegrin Constitution). Since the Constitutional Charter has transferred many competences of the former federal state to the current member states, the newly established Court of Serbia and Montenegro has a far more limited jurisdiction and operational space than the former Federal Constitutional Court. The operation and jurisdiction of the Court of Serbia and Montenegro are governed by the Constitutional Charter (Arts. 46–50), HR Charter (Art. 9) and the Act on the Court of Serbia and Montenegro (*Sl. list SCG*, No. 26/03).

With regard to human rights protection the Court of Serbia and Montenegro, according to the Constitutional Charter and the Act on the Court of Serbia and Montenegro, hears complaints of citizens when their rights or freedoms guaranteed by the Constitutional Charter have been violated by an institution of Serbia and Montenegro or of its Member State if no other judicial protection is provided, which resembles the former institute of constitutional appeal, especially because the same restrictive formulation is used: “unless other legal protection is provided”. Conse-

quently, this protection mechanism can be used only when there is no other legal (judicial or other) protection or remedy, regardless of its effectiveness. The same formulation is contained in Article 9 of the HR Charter and Article 62 of the Act on the Court of Serbia and Montenegro. The effectiveness of citizens' complaint as a legal remedy will probably remain rather limited in practice.

Until the completion of this Report, judges of the Court of Serbia and Montenegro have not been elected and therefore it has not yet become operational.

2.3. Constitutional Appeal

The Constitutional appeal is a specific legal remedy, which existed in the former FRY Constitution and still exists in the Montenegrin Constitution. The Constitutional appeal is lodged with the Montenegrin Constitutional Court (Art. 113 (1.4), Montenegrin Constitution). For human rights violations committed by general acts (laws, ordinances, etc.) constitutional appeal is not allowed, even if the existence of these acts constitutes a violation of constitutionally guaranteed rights. The only possibility to challenge these is to lodge a motion to review the constitutionality and legality of such acts, which the Constitutional Court is not bound to consider.

Under the Montenegrin Constitution, a constitutional appeal may be lodged only "when no other judicial protection is available" (Art. 113 (1)). The Court's interpretation of the provision has been the same as the Federal Constitutional Court's – that constitutional appeal is possible only when no judicial protection exists, not when all other legal remedies have been exhausted (see, e.g., Montenegrin Constitutional Court Decision U. No. 62/94 of 15 September 1994).

Neither the Federal nor the Montenegrin Constitutional Court has ever considered whether a form of legal protection is effective or not. All they held to be necessary was the existence of some kind statutory protection, if only on paper. Thus, in one case relating to approval of a real estate contract, the Federal Constitutional Court dismissed a constitutional appeal against the inaction of state agencies in the first instance and upon the subsequent complaint. The Court found that legal remedy was available and that an appeal had in fact been filed with a higher body. What it disregarded was that the appeal was actuated precisely by the inaction of that higher body (see Decision Už. No. 21/95, *Decisions of the Federal Constitutional Court*, 1995, p. 265).

2.4. Ombudsman[18]

Towards the very end of 2002 and during 2003, there were two *ombudsman* appointed in the State Union of Serbia and Montenegro, as well as an *ombudsman*

18 European Court of Human Rights has taken the position that the *ombudsman* himself does not represent an effective legal remedy in terms of Article 13 of the Convention, because the

on the level of local self-government.[19] The Parliament of the Autonomous province of Vojvodina (AP Vojvodina) adopted its Decision on the Provincial *Ombudsman* at its session on 23 December 2002 (*Sl. list AP Vojvodina*, No. 23/02),[20] while the Parliament of Montenegro passed the Act on the Protection of Human rights and Freedoms on 8 July 2003 (*Sl. list RCG,* No. 41/03). The Vojvodina Decision is the more comprehensive: it fully ensures the independence, efficiency and effectiveness of this institution. In Serbia this institution has still not been introduced, although during 2002, the Serbian Ministry of Justice submitted to the Serbian Parliament a Draft *Ombudsman* Act (Act on People's Attorney).[21]

2.4.1. The Montenegrin Act on the Protector of Human Rights and Freedoms

The Montenegrin Act on Protector of Human Rights and Freedoms defines the protector as an "autonomous and independent body" (Art. 2) that "protects human rights and freedoms guaranteed by Constitution, law, ratified international human rights treaties and generally accepted provisions of international law, when such rights have been violated by an act or omission of state bodies, local self-government bodies and public services and other holders of public powers" (Art. 1). Unlike in Vojvodina, the Montenegrin *ombudsman*, or the "guardian of human rights and freedoms", has special powers regarding judicial procedure, which is rare in comparative law. The guardian can react to complaints regarding ongoing judicial proceedings only if they are unnecessary prolonged, if there is obvious misuse of procedural powers or failure to execute court decisions (Art. 24). This solution cannot be considered a violation of the separation of power, since it affects procedural or administrative matters.

The guardian can receive complaints from any person who considers that his/her rights and freedoms have been violated by an act or omission of official bodies (Art. 31), within one year of the date of the alleged violation or knowledge of violation (Art. 36 (1)) and can also act on own initiative with the mandatory consent of the injured party (Art. 34). The guardian can exceptionally take action beyond the one year deadline should he consider the case significant (Art. 36 (2)). A good solution is that persons deprived of liberty can submit their complaints in a sealed envelope (Art. 28 (3)), and such communication is "immediately forwarded

ombudsman does not have the power to change or annul acts violating human rights. However, this institution can significantly contribute to the effectiveness of another legal remedy (see *Leander v. Sweden*, ECtHR, App. No. 09248/81 (1987)).

19 Art. 126 of the Act on Local Self-Government (*Sl. glasnik RS,* No. 8/02).

20 Petar Teofilović was appointed Vojvodina *ombudsman* (*Sl. list AP Vojvodina*, No. 15/03).

21 One of the remarks made by the experts regarding the Draft act is related to the adopted ter minology for this institution. The term "people's attorney" obscures the essence of the *ombudsman* function and links it to the function of attorney or defence counsel, although these two institu tions have nothing in common. Hereinafter: the term *ombudsman* will be used.

to the guardian unopened and unread, and every response of the guardian is treated in the same manner" (para. 4). Unlike the Serbian Draft and the Vojvodina Decision, this request does not require that all legal remedies be exhausted prior to addressing the guardian, but leaves the guardian the discretionary right to request from the complainant to do so, should he consider such remedy more effective (Art. 35).

Upon receipt of a the complaint the guardian informs its author and the head of the body or agency against whose act or omission are referred to and determines the deadline, not less than 8 days, within which the head of the body is bound to respond to allegations in the complaint (Art. 39). All bodies are duty bound to provide adequate assistance to the guardian (Art. 41) and to respond to his request for access to data and records, as well as their copies, regardless of the level of confidentiality, and allow free access to all premises (Art. 40). Persons summoned by the guardian for questioning, as experts or witnesses, must respond to summons (Art. 43). The guardian then renders a final opinion and the body against which the complaint had been lodged is bound to submit a report to the guardian on action undertaken to comply with the recommendation, within the deadline set by the guardian. If the body should not comply with the recommendation, the guardian can inform the public, the immediately superior body or publish a written report about the case (Art. 44).

The guardian can submit initiatives for "changes and amendments of particular norms, especially with the view of their harmonisation with internationally accepted standards in the area of human rights and freedoms", issue opinions on draft laws and other general acts (Art. 25), as well as "give suggestions on initiating proceedings before the Montenegrin Constitutional Court for reviewing the constitutionality and legality of regulations and general acts pertaining to human rights" (Art. 26).

The guardian shall have at least one deputy (Art. 9 (1)), whereas the decision on the number of deputies is passed by the Parliament, on the proposal of the guardian (Art. 9 (2)). According to the Act, at least one deputy should deal with "protection of minority rights" (Art. 9 (4)).

2.4.2. Situation in Serbia

By the Act Establishing Particular Jurisdiction of the Autonomous Province of Vojvodina (Art. 56, *Sl. glasnik RS*, No. 6/02), the latter was given the right to independently establish and regulate the position and organisation of the provincial *ombudsman*; the Parliament of AP Vojvodina then adopted its Decision on the Provincial *Ombudsman* in December 2002.

Pursuant to Article 1 of the Decision, the provincial *ombudsman* is an independent and autonomous body that promotes and safeguards human rights and freedoms of every person and protects their rights and freedoms from violations by provincial and local bodies, as well as institutions, bodies and organisations with

administrative and public powers established by the province or municipality (e.g. schools, hospitals, etc.).[22] The provincial *ombudsman* controls the legality of work of the said bodies, as well as the suitability and effectiveness of their actions (Art 1 (3)).

The provincial *ombudsman* can receive complaints by "any one who considers that his/her human rights have been violated by an act or omission of an administrative body" (Art. 19 (1)), as well as by "his/her heir, guardian or plenipotentiary" (Art. 20 (2)). The communication must be submitted within 12 months of the date of violation or of the last decision in the disputed matter (Art. 21 (1)). Unlike the Montenegrin act which does not indicate the deadline within which the guardian is bound to act, the Decision orders the provincial *ombudsman* to act within 30 days from the date of submission (Art. 21 (2)).

In contrast to other laws, this *ombudsman* shall initiate an investigation in response to a complaint if all regular legal remedies for redressing the violation have been exhausted or if no regular legal remedy or other legal means is available, with the possibility to also initiate a procedure in cases when not all legal remedies have been exhausted (Art. 24). Explicit mention of the possibility of "non-existence of legal remedy" is quite significant, because many cases of poor administration (rudeness of management, abuse, untimely and delayed action, loss of files, etc.) or "silence of administration" are not covered by written administrative rules and therefore no legal remedies are available.

If the *ombudsman* does not dismiss the petition, he/she informs the complainant and the body to which the petition refers about the initiation of procedure, and the body is bound to respond within 15 days to the allegations in the petition (Art. 26). The provincial *ombudsman* has the right to question employees of administrative bodies, witnesses, experts, the complainant, to have insight into various documents, enter the premises of the body, etc. (Arts. 27 and 28). Should the provincial *ombudsman* consider that a human right has been violated or that there is an irregularity in work of administrative organ, he shall inform the complainant and the organ, who are bound to respond within 15 days (Art. 32). If within the given deadline the body has not undertaken measures to remedy the injury, the *ombudsman* drafts a final opinion, suggestion or recommendation and informs thereof the complainant and the administrative body, as well as the immediately superior body (Art. 33 (1)), who have the obligation to inform the *ombudsman* within 15 days about action undertaken (para. 2). If neither the body in question nor the immediate superior body should comply with the recommendation, suggestion or opinion of the provincial *ombudsman*, he then informs the supervisory body or the Executive Council, Parliament and the public (Art. 34). Beside opting for an exhaustive

22 Given that the founding rights of almost all educational, social and health institutions in AP Vojvodina have been returned to local administrations and the autonomous province, jurisdiction is rather significant.

enumeration of powers and authorities of the *ombudsman* and his deputies (Arts. 13–18), the legislator, in contrast to the Montenegrin or Serbian act, specifically defines the measures and recommendations the *ombudsman* could undertake or address to responsible bodies should he determine that there has been a violation of human rights. The *ombudsman* can suggest to administrative bodies to re-conduct the procedure in accordance with the law; adopt codes of conduct for improvement of work and treatment of citizens; submit a request for temporary suspension of execution of a final act; initiate disciplinary proceedings against an official for whom the investigation has established the responsibility for human rights violation or against a person obstructing investigation; initiate at the public prosecutor office the opening of misdemeanour or criminal proceedings (Art. 35).

In order to improve and harmonise legislation with international standards of human rights, the *ombudsman* has the right to initiate proceedings before the Constitutional Court and suggest to the Parliament and the Executive Council adoption of new and amendments to existing regulations and other acts within their jurisdiction, to be present at all sessions of the Parliament and parliamentary committees and to participate in the parliamentary debates when they concern issues from his/her jurisdiction, as well as to give opinions and recommendations about draft proposals for regulations pertaining to human rights (Art. 14).

The Decision prescribes that the provincial *ombudsman* shall have five deputies (Art. 6 (1)), but in contrast to the Serbian Draft Act, it is explicitly provided that each deputy be elected for specific areas of minority rights, rights of child and gender equality and further insists on positive discrimination by stating that at least one deputy shall be elected from the ranks of under-represented gender or national minorities (Art. 6 (2)).

Serbian Draft defines the *ombudsman* as an independent and autonomous body that promotes and safeguards human rights and freedoms guaranteed by the constitution and law in cases when they have been violated by a state administration, public services established by Serbia or other organisations exercising public authorities (Art. 1). Anyone who claims to be a victim of human rights violation file a complaint to the *ombudsman* (Art. 2).

Article 11 of the Draft act envisages that the *ombudsman* institutes a proceeding on his own initiative or on the basis of complaint filed to him. The procedure is instituted once all available legal remedies have been exhausted (Art. 13 (1)). The said article does not specify the legal remedies, which is of essential importance. With regard to this, it is unclear whether this provision would include, for instance, the constitutional appeal that has proven to be ineffective mechanism for the protection of human rights. The obligation to exhaust legal remedies that have proven ineffective or inefficient could reduce some of the essential advantages of the *ombudsman* compared to other forms of legal control, especially compared to the effectiveness and flexibility of the *ombudsman*. The *ombudsman* can initiate a

procedure even before all other legal remedies have been exhausted, if he deems that the applicant might suffer significant and irreparable damage (Art. 13 (2)). The said solution is in accordance with international standards in human rights protection, since *post festum* reaction of the *ombudsman* could make his role futile.

The *ombudsman* is elected by the Parliament by two-thirds majority, upon nomination by the Judiciary and Administration Committee of the Parliament (Art. 23 (1)). It shall have a maximum of five deputies; however, their area of responsibility is not specified (e.g. minority issues, prison issues, police, etc.) (Art. 25 (1)).

Each of the above-mentioned ombudsmen shall have the obligation to submit annual reports to the responsible parliament, situation of human rights in the territory of his/her jurisdiction[23] and recommendations (Art. 37 of the Decision on provincial *ombudsman*, Art. 46 of the Montenegrin Act on Guardian of human rights and freedoms, Art. 22 of the Draft Act on People's Attorney). This could certainly have an effect on the improvement of the overall state in administrative bodies.

3. Restrictions and Derogation

Article 4, ICCPR:

> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
>
> 2. No derogation from Articles 6, 7, 8 (paras. 1 and 2), 11, 15, 16 and 18 may be made under this provision.
>
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A future communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 15, ECHR:

23 Depending on the chosen solution, these reports are considered by the relevant parliament or government and they must be accessible to the public (e.g. reports of the Vojvodina *ombudsman* are published in *Sl. list AP Vojvodina* and in the media (Art. 37 (6)).

> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3,4 (para. 1) and 7 shall be made under this provision.
>
> 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

3.1. Restrictions of human rights

The HR Charter prescribes that guaranteed human and minority rights can only be restricted on the ground foreseen by the said Charter, the Constitutional Charter, constitutions of member states and the generally applied law containing reference to the provision by which restriction is permitted. Moreover, guaranteed human and minority rights can be restricted only to the extent necessary in an open and free democratic society to fulfil the purpose for which such restriction is permitted. Restrictions cannot be imposed for purposes other than those they were prescribed for. When imposing restrictions on human and minority rights and interpreting these restrictions, all state agencies, courts in particular, are bound to take into account the essence of the right subject to restriction, importance of the purpose of restriction, nature and scope of restriction, relationship between the restriction and its purpose, as well as to take into account whether there is a way to fulfil this purpose by a lesser restriction of right, while the restrictions should never affect the essence of the guaranteed right (Art. 5).

According to the constitutions of both Serbia and Montenegro, the general grounds for imposing restrictions on human rights are to ensure the human rights of others (Art. 11, Serbian Constitution; Art. 16 (2), Montenegrin Constitution) and the prohibition of the abuse of these rights (Art. 13 (3), Serbian Constitution; Art. 16 (3), Montenegrin Constitution). None of the constitutions elaborate these two bases.

Constitutions of both member states, as well as the former federal constitution, contain a similar general provision governing the "exercise" of human rights (Art. 67 (2), Federal Constitution; Art. 12 (1 and 2), Serbian Constitution; Art. 12 (1.1), Montenegrin Constitution). Pursuant to Article 12 of the Serbian Constitution

the manner of exercising certain freedoms and human rights may be prescribed by law in two cases: 1) when so envisaged by the Constitution and 2) when necessary to ensure the exercise of those rights.

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

In the second case, the manner in which human rights are exercised may be prescribed by law *when necessary to ensure the exercise of those rights*. This provision refers to human rights that cannot be exercised directly, and makes it possible for the legislature to prescribe by law how they will be implemented. This creates a potential for abuse and for imposition of legal restrictions on these rights. There has to date been no closer interpretation by either the legislature or the courts as to which rights can be directly exercised and which cannot. Such a wide possibility to restrict human rights given to the legislator by the Serbian Constitution can be in contravention to Article 2 (2) of the HR Charter, which provides that human and minority rights guaranteed by the Charter shall be exercised directly, as well as in contravention to standards for restrictions quoted in Article 5 of the HR Charter.

Optional restrictions also are provided for and defined in the HR Charter and constitutions. The Serbian Constitution states explicitly that human rights may be restricted "when so determined by the Constitution" (Art. 11, Serbian Constitution), whereas the Charter regulates this issue by the Article 5 (1) (see above). Though the Montenegrin Constitution is not so explicit in envisaging the possibility of restrictions, it is similar to the HR Charter in terms of prescribing them in provisions treating particular rights. For instance, the HR Charter contains a provision according to which the freedom of peaceful assembly can be restricted by laws of member states "if so necessary for reasons of public security, public health and morality, national security or protection of the rights of others " (Art. 31 (4), HR Charter), as well as that freedom of movement may be restricted by federal statute "if so required by criminal proceedings, protection of public order and peace, to prevent the spread of contagious diseases, or for the defence of the state" (Art. 37 (2), HR Charter).

Until the adoption of the HR Charter, the legal system of Serbia and Montenegro has not known the principle of proportionality where restrictions on human rights are concerned, nor has this principle been applied by the courts because lawyers in Serbia and Montenegro are not accustomed to seeking a balance between the public interest that justifies a restriction and the interest underlying the right in

question. Article 5 of the HR Charter clearly defines the principle of proportionality, as well as the standards to which courts in particular must adhere to when interpreting restrictions of human rights. The principle of proportionality has been strictly laid out in the HR Charter, since it not only requires proportionality between the purpose of restriction and the human rights subjected to restriction, but also expects the necessity of restriction, i.e. that the purpose of restriction can only be fulfilled by the given measure. Standards for evaluating proportionality prescribed by the HR Charter are entirely in keeping with the jurisprudence of the European Court of Human Rights (see *Handyside v. United Kingdom*, ECtHR, 1 EHRR 737 (1976); *Informationsverein Lentia v. Austria*, ECtHR, 17 EHRR 93 (1993); *Lehideux and Isorni v. France*, ECtHR, App. No. 24662/94 (1998)).

The HR Charter also strictly prohibits restrictions of human and minority rights guaranteed by the generally accepted rules of international law, international treaties valid in the state union as well as laws and other regulations in force, on the ground that they are not guaranteed under the HR Charter or are guaranteed to a lesser extent (Art. 8, HR Charter).

3.2. Derogation in a "Time of Public Emergency"

3.2.1. General

The HR Charter envisages that upon official declaration of a state of war or state of emergency, where a threat to the survival of the State Union or a Member State exists, measures for derogation of human and minority rights guaranteed under the Charter may be taken, though only to the extent necessary in the given situation (Art. 6, HR Charter). Therefore, the HR Charter envisages three preconditions for derogation of human rights – official proclamation of the state of war or emergency (formal condition), threat to survival of the state union of member state and the necessity of derogation measures in the given situation (material conditions). Derogation measures have a strictly temporary character and must be discontinued when at least one of these conditions have ceased to exist.

The Serbian Constitution provides for derogation from certain guaranteed human rights during a state of war. Instead of derogation, it somewhat awkwardly uses the term "restriction," which could result in confusion. Derogation measures are a particular instrument used by the state in situations of emergency, when its survival is threatened; these measures differ from the measures used by the state to restrict human rights in cases of other interests in regular situations, when the existence of the state is not compromised. The Montenegrin Constitution does not provide for any derogation from the human rights its guarantees even in emergencies.

There is an evident discrepancy between the Constitutional Charter, together with the HR Charter and the Serbian Constitution with regard to derogation since

the Constitutional Charter (Art. 19) leaves the proclamation of the state of war in the exclusive jurisdiction of the Parliament of Serbia and Montenegro. In addition, since the HR Charter enumerates all the human rights, derogation from them pursuant to the Serbian Constitution would be meaningless, as they would in any case be guaranteed by the Charter. It should be borne in mind, however, that the Serbian Constitution was written as the organic act of an independent state and, as a result, major problems are encountered in applying the HR Charter. The possibility therefore exists of the Serbian Constitution being used as grounds for derogation from human rights during a state of war.

3.2.2. Derogation During a State of War[24]

Under the Constitutional Charter, a state of war, a state of imminent threat of war, and a state of emergency is proclaimed by the Parliament of Serbia and Montenegro, with preliminary approval of parliaments of member states (Art. 19 (1), Constitutional Charter). Article 6 of the HR Charter provides that if the Parliament of Serbia and Montenegro is unable to convene the decision on derogation of human rights shall be taken by the Council of Ministers, with approval of competent bodies of member states. Derogation measures can last up to 90 days and beyond this time limit can be extended for additional periods of 90 days. The Council of Ministers has the obligation to submit its acts setting measures for derogation of human and minority rights to the Parliament of Serbia and Montenegro for approval as soon as it is able to convene. Otherwise, measures for derogation of human and minority rights shall cease to be valid at the end of the first session of the Parliament of Serbia and Montenegro held after declaration of the state of war. The measures for derogation of human and minority rights shall cease to be valid upon the termination of the state of war or state of emergency. The wording in the Federal Constitution (Art. 99 (11)) had also prescribed the obligation of submitting acts by which derogations of human rights have been set, but this obligation did not entail appropriate legal sanction, i.e. the cessation of validity of derogation measures in case the derogation acts were submitted to the Parliament for approval. The solution in the Charter is a reaction to the misuse of non-existence of this sanction in Federal Constitution after the NATO air strikes in 1999.

The Serbian Constitution contains similar provisions but also empowers the President of Serbia to declare a state of war if the republic's Parliament is unable to convene and after seeking the opinion of the Prime Minister (Art. 83 (1.6), Serbian Constitution). In this respect the Serbian Constitution is in contravention to the Constitutional Charter, since the proclamation of the state of war is under the exclusive jurisdiction of the state union. During a state of war, the President of Serbia, at his own initiative or at the proposal of the government, may issue acts

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

placing restrictions on certain human rights, and submit them to Parliament for approval as soon as it is able to convene (*id*., para. 7).

These provisions in the Constitutional Charter and the Serbian constitution requiring approval of Parliament of Serbia and Montenegro and the member states' parliaments for derogation are in accordance with the OSCE standards in this field (*Document of the Moscow Meeting of CSCE on the Human Dimension*, 1991, para. 28.2).[25]

Derogation from certain human rights during a state of war as envisaged by the Constitutional Charter and Serbian Constitution are in accordance with Article 4 of the ICCPR and Article 15 ECHR, which allow such measures "[in] time of public emergency that threatens the life of the nation...". The provisions of the Serbian Constitution are in fact more restrictive as they confine the possibility only to a state of war, whereas the ICCPR and ECHR allow derogation in other public emergencies as well. The HR Charter also allows derogation in case of declared state of emergency. The Serbian Constitution and the HR Charter imply that the state of war must be officially declared, which is in accordance with the ICCPR and ECHR.

Neither the former Federal Constitution nor the Serbian Constitution had envisaged, however, that the measures taken in a state of war must be in proportion to the threat to the state, namely that they be "to the extent strictly required by the exigencies of the situation" (Art. 4, ICCPR; *Document of the Moscow Meeting of CSCE on the Human Dimension*, 1991, para. 28.7). Since until the adoption of the HR Charter the SaM legal system has not accepted the principle of proportionality, the possibility existed of the federal or republican authorities could take advantage of a state of war to suspend certain human rights irrespective if this is justified by the threat to the state. Article 6 of the HR Charter explicitly prescribes the necessity of derogation measures for survival of the state as the condition for their validity.

The Serbian Constitution does not stipulate the rights from which there can be no derogation during a state of war and gives the President of the Republic discretionary powers in this regard (Art. 83 (7)), which could result in violation of Art. 4 (1 and 2) of the ICCPR. Hence, under this Constitution, all rights may be derogated from during a state of war.

According to the HR Charter, derogation measures are under no circumstances allowed with regard to rights guaranteed by Article 1 (human dignity and unrestricted development), 11 (right to life), 12 (inviolability of physical and mental integrity), 13 (prohibition of slavery) 14 (right to personal freedom and security), 17 (right to a fair trial), 19 (presumption of innocence), 20 (*nullum crimen sine*

25 See also: *The Paris Minimum Standards of Human Rights Norms in a State of Emergency* , Section A, para. 2, 1984; ILA, Report of the First Conference Held at Paris, London, 1985; 79 *AJIL*, 1072 (1991).

lege), 21 (*ne bis in idem*), 25 (right to enter into marriage), 26 (freedom of thought, conscience and religion), 35 (right to citizenship), 50 (prohibition of forcible assimilation of minorities) and 51 (prohibition of incitement to racial, national and religious hatred) of the HR Charter.

3.2.3. State of Emergency[26]

Although the HR Charter allows for such possibility, the Serbian Constitution does not provide for derogation of human rights in any circumstances other than the state of war. Under the Serbian State of Emergency Act (*Sl. glasnik RS*, No. 19/91), however, the President of the Republic, who may declare a state of emergency at the proposal of the government, is empowered to issue orders and other acts to deal with the situation. These include compulsory work orders, and restrictions on freedom of movement and residence, on the right to strike, and on the freedom of assembly, political, trade union and other activities (Art. 6 (1)), State of Emergency Act).

As noted above, the Constitution authorises the President of Serbia during a state of war to issue acts placing restrictions on rights and freedoms (Art. 83 (1.7)). On the other hand, during a state of emergency the President may "take the measures required by the circumstances ... in accordance with the Constitution and law." There is no mention of restrictions on human rights. If derogation at a time of the gravest threat to the country – a state of war – explicitly requires constitutional authority, the lack of such a requirement at a time of lesser danger – a state of emergency – cannot be interpreted as approval to impose restrictions on human rights. In that sense, Article 6 (1) of the State of Emergency Act is unconstitutional. The Act is also inconsistent with the Serbian Constitution.

Under the Serbian State of Emergency Act, derogation of rights is not subject to ratification by the Parliament, and this constitutes a departure from the OSCE standards (*Document of the Moscow Meeting of CSCE on the Human Dimension*, 1991, para. 28.2).

In contrast to the restrictions that may be imposed on human rights during a state of war, the Serbian Constitution foresees in a state of emergency only "measures such as are required by the circumstances" (Art. 83 (8), Serbian Constitution). Furthermore, the State of Emergency Act introduces some proportionality by stating that the objective of these measures is "to ensure the elimination of the state of emergency as soon as possible and *with the least detrimental consequences"* (italics added; Art. 5 (2) of the Act). The list of rights on which restrictions may be placed in a state of emergency is in accordance with Article 4 (2) of the ICCPR and Article 15 ECHR.

26 See IV.1. for state of emergency in Serbia in 2003.

4. Individual Rights

4.1. Prohibition of Discrimination

Article 2 (1), ICCPR:

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

Article 26, ICCPR:

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

Article 14, ECHR:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 1, Protocol No. 12 to the ECHR:

> (1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> (2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

4.1.1. General

Where the prohibition of discrimination is concerned, SaM is bound, besides the ICCPR, by the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination Against Women, ILO Convention No. 11 on Employment and Choice of Occupation, and the UNESCO Convention Against Discrimination in Education.

The HR Charter (Art. 3), Serbian (Art. 13) and Montenegrin (Art. 15) Constitutions all prohibit discrimination. The HR Charter provides that:

All are equal before the law.

Everyone is entitled to the equal protection of the law, without any discrimination.

All direct or indirect discrimination is prohibited, on any ground, including race, colour, sex, ethnicity, social origin, birth or similar status, religion, political or other opinion, property, culture, language, age or mental or physical disability.

Temporary enactment of special measures necessary for the realization of equality, special protection or progress of persons or groups of persons which are in unequal position is allowed, in order to facilitate the full enjoyment of human and minority rights under equal conditions.

The special measures in part (4) of this Article can be applied only until their purpose is attained.

The HR Charter significantly improved the regulation of the prohibition of discrimination in SaM. Although the Federal Constitution guaranteed that all are equal before the law (*devant la loi*) in the same way as Article 26 of the ICCPR, it, as well as the Constitutions of the member states, guaranteed the right to the equal protection of the law (*une égale protection de la loi*) only to citizens. This normative flaw was corrected by Article 3 of the HR Charter, so that the right to equality in SaM, in accordance with international standards, contains two kinds of obligations: the prohibition of discrimination by law or other normative act and the obligation to guarantee by law an effective remedy against any discrimination.

The definition of discrimination in Article 3 of HR Charter is similar to the definitions in international instruments. According to the HR Charter, "all direct or indirect discrimination is prohibited, on any ground" which means that the HR Charter, just like the ICCPR and ECHR, makes it possible to prohibit discrimination on grounds which are not specifically listed.

The scope of protection of the provision on discrimination in Article 3 of the Charter will be determined by future jurisprudence. The European Court of Human Rights established certain standards through its case law. According to the Court, a difference in treatment is discriminatory if it lacks objective and reasonable justification, that is to say, if it does not pursue a legitimate aim or if there is no reasonable proportionality between the means used and the aim pursued (see *Belgian Linguistic Case*, ECtHR, 1 EHRR 252 (1968); *Rassmusen v. Denmark,* ECtHR, 7 EHRR 371, (1984); *Van der Mussele v. Belgium*, ECtHR, 6 EHRR 163 (1983)). The Court also established certain specific, "suspect" grounds of discrimination, such as sex, religion and race, which require the fulfillment of a particularly heavy burden of proof in order to justify differential treatment (see *Hoffmann v. Austria*, ECtHR, 17 EHRR 293, (1993) and *Abdulaziz, Cabales and Balkandali v. United Kingdom*, ECtHR, 7 EHRR 471, (1985)). In its more recent jurisprudence, the Court also established a

positive obligation of States to treat differently persons whose situations are significantly different (see *Thlimmenos v. Greece*, ECtHR, App. No.34369/97 (2000)). Article 3 (4) of the HR Charter introduces the possibility of enacting measures of affirmative action ("positive discrimination"), i.e. special measures intended to reduce factual inequalities. These measures, as prescribed by international standards, must have a strictly temporary character, according to Article 3 (5) of the HR Charter.

The Montenegrin Constitution features an original solution (Art. 15) with regard to the prohibition of discrimination as, in contrast to other national and international acts, it does not enumerate different kinds of discrimination:

> Citizens shall be free and equal, irrespective of any distinctions or personal characteristics.
>
> All shall be equal before the law.

The fact that the Montenegrin Constitution prohibits discrimination based on "any distinctions or personal characteristics" rather than citing the usual grounds, creates the possibility of a broader interpretation which, along with the traditional forms, could include new forms of discrimination. The Montenegrin Constitutional Court has not thus far had an opportunity to interpret this provision. But it should be borne in mind that, the Montenegrin guarantees protection against discrimination only to citizens.

Article 13 of the Serbian Constitution states:

> Citizens shall have equal rights and responsibilities and shall enjoy equal protection before state and other bodies, irrespective of race, sex, birth, language, nationality, religion, political or other beliefs, education, social origin, property or other personal characteristics.

A major defect of this Constitution is that it fails to guarantee equality before the law to all. It also speaks only of "citizens" and, finally, prohibits only discrimination by government and other bodies. This may be taken as meaning that Serbia has no constitutional obligation to prevent discrimination by other actors, which could be of major significance with respect to discrimination in the field of employment (see ILO Convention No. 11).

Nonetheless, criminal legislation of SaM defines all forms of discrimination as punishable criminal offences, including discrimination in the use of language and script (Art. 60 and 61, Serbian CC; Art. 43, Montenegrin CC; Art. 154, of the Basic Criminal Code (Basic CC)). Thus, under Art. 60 of the Serbian CC:

> Whoever denies or restricts on the grounds of nationality, race, religion, political or other belief, ethnicity, sex, language, education or social status, the rights of citizens under the Constitution, law, other regulations or ordinances or ratified international treaties, or extends favours or privileges to citizens on these

grounds, shall be punished with a term of imprisonment of three months to five years.

This definition of discrimination as a criminal offence fulfills the obligation undertaken by all states parties under Article 2 (1.b.) of the Convention on the Elimination of All Forms of Racial Discrimination to prohibit racial discrimination practised by persons or organisations. Furthermore, and in accordance with Art. 4 of the Convention, the Federal Criminal Code/Basic Criminal Code (Federal CC / Basic CC)[27] prohibits incitement to racial hatred and intolerance (Art. 24; see I.4.9.6).

On the basis of Article 14 (1), in 2001 the FRY Government made a declaration whereby it recognised the competence of the Committee on the Elimination of Racial Discrimination to receive and consider individual and collective communications relating to violations of the rights guaranteed by the Convention on the Elimination of All Forms of Racial Discrimination.[28] Furthermore, the Federal Government designated the Federal Constitutional Court as the court competent to receive and consider submissions by individuals or groups in the jurisdiction of Yugoslavia who allege to be victims of violation of the rights guaranteed by this Convention, after all other legal remedies provided by national law have been exhausted (Art. 14 (2)). The Court of Serbia and Montenegro, which has not been established at the time of the completion of this Report, is expected to continue performing this function.

4.1.2. Examples of Discrimination in SaM Legislation

4.1.2.1. Some criminal offences against dignity and morals – The Act on Amendments to the Criminal Code of the Republic of Serbia of 26 February 2002 and the Act on Amendments to the Criminal Code of the Republic of Montenegro of 19 June 2002, rape of women in marriage is incriminated for the first time (Art. 103 of CC of Serbia; Art. 86 of CC of Montenegro). Thus the discriminatory provision according to which the crime of rape exists only when the passive subject is a woman who is not married to the perpetrator, was deleted. The same amendment also applies to the crimes of forced sexual intercourse and intercourse with an infirm person (Art. 104 (1), Art. 105 (1) Serbian CC; Art. 87 (1), Art. 88 (1) Montenegrin

27 The State Union no longer has competence to pass criminal legislation, which has been transferred to the member states, so that the Federal CC should still be in force as an act of member states, until their parliaments decide otherwise (Art. 20 (5), Act on the Implementation of the Constitutional Charter). As the Montenegrin Parliament has not yet decided on this issue, the Federal CC is still in force in this member state. The Serbian Parliament, on the other hand, amended the Federal CC and enacted it as a new law, changing its name to "Basic Criminal Code" (*Sl. glasnik RS*, br. 39/03).

28 Multilateral Treaties Deposited with the Secretary-General of the United Nations http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapterIV/treaty2.asp.

CC). The discriminatory provisions based on the marital status of women are thereby deleted.

A male can be a victim of these crimes (with the exception of rape as noted above) only if compelled to engage in an act of unnatural sexual intercourse, which implies homosexual intercourse. Provisions treating unnatural sexual intercourse do in fact incriminate homosexual rape (Art. 110 (1)), Serbian CC; Art. 91, Montenegrin CC). The law, if a victim is male however, does not incriminate the rape of a male by a female, compelling a person to engage in sexual intercourse by threats or in other prohibitive conditions, rape of an infirm person and unnatural sexual intercourse with an infirm person (only Montenegrin CC, Arts. 87 (2) and 88 (2)). Only Art. 107 of the Serbian CC incriminates rape through abuse of official position. In addition, only a female can be a victim of solicitation for prostitution (Art. 251, Basic CC). This definition of criminal offences constitutes discrimination and unjustifiably places men in a more unfavourable position than women. It also reflects the prevailing social stereotype of women as mere sexual objects.

A discriminatory provision of the kind was deleted by the Act on Amendments to the Serbian CC of March 2002; the earlier provision envisaged that the victim of sexual intercourse and unnatural sexual intercourse through abuse of official position can only be a female (Art. 107). Now the victim of this crime can also be a male.

The legislation of Serbia and Montenegro does not incriminate consensual intercourse between persons of age and of the same sex. The Serbian and Montenegrin Criminal Codes define as a crime sexual intercourse with a person under the age of 14 even with the consent of the minor (Art. 106, Serbian CC; Art. 89, Montenegrin CC). The lawmakers have thus set 14 as the age of consent. But sexual intercourse between consenting males, one of whom is a minor over the age of 14, is defined as a crime (Art. 110 (4), Serbian CC; Art. 91 (4), Montenegrin CC). These provisions are discriminatory as they envisage different ages of consent to homosexual intercourse (18) and heterosexual and lesbian intercourse (14). They are also contrary to the recent case law of the European Court of Human Rights (see *SL v. Austria,* ECtHR, App. No. 45330/99 (2003) and *Land V v. Austria,* ECtHR, App. Nos. 39392/98 and 39829/98 (2003)).

4.1.2.2. Refugees and citizenship – The status and rights of refugees in Serbia and Montenegro are regulated by the relevant international instruments, primarily the 1951 Convention relating to the Status of Refugees and the 1967 Protocol on the Status of Refugees. Both Serbia and Montenegro have passed their own legislation in this field: the Serbian Refugee Act (*Sl. glasnik RS*, No. 18/92), and the Montenegrin Displaced Persons Relief Act. Both have been severely criticised for unjustifiably narrowing the definition of a refugee and the rights of refugees.

Under Article 1 of the Serbian Refugee Act, refugees are:

> Serbs and citizens of other nationality forced by pressure exerted by the Croatian authorities or the authorities of other republics, threat of genocide, persecution or discrimination on the grounds of their religion and nationality or political beliefs, to leave their homes in those republics and flee to the territory of the Republic of Serbia.

That this law is discriminatory in nature is confirmed by the opening "Serbs and citizens of other nationality." Although all refugees must have the same legal and social status, the provision makes a distinction between Serb and other refugees Moreover, it applies only to refugees from the territory of former Yugoslavia persecuted by the authorities of the ex-republics, and it remains unclear how it could be applicable also to refugees from countries outside the former Yugoslavia.

The problems that arose when the Yugoslav Citizenship Act[29] (*Sl. list SRJ*, No. 33/96; see 4.16) was passed were not removed by its subsequent amendment (*Sl. list SRJ*, No. 9/01). Under this law, all citizens of the former SFRY who were domiciled in the territory of the FRY on 27 April 1992 – including many refugees who formally registered as residents up to that date – may acquire citizenship automatically on the basis of Article 45. However, those who arrived after that date can be granted Yugoslav citizenship only by the federal or republican ministries of internal affairs,[30] which have discretionary powers in determining whether or not the requirements are met, and are bound to "take into account the interests of security and defence and the international position of Yugoslavia" (Art. 48). Where acquiring citizenship is concerned, the provision places at a disadvantage those who sought refuge in Yugoslavia after 27 April 1992 as compared to those who arrived before that date.

4.1.2.3. Montenegrin Decree on Non-Resident Employees – The Montenegrin Government issued a Decree (*Sl. list RCG*, No. 28/03) under which employers must register all non-resident employees and for each such employee pay a tax of 2.5 euros a day to the Montenegrin Employment Bureau, avoidance being punishable by severe fines.[31] Non-residents are defined as all those with no permanent residence in Montenegro or with their commercial base outside it (Art. 1 (2)), meaning that citizens of Serbia are also treated as non-residents, whereby citizens of Serbia are not afforded treatment equal with that of Montenegrin citizens. This is a violation

29 At the time of the completion of this Report this Act has not been harmonised with the Constitutional Charter. As this Report uses names of acts in force, we will in this case also use the true name of the Act, although it now contains inappropriate terminology such as "Yugoslav" citizenship.

30 The Ministry of Interior is abolished on the state union level (Art. 16, Act on the Implementation of the Constitutional Charter). See more 4.16.

31 Failure to register such persons is punishable by a fine ranging from 1,000 to 10,000 Euros and withdrawal of operating permit from one to 12 months (Arts. 9 and 10 of the Decree; *Vijesti*, 26 April, p. 4).

of the Constitutional Charter, under whose Article 7 (2) all citizens of one member-state have equal rights in the other state, except for electoral rights.

4.1.3. Draft Act against Discrimination

The Institute for Comparative Law drew up a Draft act against discrimination. Experts of the Council of Europe positively assessed the Draft and made their remarks. The fate of this Draft is uncertain because of the extensive constitutional changes, mainly the transfer of legislative jurisdiction in this matter to member states.

The Draft Act on Prohibition of Discrimination regulates the prohibition of and protection against discrimination in all spheres of social life and establishes frameworks of special protection against discrimination of particularly handicapped categories of people (Art. 1).

The notion of discrimination is defined so as to mean making any unjustifiable and prohibited distinction between and unequally treating persons or groups based on personal characteristics (Art. 2).

The Draft Act prohibits all kinds of discrimination – by discrimination particularly meaning direct and indirect discrimination, calling for and inducing discrimination, assisting in discriminatory actions and violating the principle of equal rights and obligations (Art. 5). Severe forms of discrimination are particularly pointed out, such as any instigation of, incitement to and fanning of national, racial, religious and other kinds of inequality, hate or intolerance; any propagation or deliberate implementation of discrimination by state authorities, as well as any kind of slavery, human trafficking, apartheid and ethnic cleansing (Art. 8).

Furthermore, the Draft Act lays down the prohibition of writing and displaying discriminatory messages and symbols, calling for discriminatory actions against other persons, the violation of which entails civil and legal and minor offence sanctions (Art. 10). The Draft especially envisages the obligation of the state and state authorities to ensure equal rights and freedoms for all its citizens regardless of their personal characteristics. It also prescribes special forms of the prohibition of discrimination: in proceedings before state authorities (Art. 12); in the sphere of employment (Art. 13); in public services (Art. 14); in religious rights (Art. 15); discrimination based on sex (Art. 16); discrimination based on sexual affiliation (Art. 17); discrimination against children (Art. 18); discrimination in the sphere of education and professional training (Art. 19); prohibition of discrimination against minorities (Art. 20); prohibition of discrimination based on political beliefs (Art. 21); as well as discrimination against persons with special needs (Art. 22).

The Draft Act also lays down procedures which, although in contradiction to the principle of equality, do not constitute discrimination. Thus, regulations, decisions and special measures, i.e. measures of the so-called affirmative action, adopted

with a view to promoting the position of ethnic, religious, linguistic and other groups in order to extend special protection to them to support their survival and development, are not considered discrimination (Art. 6 (2)).

For the purpose of this Draft Act, mechanisms of protection envisage protection before the Federal Constitutional Court (lodging a constitutional appeal), in administrative procedure and administrative dispute (Arts. 23 and 24).

The Draft Act also regulates civil and legal protection against the court (proceedings and appropriate appeals) and temporary measures through which protection is implemented; the right to this protection applies to every person injured by discriminatory actions, but, in certain cases and under certain conditions, also to organisations for the protection of discriminatory groups (Arts. 26–30). Furthermore, the Draft lays down irrefutable assumption of guilt if it is indisputable between the parties or the court established that there was an act of direct discrimination (Art. 29). He who was subjected to discriminatory treatment does not have to prove either the offence or the act of discrimination itself. Instead it is sufficient to show that there is reason to believe that he was subjected to discriminatory treatment. It is the responsibility of the offender to prove that there was no act of discrimination.

Finally, the Draft Act prescribes disciplinary and criminal responsibility, including appropriate sanctions (Arts. 31–33).

The Institute for Comparative Law drew up a Draft Act on Prohibition of Discrimination of Disabled Persons as well. This Draft both generally and in particular prohibits discrimination on the basis of disability. It also envisages mechanisms for the protection and measures for equal representation and social inclusion of disabled persons.

4.2. Right to Life

Article 6, ICCPR:

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
>
> 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this Article shall authorise any State Party to the present Covenant to derogate in any way from any obligation assumed

under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

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

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

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

Article 1, Second Protocol to the ICCPR:

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

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

Article 2, ECHR:

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

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

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

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

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

Protocol 6 to the ECHR:

Article 1

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

Article 2

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

Article 3

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

Protocol 13 to the ECHR:

Article 1

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

Article 2

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

Article 3

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

4.2.1. General

The HR Charter and the constitutions of member states guarantee the inviolability of human life (Art. 11 (1) HR Charter; Art. 14 (1), Serbian Constitution; Art. 21 (1), Montenegrin Constitution), underscoring that this is a right that belongs inherently to every individual.

The HR Charter states explicitly that "the death penalty cannot be imposed in the State Union of Serbia and Montenegro" (Art. 11 (1), HR Charter). The FRY ratified in 2001the Second Optional Protocol to the International Covenant on Civil and Political Rights, which aims at the abolition of the death penalty (*Sl. list SRJ (Međunarodni ugovori)*, No. 4/01). Upon its admittance to the Council of Europe on 3 April 2003 Serbia and Montenegro signed Protocol No. 6 to the ECHR, which also mandates the abolition of the death penalty, except in respect of acts committed in time of war or of imminent threat of war, as well as Protocol No. 13, which abolishes the death penalty without any exceptions. The Government of SaM made a commitment to ratify both Protocols within one year from the admission of SaM into membership of the Council of Europe, i.e. by April 2004.

The member states have not yet met their obligations, because both constitutions allow the death penalty.[32] Still, this apparent disharmony should not present any legal consequences because the provisions of the HR Charter and ratified international treaties are directly applicable (Art. 2 (2) HR Charter; Art. 10, Constitutional Charter).

32 Inspite of the obligation of the two member states to harmonise their constitutions with the Constitutional Charter and ratified international treaties within six months from the entry into force of the Constitutional Charter (Art. 20 (3)), this has not yet been done in respect of the death penalty.

Capital punishment was completely abolished in the penal legislation of both Serbia and Montenegro in 2002. The then republican criminal legislation was harmonised with the previous amendments to the Federal CC (*Sl. list SRJ*, No. 61/01) which had abolished the death penalty and replaced it with the punishment of 40 years of imprisonment. A third paragraph has been added to Article 4 of the Federal Criminal Code (in adoption procedure of Basic CC in Serbia),[33] which deals with the mandatory application of a criminal law more lenient to the offender, stating that if in the time of the commission of a criminal offence the death penalty was prescribed for that offence, a punishment of 40 years imprisonment can be imposed.

The state has special responsibilities with regard to persons who have been detained or whose freedom is otherwise restricted. Failure to provide medical aid or food, to prevent acts of torture or suicide attempts by these persons could be a violation of the right to life (*Keenan v. United Kingdom*, ECmHR, App. No. 27229/95 (1999)). (In this sense, the HR Charter and the constitutions of the member states proclaim the inviolability of the physical and psychological integrity of the individual, respect for human dignity, and prohibit any form of violence against detained persons (Arts. 1, 12, 14 HR Charter; Art. 28, Serbian Constitution; Art. 24, Montenegrin Constitution, see 4.3). The Serbian Parliament passed a Directive on Police Ethics and Conduct (*Sl. glasnik RS,* No. 41/03), which prescribes that a police officer "guarding a prisoner whose condition requires special care has a duty to inform the medical staff if this is necessary to protect the life and health of the prisoner in question" (para. 20).

With respect to the right to life, states also have an obligation to take active measures to prevent malnutrition, promote medical care and other social welfare activities aimed at reducing the mortality rate and extending life expectancy (see General Comment No. 6/19, Human Rights Committee, 27 July 1982). Thus the HR Charter and the constitutions of the member states state that everyone is entitled to health care, adding that children, expectant mothers and the elderly have the right to health care provided by the member states if they are not covered by another insurance programme (Art. 45, HR Charter; Art. 30, Serbian Constitution; Art. 57, Montenegrin Constitution).

Where hazardous activities that could have an adverse effect on the health of those involved are concerned, the state is bound to issue health risk warnings and establish simple and effective mechanisms to enable the persons concerned to obtain all necessary information (see *McGinley and Egan v. United Kingdom*, ECtHR, App. No. 21825/ 93/94 (1998)).

33 See 4.1.1.

Under Article 13 of the Yugoslav Environment Protection Act (*Sl. list SRJ*, No. 24/98), the competent government agencies must provide the public with accurate and timely information on the state of the environment and any pollution that represents a threat to human life and health or to the environment. The corresponding articles in the republican statutes are very similar (Art. 8, Serbian Environment Protection Act, *Sl. glasnik RS*, Nos. 66/91, 83/92, 53/93, 67/93, 48/94, 44/95 and 53/95; Art. 7 (12), Montenegrin Environment Act, *Sl. list RCG*, Nos. 12/96, 55/00).

The former Federal Constitution did not prohibit derogation from the right to life when an imminent threat of war is declared, which is now corrected by the HR Charter, which allows derogation from specific rights in the case of war of other emergency, but the measures of derogation are not allowed in respect of the right to life. Thus, the provisions of the HR Charter (Art. 6 (9)) are in harmony with the ICCPR and ECHR.

The authors of the new Serbian Constitution should bear in mind the non-derogable character of the right to life, especially since the present Constitution does not even specify rights on which no restrictions may be imposed (see 1.3.2.).

The HR Charter explicitly prohibits cloning of human beings (Art. 11 HR Charter). The prohibition of cloning has not yet been developed further by laws or other normative acts of the member states, nor has an international treaty dealing with this issue been ratified, and thus the full scope of this provision of the HR Charter is not yet fully clear.

4.2.2. Criminal Law

Offences against the right to life are defined in the criminal legislations of the member states, and are prosecuted by state prosecutor *ex officio*. The Federal CC / Basic CC deals with crimes against humanity and international law such as genocide (Art. 141), war crimes (Art. 142–144), illegal killing or wounding of enemy combatants (Art. 146), and incitement to a war of aggression (Art. 152). This is in keeping with Serbia and Montenegro's obligations under international treaties, including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1949 Geneva Convention on the Protection of Victims of War, and the 1977 Additional Protocols on international and non-international armed conflicts.

Republican statutes also define offences against life (Art. 47, Serbian CC; Art. 30, Montenegrin CC). Homicide carries a minimum penalty of five years in prison while aggravated forms of the crime are punishable with at least 10 years in prison and 40 years as a maximum sentence.

The Serbian CC (Art. 51 (1)), and its Montenegrin counterpart (Art. 34 (1)) define as punishable incitement to suicide and assisting a person to commit suicide.

This means that SaM law does not allow euthanasia and does not recognise it as a mitigating circumstance in cases of assisted suicide.[34]

Extradition of accused or convicted persons is governed by the provisions of relevant international multilateral and bilateral treaties; if no such treaty exists with a specific country, or if an issue is not covered by the treaty, the procedure of extradition is to be conducted in accordance with the Criminal Procedure Code (CPC) (Art. 539). The authorities cannot enter a bilateral treaty on extradition with another state if in that state the death penalty can be imposed on extradited persons. A person can be extradited to another state in which the death penalty still exists only on the condition that the death penalty cannot be imposed (Art. 549 (3) CPC). This provision is in accordance with Article 11 of the European Convention on Extradition (ratified with additional protocols, *Sl. list SRJ*, No. 10/01), which states that:

> if the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death penalty will not be carried out.

4.2.3. Abortion

Neither the ICCPR nor ECHR define the beginning of life. The word "everyone" in Article 2 ECHR allows interpretations that the life of the foetus[35] is also protected, but the European Commission of Human Rights determined that no intention of State Parties to the Convention to protect the right to life of the foetus could be established from the context of Article 2 (see *X v. United Kingdom*, ECtHR, App. No. 8416/78 (1980)).

Abortion is regulated by statutes of member states: the Serbian Act on Abortion in Medical Facilities (*Sl. glasnik RS*, No. 16/95), and the Montenegrin Act on Abortion Procedure (*Sl. list SRCG*, Nos. 29/79, 31/79, 29/89; *Sl. list RCG*, Nos. 28/91, 17/92 and 27/94). Under both laws, abortion may be performed only at the request of the woman, with the Serbian law also requiring written consent of the woman. A simple request by the pregnant woman is sufficient up to the tenth week (Art. 6, Serbian Act; Art. 2, Montenegrin Act) and, in exceptional cases only, after the twentieth week of pregnancy.

34 It is interesting to note that the legislation of the Kingdom of Yugoslavia (before World War II), recognised mercy killing as a mitigating circumstance.

35 No national or international consensus exists regarding abortion; e.g. Article 4 (1) of the American Convention on Human Rights protects the right to life "in general from the moment of conce ption" thereby allowing abortion only in exceptional circumstances.

Every abortion after the tenth week is considered exceptional and may be performed only in the following circumstances:

1. to save the life of the woman or eliminate a serious risk to her health (health reasons);

2. if there is a risk of the child being born with a severe physical or mental disability (eugenic reasons);

3. if conception was the result of a criminal offence such as rape (social reasons).

Decisions on abortions up to the tenth week of pregnancy are by the attending physician; up to the twentieth week by a panel of medical doctors, and after the twentieth week by the medical ethics board of the hospital.

4.2.4. Use of Force by Government Agencies

Both the Serbian and Montenegrin Acts on the Enforcement of Criminal Sanctions (*Sl. glasnik RS*, No. 16/97; *Sl. list RCG*, No. 25/94) prescribe when force may be used against convicts. The Serbian Act states that force may be used only to prevent escape, a physical attack on another person, self-inflicted injury, material damage, and in cases of active or passive resistance to a legitimate order by an on-duty officer (Art. 136). The corresponding provision in the Montenegrin Act is virtually identical (Art. 61).

The Serbian Act prescribes in detail the use of firearms (Art. 138). Though these provisions are based mainly on the Serbian Interior Affairs Act (*Sl. glasnik RS*, No. 44/91), other ancillary legislation regulating the use of force must be taken into account, including the Regulations on the Use of Force in Detention Facilities (*Sl. glasnik SRS*, No. 30/78). The Regulations allow the use of firearms, with possible lethal consequences, to prevent the escape of a convict from a high security prison, regardless of the length of the sentence the prisoner is serving (Art. 4 (1.1)). This in effect means that a prison guard may shoot, possibly fatally, a prisoner attempting to escape, irrespective of whether his crime was multiple murder or petty larceny. There is, however, a certain measure of control over the use of force under the Regulations, which envisage that the force used in a given situation should result in the least harmful consequences, that before using a firearm, the prison guard must warn the escaping prisoner that he will shoot, first orally and then with a shot fired into the air, and that use of firearms is ruled out when the escaping prisoner conceals himself in a group of civilians whose lives might be endangered.

The Serbian Interior Affairs Act (*Sl. glasnik RS*, Nos. 44/91, 79/91, 54/96, 30/00 and 8/01) and its Montenegrin counterpart (*Sl. list RCG*, No. 24/94) regulate the use of force by law enforcement officers. Under the Serbian Act, police may use firearms only when other means do not suffice to protect assets and property (Art. 23 (1.1–6)) and to "repel an attack on a facility" (line 6). Deprivation of life in this case does not come under any of the three exceptions provided for by the

ECHR (Art. 2 (2)). Still, an issue of much greater importance is how to protect certain people or facilities in real life and at the same time meet the test of "strict proportionality" (see *Stewart v. United Kingdom*, ECtHR, App. No. 1004/82 (1982); *McCann and Others v. UK*, ECtHR, App. No. 18984/91 (1995), Publications of ECtHR, Series A, Vol. 324; *Kelly et al. v. United Kingdom*, ECtHR, App. No. 30054/ 96 (2001); *Gul v. Turkey*, ECtHR, App. No. 22676/93 (2001)). The provisions of the Montenegrin Interior Affairs Act are similar (Art. 17 and 18), and oblige a law enforcement officer to give warning before using a firearm (Art. 19 (2)).

The matter is dealt with in greater detail in ancillary legislation. The Serbian Directive on Police Ethics and Conduct (Art. 18 (1)) prescribes the duty of police officers to always respect "everyone's right to life". Article 21 sets out that "members of the police can resort to the use of force, especially firearms, only when the use of force is allowed by law or another normative act, applying only necessary force and only when the use of force itself is strictly necessary in order to achieve a legitimate aim. The Directive surpasses the aforementioned acts by insisting on "absolute necessity", i.e. "strict proportionality" and is thus in accord with the ECHR.

The Montenegrin Directive on the manner of performing certain activities of public security and application of special powers and duties in the performance of such activities (*Sl. list SRCG*, No. 22/84) foresees various measures which an "authorized person" can use depending on the circumstances of the case and on the reaction of the "assailant". When performing their duties, authorized persons must "protect and guard human lives and dignity and can apply only those measures of coercion which are prescribed by law and which allow to attain of an official goal with as little prejudicial consequences as possible" (Art. 3). If no specific mode of action is prescribed, all authorized persons are required to act in accordance with the principles of legality, rationality and efficiency, bearing in mind the interests of security and legal rights and duties of working people and citizens, organizations of associated labour and other self-managing organizations and communities (Art. 4) The Montenegrin Directive uses obsolete, socialist terminology and requires substantial change. Although the use of force must entail "as little prejudicial consequences as possible" and conform with the principles of legality, rationality and efficiency, this terminology has to be more precise and must be harmonised with international standards, especially with the standard of strict proportionality.

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

Article 7 ICCPR:

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

Article 3 ECHR:

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

4.3.1. General

Besides Article 7 of the ICCPR on the prohibition of torture, Serbia and Montenegro is bound also by the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. When it ratified this Convention, the FRY also recognised the competence of the Committee against Torture to receive and consider communications by state parties and by or on behalf of individuals (Arts 21 (1) and 22 (1) of the Convention).[36] The SaM has signed Optional protocol to the CAT on 25 September 2003.[37]

The HR Charter and both constitutions of member states contain provisions prohibiting torture. Article 12 states that:

> Everyone has the right to the inviolability of their physical and mental integrity.
>
> No one can be subjected to torture, inhuman or degrading treatment or punishment.
>
> No one can be subjected to medical or scientific experiments without freely given consent.

The prohibition of torture is also prescribed by the constitutions of the member states. Article 26 of the Serbian Constitution states that:

> Respect for human personality and dignity in criminal and all other proceedings, in the event of detention or other restriction of freedom, as well as during the serving of a prison sentence, shall be guaranteed.
>
> No one may be subjected to torture or degrading treatment or punishment.
>
> Medical and other scientific experimentation may not be carried out on an individual without his consent.

The Montenegrin Constitution deals with the issue in a similar manner:

> Respect for the inviolability of physical and mental integrity of man, his privacy and personal rights shall be guaranteed.
>
> The personal dignity and security of man shall be guaranteed (Art. 20).

36 In May 2001, the Committee against Torture handed down its first decision on a communica tion submitted by an individual against Yugoslavia (*Ristić v. Yugoslavia*, Com. No. 113/1998) in which it found Yugoslavia in violation of its obligations under the Torture Convention. For more details see II.2.3. The Committee against Torture found on 21 December 2002 that SaM violated its international obligations in the case *Hajrizi Džemajl et al. v. Yugoslavia,* Com. No 161/2000, www1.umn.edu/humanrts/cat/decisions/161–2000.html.

37 See www.apt.ch/un/opcat/opcat_status.htm.

> Respect for the human personality and dignity in criminal and all other proceedings, in the event of detention or other restriction of freedom, as well as during the serving of a prison sentence, shall be guaranteed.
>
> The use of force against a suspect who has been detained or whose freedom has been restricted, as well as any forcible extraction of confessions or statements, shall be prohibited and punishable.
>
> No one may be subjected to torture, or to degrading treatment or punishment.
>
> Medical and other scientific experimentation may not be carried out on an individual without his consent (Art. 24).

The question may arise as to whether the inclusion of two separate provisions meant to insure respect of the human person in the HR Charter and the Montenegrin Constitution is justifiable. A possible answer would be that Article 12 of the HR Charter mandates general prohibition of torture and inviolability of physical and mental integrity, while Article 14 (7) specifies these principles in the case of detention:

> Any detained person is to be treated humanely and with respect of his or her dignity. Any violence towards a detainee as well as any forcible extraction of confession are strictly forbidden.

Thus, the protection of Article 12 would cover acts of private persons as well as public officials, while the protection of Article 14 would be limited to the actions of the latter. The legislator probably decided to emphasise the prohibition of torture and inhuman treatment of detainees, because these persons find themselves in quite unenviable situations, and research shows that detainees are a particularly vulnerable group. The HR Charter envisages a series of guarantees for persons deprived of their liberty because they are suspected of having committed a crime or misdemeanour (Arts. 14, 15 and 16, HR Charter), which can significantly reduce the frequency of cases of torture, inhuman or degrading treatment or punishment. Two guarantees, considered to be crucial by the Committee for the Prevention of Torture[38] of the Council of Europe (CPT), are provided by the HR Charter – a person deprived of his or her liberty has the right to inform a person of his own choosing of his arrest (Art. 14 (5)) and has the right to counsel of his own choosing to be present at his hearing (Art. 15 (1)). There is a guarantee which the HR Charter does not foresee – the right of access to a physician. While the police usually have their own doctors, according to the CPT this right also includes the right to choose one's doctor. While the HR Charter does not protect this right, it could be provided for by a lower normative act, by prescribing a list of doctors from which a detainee

38 See the Second general report of the CPT at www.cpt.coe.int/lang/srp/srp-standards-s.pdf. The C PT was established as an organ of oversight over the implementation of the like named Conv ention of the Council of Europe. SaM ratified this Convention on 27 December 2003.

could choose if he/she doubts the quality or objectivity of the doctor provided by the police. The detainee and his/her lawyer should certainly have access to any findings of the physician and the results of any examinations.

The Serbian and the Montenegrin constitutions prohibit torture and degrading treatment or punishment, but unlike the HR Charter and Article 7 ICCPR they fail to prohibit cruel or inhuman treatment or punishment.[39] A similar mistake was made in the wording of the provision which prohibits performing medical experiments on an individual without his/her consent.[40] The HR Charter prohibits experimentation without *freely* given consent. Unlike the HR Charter, the two constitutions do not mention that the consent must be "freely" given. Many legal writers consider this word to be crucial in Art. 7 ICCPR.

The HR Charter (Art. 6(9)) allows no derogation from the prohibition of torture and inhuman or degrading treatment even during a state of war or emergency, which is in accordance with the ICCPR and ECHR. The former Federal Constitution had a similar provision. The Serbian Constitution, however, makes derogation possible without any restrictions during the state of war (see 3.2.2). The Montenegrin Constitution is silent on this point.

The Serbian Constitution also guarantees compensation for damages sustained as a result of the "unlawful or improper conduct" of a government official or agency, which should be constructed as including compensation in cases of torture or similar treatment (Art. 123). Compensation is sought by filing a civil action, as well as in the course of criminal proceedings against persons indicted for torture or similar treatment (Art. 103, CPC).

4.3.2. Criminal Law

Under the Torture Convention, states must ensure that all acts of torture are offences under their criminal law and take into account their grave nature when prescribing penalties (Art. 4). Several provisions of national law treating abuse of official position prohibit torture. Most of these offences are contained in the Federal CC/Basic CC.[41] The most important criminal offence treated therein is civil injury (Art. 191):

39 ECtHR has in several judgments drawn a distinction between torture and inhuman and degrading treatment; see: *Ireland v. United Kingdom*, ECtHR, App. No. 5310/71 (1978); *Tyrer v. United Kingdom*, ECtHR, App. No. 5856/72 (1978); *Smith and Grady v. United Kingdom*, ECtHR, App. No. 33985/96; 33986/96 (1999). Whether maltreatment in a specific case amounted to a violation of this right depends on the circumstances of the case, and especially on "the duration of the maltreatment, its physical and mental consequences, and in some case on the gender, age or health of the alleged victim" (*Ireland v. United Kingdom*, para. 162).

40 On the other hand, if authorities do not provide an adequate medical treatment this can amount to a violation of the prohibition of inhuman or degrading treatment (*Hurtado v. Switzerland* ECtHR, App. No. 17549/90 (1994), *D v. United Kingdom*, ECtHR, 24 EHRR 423 (1997).

41 See 4.1.1.

> A person acting in an official capacity who abuses another by inflicting severe physical or psychological suffering, or coerces or insults him, or otherwise treats him in a manner violating his human dignity, shall be punished with a term of imprisonment of three months to three years.

Though the term "torture" is not explicitly used, the offence encompasses the infliction of severe physical or psychological suffering, as well as the enforcement of criminal sanctions, and thus corresponds to the definition used in the Torture Convention. An important point is that, in contrast to the Convention (Art. 1), *intent* is not required. Use of force, even when severe physical or psychological injury is not a consequence, as well as ill-treatment and violation of human dignity, i.e. actions that come under inhuman or degrading treatment, are also prohibited.

The Federal CC/Basic CC incriminates the extraction of statements (Art. 190). A statement extracted by force is defined as a confession or any statement obtained from an accused, witness, expert witness or other person by an on-duty law enforcement agent through the use of force, threats, or any other proscribed means. The law envisages two degrees for this criminal offence: simple and aggravated. Aggravated extraction of a statement requires extreme force to have been used or consequences of a serious nature for the victim in subsequent legal proceedings against him, and carries a minimum penalty of one year in prison.

In 1998, the Committee against Torture criticised the then FRY for the failure of its criminal law to prohibit torture in itself, in accordance with Article 1 of the Torture Convention, and recommended introduction of the criminal offence in national legislation as it is defined in the Convention.[42] This, however, has not been done to this day.[43]

Though the Basic CC does not explicitly prohibit the extraction of statements through the use for that purpose of medical or scientific experimentation, Article 190 bans obtaining statements by "other proscribed means," which may be construed as meaning such experiments. Since the HR Charter is directly applicable this is no longer an essential problem.

The Torture Convention also prohibits incitement or acquiescence to infliction of severe pain or suffering by a person acting in an official capacity. In several cases, the European Court of Human Rights found Turkey responsible for violations of Article 3 ECHR, when members of the military burned and destroyed houses belonging to civilians and forced them to watch (*Selçuk and Asker v. Turkey*, ECtHR, App. No. 23184/94, 23185/94 (1998)). The UN Committee against Torture went even further in the case of *Hajrizi v. Yugoslavia,* where it found a violation of the Convention against Torture, even though the houses of the petitioners had

42 See remarks and comments on FRY Report, UN doc. Committee against Torture, UN CAT/C/YU - GO of 16 November 1998, pp. 10, 17.

43 The only amendments made by the SaM authorities so far were to the penalties envisaged, not the prohibition of torture.

not been demolished by state officials, but the latter were present and did nothing to prevent or stop the carnage. The Federal CC/Basic CC prohibits incitement to civil injury, extraction of statements or violation of the equality of citizens, but it is debatable whether an official who incites others to torture or acquiesces to it could be prosecuted on the basis of this provision. Depending on the circumstances, other articles of the CC could be applied: Article 174 (abuse of official position), Article 182 (dereliction of duty), Article 199 (failure to report a criminal offence carrying a prison term of five years or more).

In view of the gravity of torture, it would seem that the punishment envisaged for civil injury (Art. 191, Federal CC/Basic CC) – three months to three years imprisonment – is too lenient, and, furthermore, an attempt to commit the act is not punishable.

The Serbian and Montenegrin Criminal Codes regulate the prohibition of torture much alike the Federal CC/Basic CC. They prescribe as criminal offences extraction of statements (Art. 65, Serbian CC; Art. 47, Montenegrin CC), and civil injury (Art. 66, Serbian CC; Art. 48, Montenegrin CC). There are, however, some differences:

> An official, who in the performance of duty abuses another, insults him or generally treats him in a manner that violates his human dignity, shall be punished with a term of imprisonment of three months to three years (Art. 66, Serbian CC, wording of Art. 48, Montenegrin CC, is similar).

As defined by the two republican codes, the offence does not encompass infliction of "severe physical or psychological pain" and "coercion," as envisaged by the Federal CC (Art. 191), and the Torture Convention (Art. 1). Though the Serbian CC incriminates the use of force (Art. 62 (1)), this is not sufficient to compensate for the failure to prohibit the infliction of pain: first, use of force does not necessarily include infliction of pain and, second, prosecution is by civil action except when accompanied by threats of death or serious bodily injury.

Apart from these criminal offences containing elements of torture in their subject matter, federal penal legislation deals with torture in a number of other provisions. Namely, in the part of Federal CC/Basic CC regulating crimes against international law, there are offences that include torture in their modus of perpetration. These are: war crimes against the civilian population (Art. 142), war crime against the wounded and sick (Art. 143) and war crimes against the prisoners of war (Art. 144).

4.3.3. Criminal Proceedings and Execution of Criminal Sanctions

Under the federal CPC, detention could up to the end of 2000 be ordered by both the investigating judge and the police. A person could be held in police custody for up to 72 hours, and it was in this period that the most serious violations of the

prohibition of torture and similar treatment occurred. The Federal Constitutional Court ruled Art. 196 unconstitutional and did away with the possibility of police custody (*Sl. list SRJ*, No. 71/00). This paragraph of Yugoslav legislation was criticised also by the Committee against Torture, which recommended that the period of police custody be limited to 48 hours at the most, and that the detained person be allowed access to legal counsel immediately upon being taken into custody.[44] New CPC lays down as a rule that only the competent court may order a person to be taken into custody.[45] A person arrested without a court order will be brought promptly before an investigating judge (Art. 5).[46] If, for unavoidable reasons, the apprehension of a person deprived of liberty has taken longer than eight hours, the police shall inform the investigating judge accordingly (Art. 227 (3)).

The new CPC encompasses special provisions with regard to the requirements of respect for the person of the suspect and/or the accused in the course of the proceedings. Therefore "it is not allowed to use force, threat, deceit, promise, extortion, exhaustion or other similar measures against the accused to obtain his statement or confession or anything that could be used as evidence against him" (Art. 89 (8)). Court decision cannot be based on evidence obtained in such a way. Any violence against a person deprived of liberty and person whose liberty has been restricted, as well as any extortion of confession or other statement from the accused or other person involved in criminal proceedings is also forbidden (Art. 12). Besides this prohibition, the legislators have also prescribed that court decisions cannot be based on evidence that is by nature or by the method of obtaining in contradiction with the provisions of this Code, other statute, constitution or *international law* (Art. 18 (2); italics added).

The CPC prohibits injury to the personality and dignity of detained persons (Art. 148), and extraction of confessions or other statements from a detained person or another party to the proceedings. A detained person may request to be seen by a medical doctor, under the supervision of the investigating judge (Art. 150). Where interrogation is concerned, the law states that it must be conducted in a way that "fully respects the personality of the accused" (Art. 89 (8)).

The status of convicts is defined and more closely regulated by the Serbian Act on the Enforcement of Criminal Sanctions (*Sl. glasnik RS*, No. 16/97), which emphasises their right to humane treatment. Article 56 of the Act stipulates respect for the dignity of a person serving a prison sentence and prohibits any threats to his

44 See *supra* note 42, pp. 12, 17.

45 Custody can be ordered only in the cases it specifies, and only "if the same purpose cannot be achieved through other measures" (Arts. 141 and 142). The duration of detention remains the same as in the previous CPC (see 4.5.2.1).

46 If for unavoidable reasons, the custody lasted more than eight hours, the police are bound to inform the investigating judge (Art. 227 (3)).

physical or psychological well-being. Articles 57 through 103 lay down the treatment of convicts. The Act contains a provision on the status of persons against whom sanctions are being enforced (Art. 5) and, though it does not explicitly prohibit torture, it envisages that the rights of convicts may be restricted only to the extent necessary to enforce the sanctions, and in accordance with the law.

A state may be held responsible for violations of the prohibition of torture or inhuman or degrading treatment or punishment if it expels, deports or extradites a person to another state, and there are serious reasons to believe that a real risk exists for this person to be subjected there to torture or maltreatment (*Vilvarajah et al. v. United Kingdom,* ECtHR, App. No. 13163/87, 13164/87 (1991)).[47] Even though Article 3 ECHR cannot be interpreted as the banning of the death penalty as such, the Court found that the United Kingdom would be violating Article 3 if it extradited the applicant to the United States, which still enforces the death penalty, because of the existence of the so-called "death row phenomenon" (*Soering v. United Kingdom*, App. No. 14038/88, Ser. A, No. 161). Also, according to Article 3 of the UN Convention against Torture: "no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." The European Court of Human Rights adopted the same principle. If a state expelled an individual, regardless of how undesirable or dangerous he truly is, it would violate Article 3 ECHR, if the expulsion is a link in a chain of events ending with torture or inhuman treatment in the receiving state (*Chahal v. United Kingdom,* ECtHR, App. No. 22414/93 (1996)).

As extradition is done according to multilateral or bilateral international treaties, the authorities have the duty to respect the aforementioned rules when exercising their treaty-making powers. If an issue is not dealt with by a treaty, the provisions of Article 539 of the CPC are to be applied. According to Article 548 (2) the Minister for Human Rights will not allow extradition of an alien "if there are substantial grounds for believing that he would be in danger of being subjected to torture or inhuman treatment in the receiving state", and, if extradition is allowed, the Minister's order will contain a clause prohibiting "the imposition of a more severe penalty than the one already handed down, or of the death penalty (Art. 549 (3)). If a real risk exists that the death penalty will be imposed in the receiving state or of the occurrence of the "death row phenomenon", in spite of the prohibition in the order on extradition, according to international standards the request for extradition should be denied (*Soering v. United Kingdom*).

47 The state expelling or extraditing an individual would be held responsible for the expected treatment in another state, irrespective of whether the threat arises from the organs of that state or from private individuals, if the authorities of the receiving state are not ready or capable to provide adequate protection (*HLR v. France*, 26 EHRR 29 (1998)).

4.3.4. Use of Force by Police

Under the Serbian Interior Affairs Act (*Sl. glasnik RS*, No. 44/91), law enforcement officers are obligated to use force in a manner that will "produce the least harmful consequences" (Art. 3). The subject matter is more closely regulated by the Regulations on the Use of Force (*Sl. glasnik RS*, Nos. 40/95, 48/95 and 1/97), Article 2 of which states that a law enforcement agent:

> shall use force in the performance of his duty in such a manner as to produce the least harmful consequences for the person against whom the force is being used, and only for as long as the reasons... for the use of force exist.

When using force, a law enforcement agent is bound to safeguard human life and dignity (Art. 3). The types of force that may be used are listed: a police officer's physical strength, nightstick, handcuffs, special vehicles, specially trained dogs, mounted police, chemical agents, and firearms. The police officer's immediate superior examines how the use of force was applied within 24 hours of its use (Art. 31 (1)). Whether the use of force was justified or not and the manner of its application is evaluated by a senior officer designated by the Ministry of Interior. In the event that the use of force was unjustified or incorrectly applied, this officer recommends to the Minister of Interior the taking of appropriate measures (Art. 31 (4)).

It is simply not enough to prescribe rules of conduct when using force, it is far more important to apply these rules in real life, and it is especially important to establish an effective system of control and oversight, and an effective investigation in the event of allegations that members of the police used force to such an extent that it becomes torture or inhuman or degrading treatment. This requires a series of further reforms in Serbia and Montenegro.

4.4. Prohibition of Slavery and Forced Labour

Article 8, ICCPR:

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

2. No one shall be held in servitude.

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

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

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

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

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

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

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

Article 4, ECHR:

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

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

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

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

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;

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

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

Article 1, Protocol No. 4 to the ECHR:

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

4.4.1. General

With regard to the prohibition of slavery and forced labour, the SaM is bound, besides provisions of the ICCPR, by many other international conventions on prohibition of slavery and other forms of servitude.[48] By ratifying these conven-

48 The Slavery Convention (*Sl. novine Kraljevine Jugoslavije*, No. 234/29), by the Convention No. 29 Concerning Forced Labour (*Sl. novine Kraljevine Jugoslavije*, No. 297/32), Convention on the Suppression of Trade in Adult Women (*Sl. list FNRJ*, No. 41/50), Convention for the Suppression on the Trafficking in Persons and of the Exploitation of the Prostitution of Others (*Sl. list FNRJ*, No. 2/51), Supplementary Convention on the Abolition of Slavery, the Slave Trade and Ins titutions and Practices Similar to Slavery (*Sl. list FNRJ*, (*Dodatak*), No. 7/58), International Covenant on Economic, Social and Cultural Rights (*Sl. list SFRJ*, No. 7/71), Convention on the Elimination of

tions, Serbia and Montenegro has undertaken the responsibility to protect certain rights, together with the obligation to suppress and punish all forms of slavery, practices similar to slavery, transport of persons in the position of slavery, trafficking in human beings and forced labour.

4.4.2. Trafficking in Human Beings and Smuggling of People

Prohibition of slavery belongs to the category of absolute rights. Article 4 (2) of the ICCPR prohibits the derogation of rights listed in Article 8 (1 and 2), because they pertain to the overall situation of the human being, whereas the other rights listed in this article pertain to labour that is not voluntary, but is neither permanent nor constant. Keeping someone in the position of slavery was for long considered a part of the distant past. However, today this has become an issue of interest since it occurs massively in the form of trafficking in human beings.[49]

4.4.3. National Legislation

During this year important steps have been taken to change the penal policy with regard to the most serious criminal offences.

The most significant change in this respect is the incorporation of prohibition of trafficking in human beings into the HR Charter. Article 13 of the Charter reads:

All Forms of Discrimination against Women (*Sl. list SFRJ* (*Međunarodni ugovori*), No. 11/81), Convention on the High Seas (*Sl. list SFRJ* (*Dodatak*), No. 1/86), Convention against Transnational Organized Crime and additional protocols (*Sl. list SRJ* (*Međunarodni ugovori*), No. 6/01), Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (*Sl. list SRJ* (*Međunarodni ugovori*), No. 7/02) as well as the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (*Sl. list SRJ* (*Međunarodni ugovori*), No. 7/02).

49 The Article 3 (1) of the First Protocol to Prevent, Suppress ad Punish Trafficking in Persons, Especially Women and Children, together with the Convention against Transnational Organized Crime (hereinafter: First Protocol), defines trafficking in human beings as: "recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, abduction, of fraud, deceit, abuse of power or of a position of vulnerability or of the giving or receiving of payment or benefits to achieve consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices akin to slavery, servitude or removal of organs". Article 3 (1) of the Second Protocol against Smuggling of Migrants by Land, Sea and Air, which supplements the Convention against Transnational Organized Crime (hereinafter: Second Protocol) defines smuggling of people as: "procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of illegal entry of a person into a state party of which the person is not a national or a permanent resident". It is important to make a distinction between these two notions, for the purpose of better defining the problem from the aspect of prohibition of holding in slavery. Exploitation is not a decisive factor in case of smuggling of people, but is elementary in trafficking in human beings. With smuggling the accent is on the violation of law with regard to crossing a state border, while in trafficking it is on violation of human rights.

> No one may be held in slavery or in a status akin to slavery. Trafficking in human beings in any form shall be prohibited. Forced labour shall be prohibited. Sexual or economic abuse of any person in a disadvantageous position shall also be regarded as forced labour. Forced labour shall not be understood to mean any work or service lawfully required of convicted by final decision, persons performing their military service or in the case of emergency situations posing a threat to the survival of the Union.

Slavery and its contemporary forms are thus explicitly prohibited by the highest legal act of the State Union. Constitutions of member states, which do not prescribe the prohibition of slavery should be harmonised in this respect with the Constitutional Charter,[50] of which the HR Charter is an integral part.

A new provision was incorporated into the Serbian CC, dealing explicitly with trafficking in human beings.

> A person who by fraud or deception, abuse of power or trust or a position of dependency or vulnerability of another: solicits, transports, transfers, hands over, buys, sells, brokers the transfer or sale, hides or keeps another person with the intent to profit, exploit the labour of this person, commit criminal offences, prostitution or begging, use for pornographic purposes, extract body parts for transplantation or use a person in combat activity, shall be punished by imprisonment from one to ten years. (Art. 111b Serbian CC, *Sl. glasnik RS*, No. 39/03).

If the said criminal offence has been committed against several persons or by abduction, while performing official duty, within a criminal organisation, or in a particularly cruel and degrading manner or if seriously bodily harm was inflicted, the perpetrator shall be punished by imprisonment for at least 3 years (Art. 111b (2)). If the offence is committed against a minor or if it involves the death of the victim, the punishment shall be no less than 5 years of imprisonment (Art. 111b (3)). However, if the victim is under the age of 14, the perpetrator shall be punished even if he/she has not used force, threat or any other of the stated means in perpetrating the offence (Art. 111b (4)). This provision is in keeping with international standards on prohibition of trafficking in human beings.

In addition, the Federal CC/Basic CC explicitly quotes relationship of slavery and transportation of enslaved persons as criminal offence against humanity and international law (Art. 155 (1)):

50 According to the Implementation of the Constitutional Charter Act, member states are bound to harmonise their constitutions with the Constitutional Charter and the ratified international treaties of the state union of Serbia and Montenegro, within six months from the date of entry into force of the Constitutional Charter (Art. 20 (2)).

> A person who, in violation of the provisions of international law, places another person in the condition of slavery or condition akin to slavery or keeps him in such condition, buys, sells, gives to another person or brokers the sale or transfer of such person or incites another to sell his freedom or the freedom of persons sustained or taken care of by him, shall be punished by imprisonment of not less than 3 years.

Paragraph 2, Article 155, incriminates the transport of persons in slavery or in condition akin to slavery from one country to another, prescribing a punishment of one to ten years of imprisonment, while paragraph 3 of the same article prescribes the punishment of at least 5 years in prison for a qualified form of this criminal offence involving minors. Changes made in 2003 have increased penalties for these forms of criminal offences.

During 2002, on the then federal level, the amendments to the CPC was adopted, providing for special rules for the criminal prosecution of perpetrators of offences related to organised crime, for the procedure of confiscation of property and property benefits, as well as for the international cooperation procedure in identifying and prosecuting perpetrators of offences related to organised crime. These changes have introduced a variety of new criminal law institutions. Particularly significant powers were given to the public prosecutor, who can order that a witness, witness-collaborator and members of his/her immediate family be given special protection (Art. 504p). Moreover, in 2002 the Serbian Parliament adopted and in July of the same year amended the Act on Organisation and Jurisdiction of State Bodies in Suppressing Organised Crime (*Sl. glasnik RS*, No. 67/03). These amendments prescribe that the court shall decide on the protection of personal data of witnesses or the injured party upon a demand of the interested party (Art. 15m) and, should the presence of witnesses or the injured party be impossible to secure, their hearing can be effected by way of a video conference link or through international criminal law assistance (Art. 15lj). The preceding was the result of harmonisation of national legislation with the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime as well as the UN Convention on Transnational Organised Crime.

Since June 2002 when the Act on Amendments to the Montenegrin CC was passed, trafficking in human beings has become a separate criminal offence in the Montenegrin CC. The basic form of this offence carries a punishment by imprisonment from 1 to 8 years, or from 1 to 10 years if the offence has been perpetrated against a person of less than 14 years of age or against a minor (Art. 201 (1 and 3) Montenegrin CC). Organiser of the offence shall be punished by imprisonment of minimum 5 years. By mid-December 2003 the Montenegrin Parliament put on its agenda the Criminal Code, the Code on Criminal Procedure and the Act on Public Prosecutor. The draft Act on Public Prosecutor introduces the institution of special

prosecutor to prosecute perpetrators of offences related to organised crime.[51] Until the conclusion of this Report, the Montenegrin Parliament has not adopted these laws.

Since January 2001 a regulation has been in force in Kosovo incriminating the trafficking in human beings and prescribing exceptionally harsh punishments for perpetrators. A punishment of 2 to 12 years of imprisonment is prescribed for all persons engaged in trafficking in human beings, while under aggravating circumstances, e.g. when the victim is a minor, the punishment is from 2 to 15 years, or from 5 to 20 years in case of organised criminal association with intent to engage in trafficking in human beings.[52]

4.4.4. Deficiencies in National Legislation

The Movement and Residence of Aliens Act (Art. 34 (4)) stipulates that temporary residence in SaM shall not be granted to an alien who has entered SaM in a forbidden manner and has not been recognised a status of refugee or granted the right to asylum. As a protective measure the removal of the alien from SaM soil is envisaged (Art. 35). There is no measure envisaged for temporary residence permits for victims of trafficking in human beings, although such aliens can remain in a shelter for victims of trafficking for the period of 30 days. SaM is bound, in accordance with Article 7 (1) of the First Protocol to Prevent, Suppress ad Punish Trafficking in Persons, Especially Women and Children,[53] to consider the adoption of measures to allow victims of trafficking to temporarily, or in specific cases permanently, reside in its territory and thus exclude them from the category of illegal immigrants.[54]

Although the CPC[55] and the Serbian Act on Organisation and Jurisdiction of State Bodies in Suppressing Organised Crime contain provisions introducing the

51 In its report on the case of trafficking in human beings in Montenegro, the team of independent OSCE and CoE experts that had visited Montenegro in July explicitly pointed out the necessity to harmonise the Montenegrin Prosecutors Act, Code of Criminal Procedure and the Criminal Code with international standards. The report also stresses the need to establish a special prosecutor office for organised crime and warns about the necessity to legally regulate the status of witnesses. Besides, the Report states that the rights of the defence during investigation are below standards laid down by the ECHR (in terms of access to documents, contact with the detainee, etc.). See more at www.osce.org/news/generate.php3?news_id=3718.

52 *Regulation No. 2001/4 on the Prohibition of Trafficking in Persons in Kosovo* (UNMIK/REG/2001/4) www.unicri.it/TraCCC%20docs/UNMIK_Reg.2001–04.doc.

53 See *supra* note 49.

54 It is necessary to pass new laws in the field of aliens and asylum, which are in keeping with European standards and which would ensure legal residence in SaM for the victims of this form of organised crime for the period of three months or longer, if they appear as witnesses in criminal proceedings (See the Stabilisation and Association Report for Serbia and Montenegro produced by the European Commission, *Commission Staff Working Paper, Serbia and Montenegro, Stabilisation and Association Report 2003*, Brussels, March 2003 (www.europa.eu.int.).

55 See 4.5.4.

institution of witness protection, provisions on how this protection shall be put into practice do not exist. Although the existence of provisions on witness protection is of high importance, the lack of their elaboration can impact on their practical effect. Complete protection of witnesses[56] (the victims, in cases of trafficking in persons), primarily minors, should be regulated in such a way as to allow for relocation of witness, protection of identity of witness during testimony, change of identity, alongside with protection from intimidation/retaliation against members the family of the witness.[57] Witness protection should extend to the period before, during and after the proceedings. Effective protection of witnesses, with adequate legal regulations, can be applied only if there is regional and international cooperation, since all these measures should equally exist and function both in countries of destination and countries of origin.[58] Such rules would contribute to the prevention of secondary victimisation and protection of witness rights during proceedings, as well as contribute to better persecution of offences related to organised crime.

During the state of emergency in Serbia, certain changes were made and penalties were increased for certain criminal offences.

For the basic form of the criminal offence of establishing the bond of slavery, prescribed in Article 155 (1), the Federal CC/Basic CC envisages a punishment of at least 3 years imprisonment, while for the transport of persons held in slavery or condition akin to slavery from one country to another (Art. 155 (2)) the prescribed punishment is from one to ten years imprisonment. With regard to the smuggling of people, Article 249 (2) of the Federal CC/Basic CC incriminates illegal transfer of persons across the border as well as allowing others to illegally cross borders for the purposes of material gain, prescribing a punishment from 6 months to 5 years imprisonment. This criminal offence is treated in the same way by the Montenegrin CC (Art. 201 (2)). However, in prescribing these criminal offences the obligation to protect the right of smuggled persons has been left out. Endangering the life or security of immigrants, inhuman or degrading treatment, including exploitation of immigrants, are not envisaged as a qualified form of the criminal offence, which represents a deviation from the standards laid out in the Second Protocol against Smuggling of Migrants by Land, Sea and Air (Art. 6 (3)). Although extensive amendments to the criminal legislation have been made during the year, harmonisation with international standards in this field was not fully done.

56 In OSCE member countries it is recommended that relating to witness protection rules pertaining to witnesses applied by the ICTY should be adhered to. (See: *Europe Against Trafficking in Persons – Conference Report*, OSCE/ODIHR, 2001, p. 101 (www.osce.org/odihr/europe-against-traffic - king/)).

57 The Council of Europe Resolution on witness protection in fighting organised crime, 23 November 1995 (95/C 327/04). See at http://ue.eu.int.

58 *Resolution on Combating Trafficking in Human Beings, Especially Woman and Children* , OSCE Parliamentary Assembly Declaration, Berlin, 2002, p. 23.

The amendment to the Federal CC (in adoption procedure of the Basic CC), where the Serbian legislator has increased the minimum punishment for placing persons into a bond of slavery from one to three years, simultaneously changing the Serbian CC and including in the legal text the article regulating trafficking in human beings, which prescribes a minimum punishment from one to ten years imprisonment for the basic form of this criminal offence, suffers from a lack of clarity concerning punishment. The variety of sanctions in prescribed criminal offences with similar disposition leads to doubt with regard to the future implementation of the code by Serbian courts of law.

The basic criminal code also prescribes other criminal offences on the basis of which perpetrators of trafficking in human beings are prosecuted before national courts, such as brokerage in prostitution (Art. 251). The punishment for a person "soliciting, inciting or luring... into prostitution or who in any way participates in transfer of a female person to another for the purposes of prostitution" is from 3 months to 5 years of imprisonment, while the punishment from 1 to 10 years of imprisonment is threatened for a qualified form of the offence, perpetrated against a female minor. In order to exist, the criminal offence must be perpetrated for the purpose of prostitution and against a female person, which excludes other forms of exploitation possibly affecting victims of trafficking. The legislator has not envisaged that male persons could also become an object of the incriminated offence. Although both Serbian and Montenegrin criminal codes contain provisions on trafficking in human beings, proceedings against suspects of trafficking in certain cases are still initiated by filing criminal charges on the basis of the provision on brokering in prostitution. However, this is not adequate when it comes to prosecution of perpetrators of a criminal offence of such proportions.[59]

Some shortfalls are not due to legislation but to problems in practice (e.g. as concerns the right to indemnity for damages inflicted by criminal offence[60]), either because existing law is inadequate (e.g. with regard to improving the position of victims, minors in particular, with the aim of their protection during inquiry and testimony), or because some of the solutions have not even been taken into consi-

59 The expert public and activists of non-governmental organisations point out that this is the key obstacle for a successful fight against trafficking in persons. Namely, when a certain person is accused of brokering in prostitution, not only his victim is accused of disturbing public order and peace (prostitution), but is usually deported if she is an alien. Consequently, the victim is dually victimised, because in addition to physical and mental pain inflicted upon her by the accused, she is also subject to sanctions for illegal conduct committed under duress.

60 The European Court of Human Rights has taken the position that all persons must be provided with normal access to existing national legal remedies the scope of which must be adequate for ensuring indemnity for the alleged injuries (See *Aksoy v. Turkey*, App. No. 21987/93 (1996), paras. 83–84); the Convention against Transnational Organised Crime (*Sl. list SRJ (Međunarodni ugovori)*, No. 6/01) also obligates the states parties to establish adequate procedures to ensure the right to indemnity and restitution for victims of criminal offences included in the Convention (Art. 25 (2 and 6)).

deration (e.g. the possibility of incriminating the purchase of services from victims of trafficking in human beings, the possibility of establishing state funds from which these persons would be compensated), both in Serbian and Montenegrin laws. In practice, there are still problems in prosecuting the perpetrators and insufficient security of victims.

In its General Comment No. 28, paras. 12 and 30, the Human Rights Committee recommends to states parties to undertake measures on national and international level to protect women and children, including alien women and children, from violation of their rights, such as cross border trafficking, their forced prostitution and forms of forced labour disguised as various personal services. In accordance with this, the obligation of the SaM official bodies is to fully guarantee to the victims of trafficking protection of their rights – granting asylum,[61] issuing permits for temporary/permanent residence, access to shelters, physical protection, legal, social and medical aid – regardless of origin, religion and occupation of the victim – as well as protection if the victim should consent to testify in the proceedings against the perpetrator of the criminal offence. States parties must seriously deal with root causes of trafficking in human beings. These causes are poverty, unemployment, inequality, patriarchal structure of society, discrimination, racism, violence, as well as the demand for cheep labour force and commercial sexual services.[62] Taking into account that the demand for commercial sexual services is one of the causes of increase in trafficking in human beings, it is necessary for the state to act to reduce such demand.[63] Thereby the penal policy would be directed not only against traffickers in human beings, but also against those who take advantage of such services.[64]

Judging by what has been achieved so far, although it is certainly on the right track, SaM nevertheless needs to make additional efforts to fully harmonise its legislation with international standards with the view of ensuring guarantees for human rights protection for persons under its jurisdiction from modern forms of slavery and servitude.

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61 In this case, the authorities should view the victim of trafficking as a "member of a par ticular social group" in keeping with provisions of the Geneva Convention on Refugees (See A. Kartusc h, *Reference Guide for Anti-Trafficking Legislative Review with Particular Emphasis on South Eastern Europe*, Warsaw, 2001, p. 68).

62 See the Resolution on combating trafficking in human beings, especially women and chi ldren, adopted at the session of the OSCE Parliamentary Assembly in Berlin, in 2002 (*Resolution on Combating Trafficking in Human Beings, Especially Woman and Children* , OSCE Parliamentary Assembly Declaration, Berlin, 2002, p. 22).

63 Recommendation 1545 (2002) of the CoE Parliamentary Assembly on the campaign against trafficking in women (http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/docume nts/adoptedtext/ta02/erec1545).

64 With this respect Recommendation 1545 (2002) of the CoE Parliamentary Assembly on the campaign against trafficking in women insists on punishment for the buyer who is *aware* that he is buying sexual services from a woman who is a victim of trafficking.

4.4.5. Rights of the Child

The Optional Protocol to the Convention on the Rights of the Child[65] obligates SaM not only to ensure the sustainability of existing efforts, but also to invest additional efforts into suppressing the sale of children, child prostitution, child pornography and improve the protection of victims. In accordance with that, laws of member states of the Union now envisage the criminal offence of trafficking in minors as a qualified form of trafficking in human beings. Another positive step is the accession to the ILO Convention No. 182 on the worst forms of child labour (*Sl. list SRJ* (*Međunarodni ugovori*), No. 2/03)[66] as well as the adoption of the ILO Recommendation No. 190 on the prohibition and urgent action for abolition of worst forms of child labour (*Sl. list SRJ* (*Međunarodni ugovori*), No. 2/03). Although Art. 10 of the Constitutional Charter prescribes the direct application of international treaties, as well as the precedence of international over national law (Art. 16), more effective implementation of the provisions of this Convention requires not only to harmonise national legislation with the prescribed standards, but also put in place adequate policies in this field and apply in practice all adopted standards.[67] Special attention is required with regard to rules governing care for minors and victims of trafficking in human beings.[68]

4.4.6. Forced Labour

Slavery in all its forms should be distinguished from forced or compulsory labour. The former primarily refer to the position and living conditions of a human being, whereas the latter is a much larger concept that encompasses every work done under threat or punishment.[69] Article 6 (1) of the ICESCR prescribes that:

> The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work

65 Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (*Sl. list SRJ (Međunarodni ugovori)*, No. 7/02), which supplements the UN Convention on the Rights of the Child (*Sl. list SRJ (Međunarodni ugovori)*, No. 15/90).

66 This Convention pertains to all persons under the age of 18 (Art. 2) and binds states parties to undertake urgent measures to ensure the prohibition and abolition of the most serious forms of child labour (Art. 1) such as all forms of slavery and conditions akin to slavery (sale and trafficking in children, debt slavery and servitude and forced or compulsory labour, including forcible or compulsory recruitment of children for use in armed conflicts), using, purchasing, acquiring or offering a child for prostitution, production of pornographic materials or shows, using, purchasing or offering a child for illicit activities, as well as labour that is in its nature and the circumstances in which it is performed harmful for the health, safety or morality of children (Art. 3). (ILO Convention No. 182 on the Worst Forms of Child Labour (*Sl. list SRJ* (*Međunarodni ugovori*), No. 2/03))

67 See *On child labour,* Centar za prava deteta Beograd, 2002, p. 6.

68 See the Recommendation of the CoE Committee of Ministers to states members on protection of children against sexual exploitation (*Recommendation (2001) 16 of the CoE Committee of Ministers to member states on the protection of children against sexual exploitation* http://www.cm.coe.int/.

69 Article 2 (2) of the Convention No. 29 of the ILO, has defined forced labour as "any labour or service required from a person under threat of punishment and for which this person did not volunteer".

which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

In this sense, persons who do not work may be deprived of material compensation for work, but they must not be forced to work, meaning that there is the right, but not the obligation to work.

However, constitutions of member states do not determine what type of work shall not be considered forced labour. In some situations, nevertheless, national legislation envisages the performance of compulsory service or labour.[70] These situations are similar to those envisaged in Art. 8 (3.c) of the ICCPR.

Art. 8 (3.b) of the ICCPR prescribes that prohibition of forced or compulsory labour cannot be interpreted as prohibition of execution of forced labour sanctions pronounced by the competent court. Accordingly, the HR Charter governs the work obligation of lawfully convicted persons, while the CPC prescribes that the detainee can work within prison compound on certain jobs only voluntarily, at his own request and that for such work he should be given compensation prescribed by the prison warden (Art. 149 (5) CPC).

With regard to labour of convicted persons, the European Court of Human Rights, in the case of *De Wilde, Ooms, Versyp v. Belgium* (App. No. 2832/66 (1971)) ruled that convict labour that did not contain elements of rehabilitation was not in accordance with Article 4 (2) of the ECHR. In the provisions on work obligation of convicts, the Montenegrin Act on Execution of Criminal Sanctions (Art. 37–41, *Sl. list RCG*, Nos. 25/94, 29/94) and Serbian Act on Execution of Criminal Sanctions (Art. 76–89, *Sl. glasnik RS*, Nos. 16/97, 34/01) emphasise the rehabilitation element of work performed by convicted persons. Relevant provisions of national legislation have in that respect been harmonised with international standards.

The Constitutional Charter does not prescribe general compulsory military service.[71] The Yugoslav Army Act (*Sl. list SRJ* No. 37/02) in its part on military service sets that Yugoslav citizents join Army on the basis of a authorised body decision on direction to the Army *in accordance with compulsory military service* (italics added) or on the basis of decision of acceptance in military service, meaning military school (Art. 14). Obligation provided by the Yugoslav Army Act is not considered compulsory compulsory,[72] only if it is of "a pure military characher" (Art. 2 (2.a) Convention ILO No. 29 on compulsory labour).

70 See Art. 149 (5), Criminal Proceedings Code; Art. 14, Yugoslav Army Act.

71 On conscientious objection see more in 4.8.

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

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

With regard to this, the ICCPR prohibits the derogation of paragraphs 1 and 2 of Article 8 related to prohibition of slavery and servitude, but not the provisions of paragraph 3 of the same article dealing with the prohibition of forced or compulsory labour, as well as situations when work of service are not considered compulsory or forced, given that such situations are neither of permanent or continual nature (Art. 4 (2)). In keeping with this is the Article 13 of the HR Charter, which envisages situations that shall not be considered forced labour and as such encompasses the performance of work or service in accordance with law required by situations of emergency.

However, by failing to precisely determine the duration of the compulsory work obligation in the Act on Defence space was created to arbitrarily determine the duration of compulsory work obligation during the state of war, which is a deviation from international standards. This Act should be harmonised with the ILO Convention No. 29 on Forced Labour, which in its Article 12 (1) describes the maximum period of 60 days in a 12-month period as time during which a person can be due to perform compulsory labour.[73]

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

As to usual civic obligations, free legal aid is secured (Art. 17 (2), Federal Act on Advocate, Art. 71, CPC), which is in keeping with the standard set in Article 8 (3.c.iv).[74]

73 In paragraph 2 of the same article, the Convention indirectly indicates that labour defined in Art. 1 shall be considered as an exception from the prohibition of forced labour, since it prescribes that each worker should obtain a certificate declaring the period during which he/she was subject to compulsory labour.

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

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

Article 9, ICCPR:

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

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

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

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

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

Article 5, ECHR:

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

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

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

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

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

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

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

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

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

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

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

4.5.1. Introductory Remarks

The right to the liberty and security of the person was among those whose protection by law and the prevailing practice was the most controversial in the Yugoslav legal system until 2001. Almost the entire body of legislation governing this field, in particular the federal CPC and the Serbian and Montenegrin internal affairs acts, required extensive revision or even adoption of new laws. Though the Federal Constitutional Court in late 2000 and in 2001 did away with a number of unconstitutional provisions, this was not sufficient to establish a legal system that could effectively combat crime and, at the same time, provide strong procedural guarantees of human rights. The new CPC was enacted on 26 December 2001 (*Sl. list SRJ*, No. 70/01) and, being a systemic law, entered into effect after a *vacatio legis* of three months, that is, in March 2002.

However, this CPC is not applied in Montenegro. Namely, since adoption of the Resolution on Protection of Rights and Interests of the Montenegro and its

Citizens of 2000 (*Sl. list RCG*, No. 37/00),[75] Montenegro ceased to apply laws and other regulations that have afterwards been adopted on the (then) federal level. Thereby the new CPC, particularly important for human rights aspect, is not applied in Montenegro. The adoption of Montenegrin CPC was announced for 2003, however until the conclusion of this Report, the Montenegrin Parliament has not adopted it.[76]

In this Report we shall analyse only the CPC adopted in 2001. For the analysis of the CPC applied in Montenegro, see *Human Rights in Yugoslavia 1998, 1999, 2000, and 2001.*

4.5.2. Right to Liberty and Security of Person

4.5.2.1. Prohibition of arbitrary arrest and detention – The intent of the ICCPR's Article 9 is to provide procedural guarantees against arbitrary arrest and detention. State parties have an obligation to define precisely when arrest is lawful, and to provide for judicial review to determine whether or not this is the case. The Human Rights Committee has interpreted the article as also guaranteeing the right to personal safety, under which states are obliged to take "reasonable and appropriate" measures to protect every individual from injury by others (see *Delgado Paéz v. Columbia*, No. 195/1985, para. 5.5).

Constitutional documents in Serbia and Montenegro guarantee the right to personal liberty (Art. 14, HR Charter; Art. 22, Montenegrin Constitution; Art. 15, Serbian Constitution). According to the HR Charter "everyone shall have the right to personal liberty and security" (Art. 14). This provision contains a more precise definition compared to the previous Federal Constitution where only the right to personal liberty was mentioned, but not the right to security. The Montenegrin Constitution (Art. 20 (2)) also guarantees the right to "security of person", whereas the Serbian Constitution does not contain such provision.

The ICCPR's requirement that arrest and detention be lawful and its prohibition of arbitrariness does not only relate to criminal proceedings; it includes all cases in which a person's freedom is restricted, e.g. due to mental illness, vagrancy, alcohol or drug addiction, and the like. The constitutions in Serbia and Montenegro use two terms: "detention" and "custody," with the latter always relating to criminal cases[77] and the former to all other forms of detention. The Charter rectifies the shortfall of the former Federal Constitution, which had in some provisions inconsequently used the terms "person deprived of liberty" and "arrested person". Na-

75 This resolution was declared unconstitutional by the Federal Constitutional Court in 2001; however, this decision was not adhered to in Montenegro.

76 Meanwhile new constitutional documents of the State Union of Serbia and Montenegro have been adopted, and this area was ascribed to the jurisdiction of member states.

77 Thus Art. 16 of the Serbian Constitution and Art. 23 of the Montenegrin Constitution states that "A person suspected of having committed a criminal offence may be taken into custody and detained".

mely, in Article 16 (3) the HR Charter states that "everyone shall have the right to defence, including the right to take a defence counsel of his own choice before the court or other authority competent for conducting proceedings, right to undisturbed communication with his/her defence counsel and right to have enough time and conditions for the preparation of his/her defence". Furthermore, a clear distinction is made between rules and guarantees related only to criminal and misdemeanour proceedings (Art. 15), which was seen as a deficiency in the former Federal Constitution. For instance, the Article 23 of the Federal Constitution dealing with deprivation of liberty, guaranteed in some of provisions the right to person deprived of liberty to "choose his own defence counsel" (para. 5) or that he must be "informed of his right to remain silent" (para. 4), which could lead to the conclusion that provisions on deprivation of liberty relate only to criminal cases. The Montenegrin Constitution still contains deficiencies in distinguishing between the concepts of person deprived of liberty and arrested person (Art. 22).

The HR Charter prescribes that "no one may be arbitrary arrested. Arrest shall be permissible only in the cases and the way foreseen by the State Union Law or laws of the Member States" (Art. 14 (2)). Member states are not prohibited to regulate cases and procedure for deprivation of liberty, as was the case in FRY. This solution, along with some others, is the consequence of the new organisation of the union introducing a new division of jurisdictions involving significantly higher authority of the member states.

With regard to grounds for custody there is a discrepancy between the Serbian Constitution and the HR Charter, which in Article 15 (3) sets that a person may be detained only if he/she is "reasonably suspected of having committed a criminal offence" and "if so necessary for the purposes of conducting criminal proceedings".

On the other hand, the Serbian Constitution in Article 16 foresees the possibility of an individual being taken into custody if "necessary to ensure public safety." Similar provision is contained in the former CPC (Art. 191), but even before the enactment of the new Code this rule has been put out of force by a Federal Constitutional Court decision (*Sl. list SRJ,* No. 71/00). The CPC in Article 142 states reasons for assigning detention:

> (1) Detention shall be ordered:
>
> 1) against persons suspected of having committed a criminal offence for which the prescribed penalty is forty years imprisonment. If circumstances should indicate that this is the case for which the law envisages that a more lenient sentence could be passed, it is not necessary to order detention.
>
> 2) Against a defendant who has been sentenced to a five-year in prison or more by a first-instance court, if the defendant is already in custody, which is justified by the manner in which the crime was perpetrated or by other particularly serious circumstances regarding the offence.

(2) If there is reasonable doubt that a person has committed a criminal offence and if there are no conditions for detention as in paragraph 1 of this Article, with the view of unobstructed criminal procedure, detention can be ordered for to such person:

1) if he is in hiding or if his identity cannot be established, or if there are other circumstances warranting risk of flight;

2) if there are circumstances indicating that he might destroy, conceal, alter or forge evidence or traces of the criminal offence or if special circumstances indicate that he might interfere the procedure by influencing witnesses, accomplices or those who have harboured him;

3) if specific circumstances indicate that he might repeat the offence or complete the attempted offence, or that he shall perpetrate the offence he is threatening with;

4) if duly informed defendant obviously refuses to attend the main hearing at the trial.

The institute of compulsory detention envisaged by the Article 142 (1) of the CPC is not in keeping with European standards. Namely, the jurisprudence of the European Court of Human Rights reiterated that the severity of penalties cannot be the only criteria for ordering compulsory detention, but that other factors are also necessary. Also, according to the jurisprudence of this Court, with the passage of time the initial reasons are no longer sufficient by themselves, but the detention needs to be reviewed in the light of new circumstances (see *Letellier v. France*, ECtHR, App. No. 12369/86 (1991); *Caballero v. United Kingdom*, ECtHR, App. No. 32819/96 (2000)).

The Constitutional Charter envisages that detention can be ordered only by decision of the competent court (Art. 15 (3)), and not by "decision of another competent body", as was permitted by the 1974 Constitution. The law that has been in force until 2002 allowed the possibility of detention being assigned by the police (Art. 196). However, by the end of 2002, this CPC provision has been declared unconstitutional by the Federal Constitutional Court (*Sl. list SRJ*, No. 71/00).

The CPC definitely sets the rule that only a competent court can decide on detention and only in cases prescribed by the Code and under reservation envisaged by the general provision that this could be done: "only if the same purpose cannot be achieved by other means" (Arts. 141 and 142). The decision on detention is served to the person concerned at the time of deprivation of liberty or at the latest 24 hours from the moment of deprivation of liberty or appearance before the investigating judge. The detained person can appeal against this decision. Appeal does not delay execution (Art. 143 (3 and 4)). Appeal must be dealt with within 48 hours. The duration of detention must be restricted to the shortest possible time (Art. 16 (3)). The problem in this regard arises in relation to the right of the person

deprived of liberty to be promptly informed about the reasons for detention and grounds for charges against him (Art. 5 (2), ECHR). Namely, Article 143 (3) of the CPC says that "decision on detention is served to the person concerned at the time of deprivation of liberty, or at the latest 24 hours after the moment of deprivation of liberty or appearance before the investigating judge." Whether the 24-hour deadline is in keeping with the requirement of "promptness" depends primarily on whether information given to the person deprived of liberty at the time of detention suffices for him to understand the reasons for which he has been deprived of liberty.[78]

The CPC introduces the possibility of a suspect being detained by the internal affairs bodies. The CPC itself states that this is an extraordinary measure to be applied exceptionally (Art. 229). The suspect against whom this measure is applied enjoys the full scope of rights belonging to defendants, especially the right to legal counsel. The body of the Ministry of interior must immediately or within maximum 2 hours issue and serve the decision on detention. Duration of detention is limited to 48 hours *maximum*. The investigating judge must be informed about this immediately, with the possibility to request that the detained person be brought to him promptly (Art. 229 (4)). The detained person can lodge a complaint against the decision on detention. The investigating judge must decide on this appeal within 6 hours. Nevertheless, the most important guarantee for the suspect's position in this situation is the impossibility of being interrogated without the presence of counsel. Namely, the questioning of suspect shall be postponed until the arrival of counsel, up to eight hours maximum. If the presence of counsel has not been ensured until then, police shall either release the detainee immediately or bring him/her before the competent investigating judge (Art. 229 (6)).

Some provisions of the Serbian Act on Misdemeanours[79] that envisage the detention of persons seem not to be in accordance with the European Convention, namely Article 5 (1.c and 4). Primarily, pursuant to Article 5 (1.c), detention can be ordered if there is reasonable suspicion that a person has committed a criminal offence. However, misdemeanours represent a specific form of offences, which in certain situations can contain elements of a criminal offence, but cannot generally be considered as such. In addition, the body that decides on detention cannot be considered as "the competent judicial body" in terms of Article 5 (4) of the ECHR.[80]

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

79 The former Federal Act on Misdemeanours also contained similar provisions. Regulation of this area is now in the jurisdiction of member states. This Act can be applied only in areas not regulated by statute of member states and to the extent that it is in accordance with the Charter (Art. 20, Act on Implementation of the Constitutional Charter). Many provisions of this Act are not in accordance with the HR Charter and therefore should not be applicable. See more 1.2.

80 See more in 4.6.2.

Finally, the Convention does not foresee detention for the purposes of establishing person's residence even in the case of a criminal offence, which has been envisaged by Article 185 of the Act.[81]

The Montenegrin Act on Misdemeanours refers to the CPC in the part dealing with provisions on detention of persons.

4.5.2.2. Right to be informed of reasons for arrest and charges – Paragraph 2 of the ICCPR's Article 9 states that a person who is arrested shall be informed, at "the time of his arrest," of the reasons for his arrest and "promptly" informed of the charges against him. The HR Charter accepts the formulation on the rights of person deprived of liberty to be informed immediately and "in the language he/she understands" about the reasons for deprivation of liberty or the charges brought against him/her, as well as about his/her rights (Article 14 (4)). This precisely formulated guarantee has been taken from the Article 5 (2) of the ECHR. The Montenegrin Constitution lays down that a person taken into custody "must be informed immediately and in his mother tongue or in a language he understands of the reasons for his arrest..." (Art. 22 (2), Montenegrin Constitution). This formulation could be considered in accordance with the ECHR standards, because it states that the person deprived of liberty must be informed about the reasons for arrest and about the charges "in the language he/she understands". The Serbian Constitution, however, does not offer this guarantee. The Montenegrin Constitution provides that a detained person "must be given an explanation for his arrest in writing at the moment of arrest or no later than 24 hours from the time of arrest" (Art. 23 (2), Montenegrin Constitution), whereas the Serbian Constitution and the HR Charter do not contain such provision.

With regard to the right of an arrested person to be informed promptly of the charges against him, the provisions of the CPC are in accordance with international standards as they prescribe that the investigating judge must inform the arrested person of the charges and evidence against him before proceeding to question him for the first time (Art. 4 (1)), which means that the investigating judge is obliged to inform the defendant before the questioning "what he has been charged with, grounds for suspicion against him, as well as that he is not obliged to state his own defence nor respond to questions, after which he shall be asked to state his own defence if he so wishes" (Art. 89 (2)). If the defendant should request, he shall be allowed to read the criminal charges filed against him, as well as the petition for inquiry, before the first questioning (Art. 89 (3)).

4.5.2.3. Right to be brought promptly before a judge and to trial within a reasonable time – This right applies only in criminal cases and guarantees that an arrested person will be brought promptly before "a judge or other officer authorised

81 See *Compatibility of Yugoslav law with requirements of the ECHR* , CoE, Federal Ministry of Justice, Belgrade, 2002, p. 90.

by law to exercise judicial power" and that he will be tried within a reasonable time or be released. Though it is hard to determine what "promptly" means, it would seem that this period should not exceed four days even in exceptional circumstances, and should be much shorter in normal circumstances (see *Brogan v. United Kingdom*, ECtHR, A 145, 1978, p. 33). "Other officer authorised by law to exercise judicial power" means an impartial organ which is also independent, primarily with respect to executive bodies and the prosecutor, and which is empowered to either release the arrested person or order him remanded to custody (see *Schiesser v. Switzerland*, ECtHR, A 34, 1991, p. 31).

Under SaM law, custody may be ordered by an investigating judge or a judicial panel, acting either *ex officio* or at the request of the prosecutor. An investigating judge may be taken to mean "a judge or other officer authorised by law to exercise judicial power" (see *mutatis mutandis Bezicheri v. Italy*, ECtHR, A 164, 1989, p. 20).

Pursuant to Article 15 (2) of the HR Charter, "any arrested person shall be brought to the competent court promptly, no longer than within 48 hours. Otherwise, he/she shall be released". The CPC has a very clear systematisation: the person whose generally guaranteed rights and freedoms are restricted is provided with an overall guarantee that this restriction shall occur only in justified cases; these guarantees are then further elaborated in relevant places. In cases of appearance before the court in the shortest possible time and duration of the proceedings, Artide 16 first states that the defendant has the right to be brought before the court and be tried promptly. The court is *obliged* to proceed without undue delay and prevent all possible abuse of law.

Authorised persons of internal affairs bodies can deprive a person of liberty if there are grounds stated in Article 142, but nevertheless have the obligation to promptly bring this person before an investigating judge. If the bringing of person before the investigating judge has taken longer than eight hours, this delay must be explained to the judge. The investigating judge shall make official record of this. The record shall contain the statement of the person deprived of liberty about the time and venue of arrest (Art. 227 (1 to 3)).

In accordance with international standards and pursuant to the constitutional provisions requiring that "the length of detention must be of the shortest possible duration" (Art. 15 (4), HR Charter and Art. 23 (3), Montenegrin Constitution; and "shortest period necessary" in Art. 16 (2), Serbian Constitution), the CPC introduced the deadlines described above.

Both Serbian and Montenegrin constitutions prescribe that detention can last for maximum three months on the basis of a decision by competent first instance court and that it can be extended by a decision of a superior court by another three months. The period starts running on the day of arrest and, "if by the end of this period [three plus three months] charges have not been brought, the suspect shall

be released (Art. 16 (3), Serbian Constitution; Art. 23 (4), Montenegrin Constitution). The length of custody in regular proceedings is regulated in much the same way, only in more detail, by the CPC (Art. 197), while the period of custody pending indictment in summary proceedings is limited to eight days without the possibility of extension (Art. 436 (2)) and after the indictment has been filed general rules apply (see above, Art. 146). In proceedings against minors, detention is an exceptional measure and is limited to three months during pre-trial procedure, and after that to a maximum of one year (Art. 486 (2 and 3)).

A person taken into custody has the right to stand trial within reasonable period of time or otherwise be released. In SaM law the duration of detention is limited in the following way: on the bases of a decision of investigating judge detention may last for a maximum of one month, and on the basis of a decision by judicial council it can be extended for another two month maximum. The Supreme Court's judicial council (in cases of criminal offences carrying a penalty over 5 years in prison or longer) can extend this period for another three months maximum. If by end of these deadlines no indictment has been made, the detained person shall be released (Art. 144). The improvement of the position of the defendant is contained in the CPC provisions that detention can last for a maximum of two years after the indictment. If this deadline should expire without a sentence by first-instance court, the defendant shall be released (Art. 146 (3)). After the sentencing, the detention may last up to one additional year maximum. If within this period a court should abolish the decision in the first instance, detention can be continued for another year (Art. 146 (4)).

4.5.2.4. Right to appeal to court against deprivation of liberty – This right is envisaged in cases when a person has been ordered taken into custody by a non-judicial body (see *De Wilde, Ooms and Versyp v. Belgium*, ECtHR, A 12, 1971, p. 76). According to the Charter, "any arrested person shall have the right to instigate proceedings by which the court shall promptly examine the lawfulness of detention and order his/her release if the detention has been found to be unlawful" (Art. 14 (6)).

Pursuant to Serbian and Montenegrin constitutions (Art. 12 (2), 15 and 22 (2), Serbian Constitution; Art. 17 (2) and 22, Montenegrin Constitution) in other cases of deprivation of liberty the right to challenge the lawfulness of the deprivation of liberty is not provided. However, everyone is guaranteed the right to legal remedy against the decision resolving his right or legally based interest, but the right to judicial examination of the lawfulness of deprivation of liberty guaranteed by Article 9 (4) of the ICCPR cannot be identified with the right to complaint in case of violation of a specific right. Republican Internal Affairs Acts foresee that the person deprived of liberty in accordance with provisions of these acts can file a complaint to the Minister (Art. 16, Montenegrin Act; Art. 12, Serbian Act), but do not mention

the right to appeal to the competent court, which is not in accordance with international standards.

Member states Acts on Non-Contentious Proceedure (ANCP) (*Sl. glasnik RS,* Nos. 25/82, 48/88; *Sl. list SRCG,* Nos. 34/86, 5/87) provide the measure of detention in a neuropsychiatry institution. It is applied to persons who due to the nature of their illness need to have restricted freedom of movement and communication with the outside world (Art. 45 (1), Serbian ANCP; Art. 48 (1), Montenegrin ANCP). While the former Federal Constitution was in force, this provision was unconstitutional due to the clause that deprivation of liberty is permitted only in cases defined by the federal statute (Art. 23 (2), Federal Constitution). Baring in mind the permission in Article 14 (2) of the HR Charter, pursuant to which the conditions for deprivation of liberty can be prescribed by the statute of a member state, this formal element of unconstitutionality no longer exists in the acts on non-contentious proceedings.

As concerns the proceedings in this non-contentious matter, the courts in Serbia can issue a decision ordering that a person against whom the proceedings are conducted for deprivation of civil capacity can be placed in an appropriate medical institution temporarily but no longer than three months, if according to the doctor's opinion this would be necessary in order to determine his/her mental state, unless by doing so harmful consequences for the person's health could ensue (Art. 38 (3), Serbian ANCP). A complaint against such court decision can be filed by the person against whom the proceedings are being conducted, as well as his/her guardian or temporary representative within three days of the receipt of copy of the decision (Art. 39 (1 and 2)). The same provision is contained in the respective artide of the Montenegrin Act on non-contentious proceedings. The very procedure foreseen by these acts, as well as the procedural guarantees for the person in question are generally harmonised with international standards.

4.5.2.5. Right to compensation for unlawful deprivation of liberty – The HR Charter prescribes that anyone "who has been arrested unlawfully shall have the right to compensation" (Art. 14 (8)). The Serbian and Montenegrin Constitution prescribes that a wrongfully convicted or wrongfully detained person shall be entitled to rehabilitation and to compensation for damages from the state, and to other rights as envisaged by federal law (Art. 23 (4), Serbian Constitution; Art. 25 (4) Montenegrin Constitution). They contain a more elaborate formulation encompassing the right to rehabilitation (Art. 25 (4), Montenegrin Constitution; Art. 23 (4), Serbian Constitution). The Serbian Constitutions furthermore states that "everyone shall be entitled to compensation for damages sustained as a result of unlawful or improper actions of an official or state agency or organisation..." (Art. 25 (1), Serbian Constitution). The Montenegrin Constitution does not contain a similar provision.

A person unlawfully deprived of liberty has the right to rehabilitation, compensation of damages from the state, as well as other rights prescribed by law (Art. 14 CPC). Right to compensation of damages belongs to persons unlawfully convicted under conditions stated in Article 556 of the CPC, as well as to a person who has been detained without criminal proceedings being instituted or if the latter has been discontinued by final decision, or if the person has been released by a final judgement or the charges have been rejected, if such person has spent longer time in custody than the duration of penalty for the offence he has been convicted for.

The compensation procedure consists of two stages: administrative and judicial (civil law). A person who has been deprived of his liberty first submits a request to the administrative body concerned seeking "an agreement on the existence of damages and the kind and level of compensation" (Art. 557 (2)). If the request is dismissed or the administrative body fails to decide on it within three months of the date of its submission, the injured party may sue for compensation. If only a part of the request is settled, the injured party may sue for the remainder of the damages he considers he is entitled to (Art. 558 (1)).

4.5.3. Treatment of Persons Deprived of Their Liberty

Article 10, ICCPR:

> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
>
> 2. a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
>
> b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
>
> 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

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

According to the HR Charter any arrested person shall be treated humanely and with respect for his/her dignity (Art. 14 (7)). Constitutions of member states have a somewhat wider formulation by which the respect of human treatment and respect of dignity is guaranteed in "criminal and all other procedure, in case of

deprivation or restriction of liberty, as well as during execution of criminal sanctions" (Art. 26 (1), Serbian Constitution; Art. 24 (1), Montenegrin Constitution).

The Federal CC/Basic CC prescribes that a person convicted of a criminal offence may be deprived of some rights or have those rights restricted while serving the sentence, but only to the extent required by the nature of the sentence and in a manner that ensures respect for his personality and his human dignity (Art. 6, Federal CC/Basic CC; see *mutatis mutandis* Art. 6 (2)), Serbian CC). It is prohibited to "use violence against a person deprived of liberty and person whose liberty has been restricted, as well as to extort a confession or other statement from the defendant or other person taking part in the proceedings" (Art. 16, CPC). Further, the defendant must be questioned in a civil manner and with full respect of his personality (Art. 89 (7))[82] and it is forbidden to apply force, threat, deceit, extortion, exhaustion or other similar measures against him (Art. 89 (8)). During detention it is prohibited to offend the personality and dignity of the defendant. Among guarantees for respect of dignity is also the provision contained in Article 79 that only a female person can search another female person and that witnesses to this can only be female.

The Montenegrin Act on Enforcement of Penal Sanctions (AEPS, *Sl. list RCG*, No. 25/94) prescribes that convicted persons must be "treated humanely and in a manner that ensures respect for their personality and dignity and protects their physical and psychological health" (Art. 15 (1)). A similar provision exists with respect to juvenile offenders, with the added provision that they must be treated "in a manner appropriate to their physical and psychological development" (Art. 107 (2)).

The Serbian AEPS (*Sl. glasnik RS*, No. 16/97) states that "everyone shall respect the dignity of a convicted person" and that his physical or mental health may not be jeopardised (Art. 56). A juvenile sentenced to a reform institution or a juvenile prison has the same rights as an adult convict, and these may be augmented (Art. 218 (1)). Unfortunately and unlike the Montenegrin AEPS (Art. 107 (2)), the Serbian Act fails to afford special protection to juveniles subjected to disciplinary measures or stricter supervision. Finally, under the Serbian AEPS, a person committed to a psychiatric institution has the same rights as those serving prison sentences, unless his treatment requires otherwise (Art. 191).

The Serbian AEPS requires prison authorities to inform convicts of their rights and obligations and that "the text ... of the law and prison rules shall be accessible to the convict for the duration of his imprisonment" (Art. 51 (2.3)). The rule is applied also to persons in custody, convicted juveniles, and persons commit-

82 It is interesting to note that a similar provision was incorporated in the Criminal and Judicial Procedure Code of the Kingdom of Yugoslavia in 1929, which says that the questioning sh all be conducted "with civility and kindness".

ted to psychiatric institutions (Arts. 191, 218 (1) and 314). The Montenegrin AEPS does not prescribe that convicts must have access to information on their guaranteed rights. There are no rules requiring courses on the rights of convicted persons in the training of prison service personnel.

Pursuant to the Serbian AEPS, supervision of inmates of penal institutions is performed by the Office of Penal Sanctions (Arts. 9 (1) and 346 (1)). The Ministry of Public Health monitors the standards of care provided in hospitals, psychiatric institutions and other medical services in penal institutions (Art. 353). The court that has committed a defendant to a psychiatric institution supervises the legality of the pronounced measure of compulsory psychiatric treatment and confinement (Art. 195 (1)). The implementation of the detention measure is supervised "by the president of the competent court." The competent judge visits the inmates at least once a week, with the possibility to discuss with them the living conditions and behaviour of penitentiary staff, without presence of guards. (Art. 152 (2) CPC). Pursuant to the Serbian AEPS, convicts have the right to "complain to the person supervising the work of the penitentiary facility, without the presence of prison staff and appointed persons" (Art. 103 (4)). In Montenegro, penal institutions, juvenile institutions and confinement in psychiatric institutions are supervised by the Ministry of Justice (Arts. 21, 69 and 82, Montenegrin AEPS). Supervision of correctional measures is by the social welfare agency, while the court that pronounced the measure supervises the legality of its execution (Art. 113).

The right of convicted persons to complain about the conditions in which they serve their sentences is very restricted and imprecisely defined. Under the Serbian AEPS, they may complain to the prison warden against "violation of their rights or other irregularities" (Art. 103 (1)) and, if there is no response or they are not satisfied with the response, they may submit a written complaint to the Director of the Office of Penal Sanctions (para. 3). The Serbian AEPS, however, does not prescribe the time period within which Director must examine the complaint. Even more unfavourable is the Montenegrin AEPS, which states that a convict may complain only to the head of the institution in which he is serving (Art. 34 (2)), again with no time period being set for examination of the complaint, and with no further right of appeal. Under the Serbian AEPS, all of the above is applicable also to detainees (Art. 314), juveniles in reform institutions and juvenile prisons (Art 218 (1)), and persons committed to psychiatric institutions (Art. 191). The Montenegrin AEPS is silent about the rights of these persons to lodge complaints.

4.5.3.2. Segregation of accused and convicted persons, juveniles and adults – In its Article 10 (2), the ICCPR prescribes that accused persons must be segregated from convicted persons "save in exceptional circumstances", while juveniles must always be separated from adults "and brought as speedily as possible for adjudication." The CPC lays down that convicted and accused persons must "as a rule" be segregated, while the Montenegrin (Art. 16 (4)) and Serbian AEPS (Art. 312 (1))

allow no exceptions, which is in accordance with international standards. The Serbian AEPS, however, contains the general rule that accused and convicted persons are held "in the same conditions" unless otherwise prescribed by the CPC (Art. 314), which is not in line with Article 10 (2.a.) of the ICCPR, which states that accused persons "shall be subject to separate treatment appropriate to their status as unconvicted persons."

As to detention, the CPC allows exceptions from the unconditional rule that juveniles must be segregated from adults, but only when a judge of the juvenile court assesses that the "isolation of a juvenile would be of longer duration and the possibility exists of placing him in the same room as an adult who would not have a harmful influence on him" (Art. 475). It would seem, however, that this constitutes an impermissible departure from the standard set by Article 10 (2.b.) of the ICCPR. The Montenegrin AEPS prescribes that adult and juvenile persons serving sentences of imprisonment are, as a rule, segregated (Art. 16 (3)) but fails to specify in which cases exceptions are allowed. Only the Serbian AEPS allows no exceptions in this regard and even prescribes that adults sentenced to juvenile prisons and juveniles who attain their majority while serving are to be held in separate sections of the institution (Art. 282).

4.5.3.3. Correctional/penitentiary system – The basic aim of the treatment of prisoners is, under the ICCPR, their reformation and social rehabilitation. The Federal CC states that the purpose of penal sanctions is to preclude an offender from committing new crimes, his re-socialisation, deterring others from crime, strengthening morals and developing social responsibility and civic discipline. The Montenegrin AEPS states that the purpose of a prison sentence is the "re-socialisation" of the convicted person, while the Serbian AEPS does not specify the aim of penal sanctions.

4.5.4. Special Provisions in Cases of Suppressing Organised Crime

In June 2002, the Serbian Parliament adopted the Act on Organisation and Jurisdiction of State Bodies in Suppressing Organised Crime (*Sl. glasnik RS,* No. 42/02). The initial text of the Act contained only the provision on special organisation of some parts of the state bodies in charge of suppressing crime, to meet the needs of combating organised crime. Specific aspects of the procedure in prosecuting organised crime were foreseen only through amendments to the CPC. However, during 2003, after the assassination of the Serbian Prime Minister, significant amendments were made to this Act, so it now contains provisions interesting from the aspect of the right to freedom and security of person and the right to fair trial.

The amendments to the Act of 11 April 2003 (*Sl. glasnik RS,* No. 39/03) have introduced the section IIa (Art. 15a to 15l) entitled Special jurisdiction of competent state bodies in criminal procedure for the organised crime offences. The

constitutionality of some of these articles (15v–15d) has been contested before the Serbian Constitutional Court. Acting on this initiative, the Serbian Constitutional Court on 5 June 2003 has issued a provisional measures on suspension of application of certain until rendering a final decision (*Sl. glasnik RS,* No. 60/03). Somewhat later, the parliament has adopted the amendments to the Act, thereby removing these provisions from the legal system. Nevertheless, given that they were in force for the period of two months, they shall be highlighted in this report.

Provisions of this Act have introduced the institute of preventive detention. With the aim of gathering information and evidence on organised crime, the authorised official can, without a court order, forcibly bring and preventively detain in official premises a person who can provide information or indicate possible evidence. This detention can last for a maximum of 24 hours.

Exceptionally, a person may be detained in the Special Detention Unit if the gathered information and evidence justify the assumption that the person would obstruct or prevent actions of interest for the criminal procedure (Art. 15v (1)). Special prosecutor or the prosecutor designated by him/her shall decide on extending the detention within 12 hours (Art. 15v (3)). The article enabling this extension has been deleted by the amendments of July 2003 (*Sl. glasnik RS,* No. 67/03).

A detained person must immediately be informed about the reason for detention, the right to attorney and the right to inform family and other persons (Art. 15b (1 and 2)). The detained person must not be interrogated or requested to provide information unrelated to the reasons for detention. However, if required by reasons of urgency, the person held in preventive detention can be questioned in terms of CPC with the obligatory presence of an attorney. The most important deviation from the general regime of the CPC is the provision pursuant to which in such situation the *consent* of the person to give a statement is not needed, which is generally required by Article 226 (9) of the CPC (Art. 15b (4)). The detained person has the right throughout the detention period to file a complaint on which the Republic public prosecutor must decide within 72 hours.

Reasonable suspicion that the person has committed a criminal offence with elements of organised crime constitutes sufficient grounds for detaining such person for the period of 30 days. The decision is rendered by the competent official. For particularly justifiable reasons and on the justified proposal of the authorised official, the Minister of Interior can decide that detention be extended for another 30 days (Art. 15g (1 and 2)). This article was also deleted.

Furthermore, this Act introduced bases for ordering detention outside those stipulated in Article 142 of the CPC. Namely, if so necessary to apprehend a member of an organised crime group, the investigating judge can order detention for the period of three months, on the proposal of the Special Prosecutor, against such person if the information and intelligence obtained by the Service indicate that this person is a member of such group. If he disagrees with the Special prosecutor,

the investigating judge must submit his decision to the Chairman of the special section of the District court and clearly state the reasons for such decision (Art. 15d). The Supreme Court can, on the proposal by the prosecutor or the chairman of the Special section, extend the detention for another three months. This article was also deleted by mentioned amendments.

The right to review files and records is granted to the defence after the decision on conducting the investigation has been rendered (Art.15z (1)). The defence cannot obtain this right earlier if the suspect has been questioned in accordance with provisions regulating the interrogation of suspects (which is envisaged in Art. 74 (1) CPC). However, this right can be postponed by a special decision of the investigating judge, until the completion of interrogation of all persons encompassed by the request to conduct investigation (Art. 15z (2)). Against this decision a complaint can be lodged to the chairman of the Special section, who shall decide on it within 48 hours (Art. 15z (3)).

The indictment must be issued before the expiration of the detention period. In case the indictment has not been issued, the accused shall be released and the Special prosecutor must render a decision on further criminal prosecution within 30 days. After the indictment the detention may last for a maximum of two years and within this period a first instance judgment must be passed. After the first instance judgment the detention may last for another year (Art. 15e).

4.6. Right to a Fair Trial

Article 14, ICCPR:

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

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

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

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

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

(c) To be tried without undue delay;

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

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

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

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

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

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

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

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

Article 6, ECHR:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where

the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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

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

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

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

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

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

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

Article 7, ECHR:

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

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

Protocol No. 7 to the ECHR:

Article 2

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

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person

concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Article 3

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

Article 4

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

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

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

4.6.1. Introduction

Fundamental changes in the current constitutional and legal system in former FRY have also affected the judicial system, particularly the system of courts and their jurisdiction. In contrast to the former federal state, the jurisdiction of the new state union have been significantly reduced; the judicial system of the union has been organised accordingly. Under the Constitutional Charter there is only one judicial instance in the common judiciary of Serbia and Montenegro. The Court of Serbia and Montenegro consists of an equal number of judges from each member state. Justices of the Court of Serbia and Montenegro are elected by the Parliament of Serbia and Montenegro upon the proposal of the Council of Ministers, for the period of six years (Art. 45, Constitutional Charter). From the perspective of human rights protection, particularly important is Article 46 of the Constitutional Charter, under which this court shall consider "appeals filed by citizens if no other legal remedies have been stipulated, if an institution of Serbia and Montenegro has interfered with the rights and freedoms that are guaranteed to them by the Constitutional Charter".

Although the Court of Serbia and Montenegro Act (*Sl. list SCG*, No. 26/03) had entered into force in June 2003, the justices have not yet been elected and the Court has not been constituted.[83] Given that it abolished the Federal Court and the Federal Constitutional Court, pending cases await the election of judges of the Court of SaM.

During 2003, in Serbia there was a delay in measures to reorganise the judicial system and to improve its effectiveness. Namely, the deadline for establishing courts of appeal, as the new type of courts with general jurisdiction, and the Administrative Court was set for 1 January 2004 (the initial deadline was 1 October 2003, but it was extended). Since these courts have not been established until 29 December 2003, the Serbian Constitutional Court suspended the application of provisions on establishing these courts in order to prevent the infringement of citizens' rights to appeal to a higher judicial instance (News *B92*, www.b92.net, 29 December 2003).

The Montenegrin Courts Act (*Sl. list SCG*, No. 5/02) also provides the establishment of the Court of Appeal and the Administrative Court, setting a deadline on 1 July 2004 for the completion of this process (Art. 132).

On military judiciary see more in section 4.6.2.

4.6.2. Independence and Impartiality of Courts

The Serbian and Montenegrin Constitutions in their respective Articles 96 (1) and 100 lay down that courts of law are independent and bound only by the Constitution, law and other general enactments. The principle of the separation of legislative, executive and judicial powers is embodied in all three constitutions of Serbia and Montenegro (Art. 47 (2), Constitutional Charter; Art. 9, Serbian Constitution; Art. 5, Montenegrin Constitution). The independence of courts, however, depends not so much on constitutional provisions. It is exactly in the field of practice that one can judge whether the judiciary is independent and impartial, what type and amount of influence is exerted by the executive powers, as well as to what extent the right of citizens to fair trial has been ensured.

Laws regulating the work, organisational structure of courts and the status of judges were extensively amended in the course of 2001. The Serbian Parliament passed five laws in this area: the Act on the Organisational Structure of Courts, Judges Act, High Judicial Council Act; the Public Prosecutor's Office Act, and Act on the Seats and Districts of Courts and Public Prosecutor's Offices (*Sl. glasnik RS*, No. 63/01). With the exception of the High Judicial Council Act, all these laws entered into effect on 1 March 2002.

83 The Act on Implementation of the Constitutional Charter prescribes that all institutions shall be constituted and established within 30 from the effective date of the Constitutional Charter (Art. 3).

Judges have tenure of office (Arts. 101 (1) and 126 (2), Serbian Constitution; Art. 2 (1), Serbian Judges Act; Art. 103 (1), Montenegrin Constitution); justices of the Court of Serbia and Montenegro are elected for the period of six years (Art. 47 (2), Constitutional Charter), while justices of the Montenegrin Constitutional Court (Art. 111 (2), Montenegrin Constitution) are appointed for nine-year terms. Judges may not be transferred without their consent (Art. 101 (5), Serbian Constitution; Arts. 2 (2) and 16, Serbian Judges Act; Art. 103 (4), Montenegrin Constitution; Art. 27, Montenegrin Courts Act). The Act on Changes and Amendments to the Judges Act introduces new grounds for the dismissal of judges. Namely, it shall be considered that a judge has performed his/her duty in bad faith if in exercising his/her powers or acting on the basis of these powers he/she has participated in altering the electoral will of citizens, political or show trials, or has acted *mala fide* thus grossly violating human rights guaranteed by the Constitution, law and international treaties. This is the so-called lustration (vetting) provision. Besides this intervention of the legislator in the Judges Act, during 2003 the Responsibility for Human Rights Violations Act has entered into force (hereinafter: Lustration Act, *Sl. glasnik RS,* Nos. 58/03, 61/03). Pursuant to this Act, persons against whom the procedure of examining the responsibility for human rights violations is conducted include: president and justices of the Serbian Constitutional Court, presidents and judges of general and special courts, members of the High Judicial Council, public prosecutors and their deputies, heads of courts for misdemeanours and magistrates (Art. 10 (1.12)). Bodies and organisations competent for nomination, election, appointment or employment of the said persons are bound to submit a request for examining the potential violations of human rights to the Committee on Lustration without delay (Art. 14 (2)). If the person for whom the Committee or the Supreme Court have established the responsibility for violation of human rights has not withdrawn from his/her position or renounced the candidacy within 30 days from the public announcement of such decision, cannot hold or continue to hold public office for the period of five years from the public announcement by the Committee (Art. 33 (1)). The person for whom the measure of prohibition to hold public office has been issued has the right to return to his/her former employer within 15 days from the public announcement of such measure. If his/her employment had been terminated earlier or if he/she had not been employed, this person shall have the same rights as employees laid off as redundant (Art. 33 (4)).

Serbian Judges Act retains the possibility of transferring or reassigning judges to another court but improves their position in these situations. Decisions on reassignment are taken by the Supreme Court President, and those on transfer by the High Judicial Council (Arts. 18 and 17 (3), Serbian Judges Act). The improvement is in that a decision to this effect may be taken only when the judge concerned has consented in writing (Art. 16 (1 and 3)). Judges may not hold other public office or engage in other professional activity, including prohibition to become members

of political parties (Arts. 27, 100 and 126 (4), Serbian Judges Act; Arts. 106 and 111 (5), Montenegrin Constitution; Art. 28 (1.d), Montenegrin Courts Act). Under the Montenegrin Courts Act, a judge can be transferred or reassigned to another court only exceptionally, if so necessary for the normal functioning of the judicial system and for the maximum period of six months during one calendar year. The decision on temporary transfer to another court in the area of responsibility of a higher court is issued by the president of the higher court, while the decision on transfer of the judge of a higher court to another or lower court is issued by the president of the Supreme Court (Art. 27).

Changes and amendments to the Serbian Judges Act have repealed the disputed provisions from 2002, pursuant to which the presidents of courts were deprived of their right to adjudicate during their presidency.[84]

According to the Judges Act, the mechanism for protection of the position of judges is ensured though the Grand Chamber (Art. 36). This chamber consists of nine justices of the Serbian Supreme Court, excluding its president (Art. 39 (1)).

The most significant innovation with respect to mechanisms for the protection of judges is the establishment of the Grand Chamber (Art. 36, Serbian Judges Act), which is made up of nine justices of the Serbian Supreme Court excluding the Court President (Art. 39 (1)). However, the value of this institute is greatly reduced by changes and amendments to the Act. Namely, the Grand Chamber now consists of nine judges of the Supreme Court appointed by the Parliament at the nomination by the High Judicial Council. This practically transforms the Grand Chamber into a Parliament body, thus violating the principle of separation of powers.[85] Under the new law, judges may also lodge complaints when they consider that their rights have been infringed and when no other remedy is available. These complaints are considered by the Grand Chamber, which must decide on them within eight days and notify the president of the respective court, the president of the court immediately superior, and the President of the Serbian Supreme Court of its decisions (Art. 26, Serbian Judges Act).

These provisions were amended altering the procedure for appointment of judges in 2002. Presently, in the stage of nominations it is the High Judicial Council that nominates candidates for judges, prosecutors and deputies of public prosecutors and proposes to the Parliament for election, whereas the presidents of courts are nominated by the competent Parliament committee (Art. 66 (2)). Prior to this, the Minister of Justice collects information and opinions on all proposed candidates for presidents of courts and submits them to the committee together with his opinion (Art. 65a).

84 See in *Report 2002,* I.4.6.1.
85 See Decision by the Serbian Constitutional Court, *Sl. glasnik RS,* No. 60/02.

The High Judicial Council now has five permanent members and six non-permanent members by invitation, who must be judges.

An earlier amendment was abolished pursuant to which in the High Judicial Council there were four public prosecutors besides six judges (Act on the High Judicial Council, *Sl. glasnik RS,* Nos. 39/03, 41/03). Three permanent members *ex officio* are the President of the Serbian Supreme Court, Republican Public Prosecutor and the Minister of Justice and Local Self-Government, whereas the other two are elected by the Serbian Bar Association and the Serbian Parliament respectively, one among the attorneys and the other among three candidates proposed by the Serbian Supreme Court (Art. 3).

Non-permanent members by invitation are elected by the Serbian Supreme Court. Hence the majority of the Council are judges and prosecutors. The only direct representative of the executive branch is the Minister of Justice who is a member *ex officio* of the High Judicial Council (Art. 3). The entire procedure of announcing vacant positions, receiving applications by candidates and finalising the proposal for nomination is conducted through this Council.[86]

The Serbian Constitutional Court has declared unconstitutional the provision of Article 46 of the Judges Act, pursuant to which the competent parliamentary committee shall nominate another candidate in case the candidate nominated by the High Judicial Council has not been elected in the Parliament. Amendments to the Judges Act (*Sl. glasnik RS,* No. 27/03) have re-established the exclusive competence of the High Judicial Council to determine a new proposal for nomination in such case (Art. 46 (2)).

In November 2003, the Humanitarian Law Centre (HLC) has submitted an initiative to the Serbian Constitutional Court to review the constitutionality of Article 70 of the Serbian Judges Act, which governs the election and termination of office of presidents of courts. The HLC believes that the principle of independence of the judiciary has been compromised by leaving the decision-making in this matter to the Judicial Administration Council, which is under strong influence of the executive branch. Serbian Constitutional Court has not yet decided on this initiative.

Supervision of the work in administrative divisions of courts (judicial administration) and establishing the courts' expenditures are shared between the Ministry of Justice and the courts themselves (i.e. the Serbian Supreme Court). Rules of procedure, the basic legal act of the judiciary, are adopted by the Minister, but in

86 According to the Act from 2001, the Parliament could only elect as judge the candidate proposed by the High Judicial Council. This guarantee of independence of the judicial branch was drastically compromised by the novelty provision pursuant to which the competent parliamentary committee shall nominate another candidate if the proposed candidate is not elected. If neither the second candidate is elected, the High Judicial Council shall re-announce the election (Art. 46, Act on Judges).

agree*ment with the President of the Supreme Court.* Any act passed by the judicial administration that infringes on the independence of courts and judges is automatically deemed null and void, and declared as such by the Grand Chamber, on the proposal by the competent court (Art. 67, Act on Organisational Structure of Courts, *Sl. glasnik RS,* No. 63/01).

The Montenegrin Courts Act (*Sl. list RCG,* No. 5/02) has introduced significant changes in the procedure for nomination and election of judges and court officials. Judges and the judges-jurors are elected and dismissed by the Montenegrin Parliament (Art. 9 (1)). However, the Judicial Council has the central role in the nomination process, because it establishes the proposals for nomination and dismissal of judges and judges-jurors (Art. 75 (1)). Besides, the Judicial Council determines the permanent number of judges in each court, conducts the proceedings to establish the responsibility for inadequate performance of duty and upholding the reputation of judicial function and proposes special lines of expenditures in the court operation budgets (Art. 75). The Council has a president and ten members (Art. 76 (1)). The Parliament nominates the ten members, of whom six are judges, two professors of law and two are prominent legal experts (Art. 76 (3)).

In the latest years serious objections were raised to the system of military courts in the FRY.[87] According to the Constitutional Charter in which only the Court of Serbia and Montenegro is mentioned, these courts no longer exist and the system of civilian judicial power is fully established. However, the competence of military judicial bodies has not yet been fully transferred to civil courts and they continue to operate without legal basis. Towards the end of November 2003, representatives of the military judiciary, Serbian Supreme Court, Serbian Ministry of Justice and SaM Ministry of Defence have agreed to allow military courts to continue functioning,[88] until such time when all cases have been referred to civil courts. Such agreement is in contravention of the Constitutional Charter and the Implementation of the Constitutional Charter Act. It remains unclear who should deliberate and decide in cases for which military courts were previously competent.

In the law of Serbia and Montenegro, misdemeanours represent a separate institute, partly of criminal and partly of administrative nature. According to standards applied by the European Court of Human Rights, misdemeanours would be considered criminal offences in SaM and therefore guarantees of Article 6 ECHR should also apply. However, provisions of the Serbia and Montenegro Misdemeanours Act are not in keeping with these guarantees. Firstly, the courts dealing with misdemeanour cases are not independent judicial bodies, since their members are nominated and dismissed by the Government upon the proposal by the Minister of Justice (Art. 98, Serbian Misdemeanours Act (*Sl. glasnik SRS*, No. 44/89; *Sl. glasnik*

87 See *Human Rights in Yugoslavia 2002,* I.4.6.1.
88 News *B92*, www.b92.net, 22 November.

RS, Nos. 21/90, 11/92, 20/93, 53/93, 63/93, 28/94, 16/97, 36/98, 44/98, 62/01); Article 81, Montenegrin Misdemeanours Act (*Sl. list RCG*, Nos. 25/94, 29/94, 38/96, 48/99)). Secondly, the principle of equality of parties, presumption of innocence, the right to be promptly notified of the misdemeanour charges in a language one understands, the right to free legal aid, right to prepare one's defence, as well as a variety of other rights are not guaranteed by these acts.[89]

The same could be said for economic and fiscal offences. Namely, according to European standards, this specific group of punishable offences would also be considered criminal offences and all guarantees of Article 6 would apply. The Economic Offences Act (*Sl. list SFRJ*, Nos. 4/77, 36/77, 14/86, 74/87, 57/89, 3/90; *Sl. list SRJ*, Nos. 27/92, 24/94, 28/96, 64/01) provides for the application only of some provisions of CPC, which are insufficient to ensure all protection stipulated in Article 6.[90]

4.6.3. Fair and Public Trial

4.6.3.1. Fairness – The requirement that a trial be fair is of particular importance where criminal proceedings are concerned since it enhances protection of the defendant beyond the cited minimum of rights he is entitled to. It is a general clause that provides overall protection of defendants. In assessing whether or not a trial is fair, it must be considered in its entirety since the accumulation of defects, which individually are not in violation of Article 14 of the ICCPR, could in fact constitute denial of this right. In order to be fair, a trial must be oral and adversary in nature, unlawfully obtained evidence must be inadmissible, and the prosecutor must disclose to the defence all the evidence he has, including evidence that could exculpate the defendant.

Under the CPC, the proceedings are ordinarily oral and, in keeping with this, the written documents (indictment, expert findings and the like) are read out. When a court of second instance rules in chambers without conducting hearings, its decision must, as a rule, rest on the records of the case. The principle of directness requires judicial decisions to be based on the facts determined by the court itself (e.g. by examining witnesses) and not on reading of the record. The obligation of the court to base its judgement only on evidence presented at the trial derives from this principle (Art. 352 (1), CPC).

One of the most important requirements for a fair trial is that the court must hear both opposing parties. This ensures their equality of arms and contributes to establishing the facts of a case. Under the CPC, the defendant has the right "to respond to all the facts and evidence against him, and to present evidence and facts

89 See *Compatibility of Yugoslav Law and Practice with the Requirements of the ECHR,* CoE, Federal Ministry of Justice, 2002, p. 131.

90 In regard to similar provisions Croatia has put reservation to the ECHR. See http://conventions.ceo.int/treatz/en/DeclareList.asp?NT=005&CM=&DF=.

in his favour" (Art. 4 (2)). The principle is further elaborated in a series of provisions – the defendant is entitled to examine the records and evidence (Art. 74 (1)), they must receive the decision by the investigating judge on opening the judicial inquiry (Art. 243 (1)). Before the decision on opening the judicial inquiry, the investigating judge shall hear the defendant, except if delay would pose a danger (Art. 243 (1)). Likewise, before rendering a decision, the judge can summon the public prosecutor and the defendant to court so that they could respond to circumstances important for the decision with regard to opening the inquiry. At that time opposing parties can give oral proposals (Art. 243 (3)). An important guarantee for the *audiatur et altera pars* principle is given through the provision pursuant to which the investigating judge can accept the proposal by public prosecutor not to conduct the inquiry since the collected evidence provides enough grounds for indictment, *only* if he had heard the defendant beforehand (Art. 244 (1 and 2)). This rule, however, has not been fully implemented. Direct indictment is possible outside provisions from Art. 244 (2) only if it concerns a criminal offence carrying a penalty of up to five years imprisonment (Art. 244 (6)).

The indictment must be served promptly to the defendant, or within 24 hours if he is in custody (Art. 270 (1)). The intent of Article 373 of the CPC prescribing that copies of interlocutory appeals must be delivered to the opposing party is the same. Failure to comply with any of these provisions is a serious violation of due process.

The adversary system is most easily and fully secured at the trial itself. The opposing sides' equality of arms in criminal trials is, however, put into question by Article 370 (3) of the CPC under which the public prosecutor is always notified about sessions in chambers of second-instance courts, and the defendant and his counsel only if they make a request to this effect (Art. 374), or if the court considers that this would be "beneficial for the clarification of issues" (Art. 375 (1)). A failure to notify a defence counsel of such sessions when he has made the request is also a grave violation of due process.

4.6.3.2. Public trial and public sentencing – Besides the general provision prescribing the transparency of the work of all government agencies (Art. 10), the Serbian Constitution contains a separate article stating that trials are open to the public (Art. 97 (1)). For its part, the Federal Constitution lays down only that the work of federal agencies is open to the public (Art. 122 (1)), while the Montenegrin speaks of the openness of judicial hearings (Art. 102). The Federal Constitutional Court Act (*Sl. list SRJ*, No. 27/92) states that the work of this Court is open to the public and cites the ways whereby this is secured, e.g. public hearings (Art. 6 (1 and 2)). The republican statutes on courts say nothing about the openness of their work but provisions to this effect are contained in the relevant procedural laws.

The general rule with respect to both criminal and civil proceedings is that trials and hearings are held in open court and may be attended by adult members

of the public (Art. 291, CPC; Art. 306 of the Civil Procedure Act (CPA), *Sl. list SFRJ*, No. 4/77).

Under the CPC, the public is always excluded from proceedings involving juveniles (Art. 494). The law also envisages the possibility of excluding the public "*ex officio* or at the request of the parties but only after their being heard" when necessary to protect classified information, public order, public morals, the interests of a minor, or protection of individual or family life of the defendant or the injured party (Art. 292). Generally, these bases are in keeping with the ICCPR standards, especially because in the new Act the previously contested reason of "protection of other special interests of society" has been omitted – since it seemed to broadly worded. There are opinions that in a certain sense guarantees for public in the Yugoslav CPC have been more comprehensively regulated because it does not contain the grounds from the ICCPR pursuant to which the court can exclude public "in the interest of justice". Only, although not a minor problem is the silence of law with regard to protection of the witness and his "personal and family life". Barring the public from a trial or hearing in circumstances not envisaged by law is in contravention of criminal and civil procedure and constitutes grounds for appealing the judgement (Art. 368 (1.4), CPC; Art. 354 (2.12), CPA).

Similar provisions are contained in the CPA, which envisages that public can be excluded from civil proceedings "during the entire main hearing or a part of it if required by interests of preserving official, business or personal secret, or by interest of public order or morality" (Art. 307 (1)). Public can also be excluded in cases when usual security measures are insufficient to ensure undisturbed conduct of the hearing (Art. 307 (2)).

Sentencing must be public in both criminal and civil cases, irrespective of whether the public was excluded from the particular proceedings or not (Art. 357 (4), CPC; Art. 336 (3), CPA). However, making public the reasons why a particular sentence was pronounced depends on whether the pubic was excluded and, if so, "the panel shall decide if the public shall be excluded when it sets out the reasons why it imposed the sentence" (Art. 357 (4), CPC; similar in Art. 336 (3), CPA). In line with the provision on barring the public from proceedings involving juveniles, the CPC prescribes that trial record and the sentence may be made public only with permission of the court (Art. 473 (1)). However, naming of the juvenile or release of any information that could help identify him/her is strictly prohibited (Art. 473 (2)).

The CPA does not contain separate provisions to this effect. As concerns the deviation from the rule of public sentencing, jurisprudence of the ECtHR should be taken into account in addition to the text of the Convention, which does not provide exceptions to the rule of public sentencing. Namely, in several cases the Court has pronounced that circumstances of the case are crucial and that the observance of the rule of public hearing should be assessed in accordance with the particular case

and the purpose of Article 6 (1).[91] If there were no exceptions to the obligation of public sentencing, the purpose of Article 6 would not be fulfilled in those cases where the public was excluded from the proceedings (when required by interests of preserving personal privacy, juveniles or by interests of justice). Hence in this part the provisions in the statutes of SaM are in keeping with European standards.

The new CPC recognises another exception from the right of the accused to public trial. In some less serious criminal offences (offences carrying a fine as primary penalty) the judge can render a decision without holding a hearing, upon request of the public prosecutor (Arts. 449 to 454). The defendant can contest such decision: if his/her appeal is positively resolved a public hearing shall be scheduled. This norm is in keeping with the CoE Recommendation Concerning the Simplification of Criminal Justice from 1983.[92]

Administrative proceedings are held in closed sessions and are only exceptionally public (Art. 32, Act on Administrative Proceedings, *Sl. list SRJ*, No. 46/96; Art 28, Administrative Proceedings Act, *Sl. list RCG*, No. 60/03). This is not in accordance with the right to public hearing in Article 6 (1) ECHR.[93]

4.6.4. Guarantees to Defendants in Criminal Cases

4.6.4.1. Presumption of innocence – Under national law, "no one may be considered guilty of a criminal offence until so proven by a final judgment of a court of law" (Art. 23 (3), Serbian Constitution; Art. 25 (3), Montenegrin Constitution). Although the wording differs slightly from that of the ICCPR, which states that "everyone shall have the right to be presumed innocent" until proven guilty by law, there are no practical differences and both formulations have the same legal consequences: the burden of proof is on the prosecution and not on the defendant and the court is obliged to act in favour of the defendant if his/her guilt has not been conclusively proven – *in dubio pro reo* (benefit of doubt). The Charter, however, is more precise, since its Article 19 states that "everyone shall be presumed innocent until proven guilty of a criminal act by a final court decision."

Like the constitutions, the CPC also guarantees the presumption of innocence (Art. 3), and further elaborates the principle of *in dubio pro reo* by prescribing the obligation of the court to acquit a defendant when guilt has not been proven beyond reasonable doubt due to lack of evidence (Art. 355 (1.3)). The burden of proof lies exclusively on the prosecutor, given that he is legally bound to always cite in the

91 See *Sutter v. Switzerland,* 22 February 1984, para. 33; for proceedings against juveniles, see *B and P v. United Kingdom*, ECtHR, App. No. 36337/97 and 35974/97 (2001).

92 See *Compatibility of Yugoslav Law and Practice with the Requirements of the ECHR* , CoE, October 2002, p. 140.

93 Croatia has put reservations on the ECHR with regard to similar provisions. See http://conventions.ceo.int/treatz/en/DeclareList.asp?NT=005&CM=&DF=.

indictment the evidence on which the charges are based (Arts 226 and 266 (1.5), CPC).

4.6.4.2. Prompt notification of charges, in language understood by the defendant – The defendant must be informed of the criminal offence he is charged with and of the evidence substantiating the charges. This is one of the basic principles of the CPC (Art. 4 (1)), which is reiterated in provisions regulating the interrogation of defendants, "who must be informed prior to the first questioning of the charges being brought against them and the grounds for those charges" (Art. 89 (2)). The said provision is applied also to suspects, i.e. persons who are reasonably suspected of having committed a criminal offence (Art. 226 (8), CPC). The indictment is "served to the defendant at liberty without delay, or if in custody within 24 hours" (Art. 270 (1)). During the first hearing the defendant must be informed about the offence he is charged with and about the corroborating evidence of the prosecution. More importantly, person deprived of liberty must be promptly notified, in the language he/she understands, about the reasons for deprivation of liberty and immediately warned that he has the right to remain silent, the right to legal counsel of his own choice and the right to request that his immediate family be informed about his deprivation of liberty (Art. 5).

4.6.4.3. Sufficient time and facilities for preparation of defence and right to communicate with legal counsel – Furthermore, in the event of the prosecution orally amending the indictment during the trial itself, the CPC provides only for the possibility of adjournment to enable the defence to prepare and does not lay this down as an obligation. It should also be noted that the adequate-time provision is not applied to a defendant when he is questioned during the pre-trial proceedings, where no interval is envisaged between the time he is informed of the charges and evidence against him and his interrogation. Namely, at his first questioning, the defendant is given 24 hours to retain counsel but is not informed of the charges or evidence against him prior to that.

Affording a defendant sufficient time to prepare his defence is among the basic principles of the CPC (Art. 13 (5)). However, the minimum time periods it envisages are too short – eight days in regular (Art. 285 (3)) and "enough time, at least eight days" in summary proceedings (Art. 442 (3)). If the prosecutor filed another indictment at the very hearing, the judicial council is obliged to leave sufficient time for the defendant and his counsel enough time to prepare appropriate defence (Art. 341(2)). Furthermore, in the event of the prosecution orally amending the indictment during the trial itself, the CPC provides only for the possibility of adjournment to enable the defence to prepare and does not lay this down as an obligation. Upon request by the defendant and his counsel adjournment can be granted. It should also be noted that the adequate-time provision is not applied to a defendant when he is questioned during the pre-trial proceedings, where no interval is envisaged between the time he is informed of the charges and evidence against

him and his interrogation. Namely, at the first interrogation the defendant is allowed 24 hours to secure legal counsel. The new provision in the CPC is nevertheless better because it now envisages the obligation to inform the defendant about his rights in the procedure, including the right to legal counsel, at the very first questioning. Additional guarantees have been established by offering the defendant a possibility to read the criminal report and criminal findings. However, it seems that this is more linked with the right to be informed about charges and evidences than with the right to have sufficient time to prepare the defence. This is because pursuant to the letter of CPC the defendant has the right to read the criminal charges *immediately* prior to first questioning (Art. 74 (1)).

In second-instance proceedings and though there is no specific CPC provision regulating the matter, the practice of appeal courts is that "when giving notice of a session of the chamber... account must be taken to afford the parties sufficient time to prepare for the session" (see Federal Court opinion in Decision SS Kzs. 24/76). This defect is in part alleviated by Article 369 of the CPC, which requires delivering a copy of the appeal to the opposing party and giving it eight days to respond.

The right of an accused to respond to the facts and evidence against him and to present facts and evidence in his favour (Art. 4 (2), CPC) is a prerequisite without which the defendant would not be able to prepare his defence, and is a principle of the CPC.

4.6.4.4. Right to trial without undue delay – Pursuant to the CPC (Art. 16), the court is obliged "to ensure that the procedure is conducted without delay and to prevent all abuse of rights belonging to persons involved in the trial". This principle is developed elaborated in a series of CPC provisions (e.g. Arts. 218, 258, 283, 393). In the proceedings involving juveniles, CPC requires particular emergency (Arts. 474, 491, 496). The Serbian Judges Act prescribes that trial judges must inform the president of their court of the progress of their cases with regard to time. Judges must also report to their court presidents why a first-instance proceeding has not been concluded within six months of receipt of the case and continue to do so thereafter at regular monthly intervals. (Art. 25, Serbian Judges Act).

4.6.4.5. Prohibition of trials in absentia *and the right to defence* – The HR Charter and the Serbian Constitution prohibit that persons be tried in their absence if they are accessible to the court or other body authorised to conduct proceedings, whereas Montenegrin Constitution does not contain such provision (Art. 16 (5), HR Charter; Art. 24 (2), Serbian Constitution). Pursuant to the CPC, trial *in absentia* is allowed only exceptionally, in cases when the defendant is absent though his own fault, e.g. if the defendant is a fugitive or otherwise inaccessible to government agencies and there are compelling reasons for trying him despite his absence (Art. 304 (2); for the shortened procedure, see Art. 433). Furthermore, the defendant tried *in absentia* must have a defence counsel from the moment the decision is taken to

try him in his absence (Art. 71 (3)). It is strictly prohibited to conduct *in absentia* trials of juveniles (Art. 466 (1)). Upon request of the person convicted *in absentia* or his defence counsel, a new trial can be scheduled (Art. 413 (1)). These provisions of SaM law are in keeping with international standards.

The HR Charter guarantees the right to defence, which is more closely regulated by the CPC. According to the Charter (Art. 16):

> everyone shall have the right to defence, including the right to take a defence counsel of his own choosing before the court or other authority competent for conducting proceedings, to undisturbed communication with his/her defence counsel and to have enough time and opportunity for the preparation of his/her defence.

The law specifies cases when the defendant shall be given mandatory legal counsel if unable to retain one by himself. No one may be forced to testify against himself or admit his/her guilt.

The defendant may undertake his own defence only in cases when the law does not make defence counsel mandatory. In any case, the court should inform him/her on his/her right to have a council (Arts. 5, 226 (8 and 9), 229 (5 and 6), 243 (4)). Counsel is appointed by the court in two cases: when having counsel is mandatory and the defendant has not retained his own attorney and when the defendant pleads indigence. The law stipulates cases in which defence counsel is mandatory: when the defendant is deaf, mute or both, incapable of defending himself, or being tried for a criminal offence carrying the penalty of a prison term exceeding 10 years, the defendant must have a counsel at the first questioning; this also applies if the defendant is tried *in absentia*, as soon as the decision is taken to conduct trial *in absentia*; if the defendant is taken into custody he must have a defence counsel appointed by court at the time of rendering the decision on detention (Art. 71 (1–3)). Instead of a court-appointed defence counsel, the defendant can at any time take another counsel (Art. 73 (1)). Besides, president of the court can dismiss the appointed counsel who is remiss in his duties. The information on the dismissal of a defence counsel is sent to the Bar Association (Art. 73 (5)). The intent of the constitutionally guaranteed right to defence is to provide defendants with appropriate legal assistance during the entire trial. In this context, the Federal Constitutional Court on 14 March 2001 ruled unconstitutional Article 123 (4) of the former CPC stating that the time period for entering a petition for remedy starts on the day the defendant, not his counsel, is served with the judgment (*Sl. list SRJ*, No. 13/01). Where indigent defendants are concerned, the CPC states that the defendant who is unable to bear the costs of defence himself can have a court appointed counsel when on trial for offences carrying a prison sentence exceeding 3 years or if this is required by interests of fairness (Art. 72).

The CPC extends to the defendant the right to engage defence counsel. Thus the defendant who has been called by the police for questioning or has been

summoned by the investigating judge (Arts. 226 (8 and 9), 243 (4)) has the right to be informed about his rights, which includes the right to legal counsel. Probably the most important novelty is that a suspect can be interrogated by the police only with his consent and in presence of an attorney. The very statement that he agrees to the interrogation must be given in the presence of the defence counsel (Art. 226). If the defendant cannot provide himself a defence counsel, one shall be appointed *ex officio* from the list of attorneys submitted by the Bar Association.

Fundamental changes in the criminal procedure law had been made, however, in the part regulating the contact of suspect/defendant with his defence counsel and the right of counsel to review cases and records used in the proceedings. The defendant in custody must have an attorney as soon as the court renders the decision on detention (Art. 171 (2)). After passing the decision to initiate the investigation or after the immediate filing of the indictment, as well as beforehand, if the suspect has been questioned pursuant to regulations on questioning of defendants, defence counsel has the right to review records and collected items submitted as evidence (Art. 74 (1)).

The CPC allows the defence counsel to read the criminal charges filed and the request to open an inquiry immediately prior to first interrogation (Art. 74 (2)). As concerns the contact with the defence counsel, regulations are more detailed than the ones in the old law. Supervision on discussions conducted between the suspect/defendant with his defence counsel is especially regulated. Defence counsel has the right to a confidential discussion with the suspect deprived of liberty even before he has been interrogated, as well as with the defendant held in custody. Control over this discussion before the first interrogation and during the investigation is *allowed only by observation, but not by listening* (Art. 75 (1)). When the investigation is completed or when the indictment is issued without prior investigation, the defendant cannot be denied free and unsupervised correspondence and discussion with his defence counsel (Art. 75 (5)). As regards the defendant himself, he shall be allowed, if he so requests, to read the criminal charges filed and the petition for investigation immediately prior to the first hearing (Art. 89 (3)).

Text pertaining to confession given during the proceedings has also been reviewed. When the defendant confesses to having committed a criminal offence, the body in charge of conducting the procedure is obliged to continue gathering evidence about the offence *only* if the confession is obviously false, incomplete, contradictory or unclear and if it is not corroborated by evidence (Art. 94).

Since they quite well regulate the right of defence counsel to access all material evidence and unconditional obligation of the prosecutor to disclose all evidence to the defence, these provisions are in keeping with the ECHR standards (see *Edwards v. United Kingdom*, ECtHR, A 247 B, 1992, para. 36).

4.6.4.6. Right to call and examine witnesses – A defendant may during the entire proceeding make motions to call new witnesses and expert witnesses and to

present new evidence (Arts. 326 (4), 339, 340 (1)). The consequences of the failure of witness or expert witness to appear when summoned by the court or of refusing to testify are the same, regardless of whether they are witnesses for the prosecution or the defence. Persons involved in the investigation can, upon approval of the investigating judge, directly question witnesses and experts (Art. 251 (7)). Testimonies given outside the trial itself are admissible only if persons involved in the proceedings have been informed about the time and venue of these testimonies (Arts. 288 (3) and 334 (3)).

4.6.4.7. Right to an interpreter – "Everyone shall have the right to be informed as soon as possible, thoroughly and in the language he/she understands, of the nature of and reasons for charges being brought against him/her, and the right to a trial without delay. The accused shall have the right to be assisted by an interpreter if he/she does not understand or speak the language used in the proceedings" (Art. 16 (1 and 4), HR Charter). The Serbian Constitution provides that "in the proceedings before a court or other State agency or organisation which, while exercising public powers, rules on his rights and duties, each person shall be guaranteed the right to use his own language and to familiarize himself with the facts of the proceedings in his own language" (Art. 123 (2)). Contrary to this, Montenegrin Constitution guarantees "the right to use one's own language in proceedings before a court or other state agency" only to members of national minority and ethnic groups (Art. 72), but does not provide the right of every person to an interpreter.

Pursuant to CPC, parties, witnesses and others taking part in the proceedings have the right to use their own language and for that purpose simultaneous interpretation is provided (Art. 9). If the proceedings are held in the language of these persons, the court is obliged to inform them about the right to an interpreter (Art. 9 (3)). When "the defendant, his counsel... contrary to their request have been denied the right to use their own language during trial and to follow the course of trial in their language" this constitutes a serious violation of criminal proceedings (Arts. 367, item 1 and 368 (1.3)). Problem also exists regarding the issue of payment for interpreter fees. The CPC (Art. 193 (5)) only provides that the cost of interpretation for national minority languages shall not be charged to persons who are generally not requested to pay for the cost of the trial. This further means that persons who do not speak minority languages in SaM shall not enjoy such benefit. This solution is not in keeping with Article 6 (3e) of the ECHR.[94]

4.6.4.8. Prohibition of self-incrimination – No one may be forced to testify against himself/herself or admit his/her guilt (Art. 16 (6), HR Charter). The defendant has the right to remain silent, and shall be informed during the first interroga-

94 See *Compatibility of Yugoslav Law and Practice with the Requirements of the ECHR* , CoE, October 2002, p. 140.

tion that "he is not obliged to defend himself personally or respond to any questions" (Art. 89 (2)). Defendants also have the right not to enter a plea in response to the indictment and not to state their defence (Art. 320 (3)). If the defendant has not been duly informed about his rights, court judgment cannot be based on his statement (Art. 89 (10)).

The CPC also prohibits the use of force, threat, deceit, promise, extortion, exhaustion and similar means (Art. 89 (8)). Also, the judgment cannot be based on the statement of the accused that has been obtained contrary to this prohibition (Art. 368 (1.10)).

4.6.4.9. Special treatment of juveniles in criminal proceedings – Article 14 of the ICCPR prescribes that the procedure in the case of juveniles must take into account their age and the desirability of promoting their rehabilitation. There are no criminal statutes in Yugoslavia specifically treating juveniles; this is done instead in separate chapters of laws applicable to adult offenders. Thus the CPC regulates in a separate chapter (XXIX) procedure with regard to juveniles. Its provisions are applied when persons who committed criminal offences when they were minors have not attained the age of 21 at the time proceedings against them are instituted, and some provisions are applied also to youthful offenders (Art. 464).

Pre-trial proceedings are conducted by a juvenile court judge and the trial itself is held before a bench of the juvenile court. Lay judges on these benches are required to have special qualifications. Though the public is as a rule excluded, this need not always be the case since the law allows the presence in the courtroom of a limited number of professionals (Art. 494). A juvenile may never be tried *in absentia* (Art. 454) and, finally, the juvenile court plays an important role in the supervision of the measures it has pronounced and further decisions in that regard (Arts. 491 and 492).

4.6.4.10. Right to appeal – Everyone shall have the right to appeal or some other legal remedy against any decision on his/her rights, duties or legally founded interests. (Art. 18, HR Charter). The same provision is contained in the constitution of Montenegro (Art. 17 (2)) and Serbia (Art. 22 (2)). The two-instance principle is an absolute rule – an appeal against a decision of a lower court is always allowed, and in some cases may be pursued to the third instance (Art. 391 (1.3), CPC).

In addition to the right to appeal as a regular remedy, a convicted person also has recourse to several extraordinary remedies: motion for a new trial, for extraordinary mitigation of sentence and for extraordinary review of the sentence (chapters XXIV and XXV, CPC).

4.6.4.11. Right to compensation – The HR Charter provides that "any person who has been wrongly sentenced for a punishable act shall have the right to be rehabilitated and paid compensation by the state" (Art. 22). The relevant provision in the Serbian Constitution (Art. 23 (4)) is virtually identical, whereas the Montenegrin Constitution (Art. 25 (4)) prescribes only the right to compensation.

The CPC specifies cases and procedure for exercising these rights. Hence the person who has been wrongly convicted or has been found guilty but not convicted and subsequently new proceedings were dismissed by extraordinary legal remedy or the person was acquitted by court or if the charges have been dismissed, shall have the right to compensation. However, the convicted person shall not have the right to compensation if the proceedings were dismissed or decision rendered to dismiss the charges as the result of the injured party as a prosecutor abandoning the case, or of the injured party withdrew charges through an agreement with the defendant, or if in the new proceedings the decision was rendered to dismiss the charges due to lack of jurisdiction of the court if the authorised prosecutor has initiated proceedings before a competent court or if the defendant has wilfully brought about the verdict by false confession or in other manner, unless under duress (Art. 556 (1 and 2)).

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

One of the rare incomplete guarantees in the HR Charter pertains to the principle of *ne bis in idem.* Namely, under Article 21 "no one may be tried twice for the same offence". This does not rectify the deficiency of the former Article 28 of the Federal Constitution[95] because it still does not explicitly guarantee the essence of this principle – no new charge for the same offence. Much better solution is the one in Montenegrin Constitution, according to which "nobody can be tried twice for the same punishable offence" (Art. 27). Serbian Constitution does not contain any provisions whatsoever about this principle of procedure.

The CPC recognises the norm according to which "nobody shall be prosecuted and punished for a criminal offence for which he had already been acquitted or convicted by final judgement, or when criminal proceedings have been terminated by final decision or the charges have been dropped by final judgment" (Art. 6 (1)). Besides, it is prohibited to render decisions that are less favourable for the defendant in the proceedings upon filing the relevant legal remedy (Art. 6 (2)).

4.6.5. Special Provisions Regarding Criminal Proceedings in Organised Crime Cases

In the field of legislation certain steps were made in regard to organised crime. In this respect, amendments to the CPC entered into force on 27 December

95 See in *Human Rights in Yugoslavia 2002,* I.4.6.3.12.

2002 (*Sl. list SRJ,* No. 68/02). These amendments provided a new chapter of the CPC (XXIXa) that regulates special rules of procedure for criminal offences of organised crime. In cases not explicitly regulated by this chapter, other provisions of CPC shall be applied (Art. 504a (2)).

Article 504v specifically prescribes that information about pre-trial and investigating procedures for offences of organised crime represent official secret. The information about pre-trial can be obtained only with a written authorisation of the public prosecutor, and the information about the investigation with an approval of the investigating judge, with prior consent of the public prosecutor (Art. 504v (2 and 3)).

Also, for the first time the notion of the witness collaborator is introduced into the legislation. The CPC defines the witness collaborator as "a member of a criminal organisation against who criminal charges have been filed or proceedings are being conducted for the criminal offence of organised crime, provided there are extenuating circumstances on the basis of which according to the Criminal Code he could be exculpated or his sentence reduced and if the significance of his statement for uncovering, proving or preventing other offences by the criminal organisation is more important than the damaging consequences of criminal offences he had committed" (Art. 504d (1)). Witness collaborator who has participated in the trail shall not be prosecuted for the offence he testified about.

The witness collaborator is not bound by the CPC provisions related to relieving from duty to bear witness and responsibility to respond to certain questions (exculpation for the spouse, relatives to a certain degree of kinship, possibility to deny response to questions that would mean exposure for himself or other persons to severe shame, significant material loss or criminal prosecution) (Art. 504đ).

The Council that decides on the proposal of the prosecutor to hear such witness during the trail shall hold a session in camera (Art. 504e (2)). The CPC in Article 292 provides possibilities in which it is allowed to exclude public from the main hearing. Since there is no provision of this kind on pre-trail proceedings, this is significant for the principle of public presence from the aspect of the defendant's position. Article 504j envisaging that "statements and information obtained by the public prosecutor during pre-trial proceedings can be used as evidence in the trail proceedings but the decision cannot be based entirely on them". *Ratio legis* of this provision is a protection of the witnesses and their personal and family circumstances as well as their safety. In the part related to the analysis of Article 292 of the CPC, the absence of specific ground for excluding the public in relation to the protection of the interest of witnesses was stressed. The Council can open the trial for public upon proposal by the public prosecutor and with consent of witnesses (Art. 504ž).

Provisions of the new CPC also prescribe that the Ministry of Interior that in the pre-trial proceedings has undertaken some of the actions against organised

crime offences, have the obligation to immediately inform the public prosecutor (Art. 504l).

From the aspect of the protection of international standards of human rights, especially important are the provisions in the Articles from 504lj to 504o. The CPC provides new measure – under-cover investigator (Art. 504lj (2)). On the basis of the written order of an investigating judge, the Ministry of Interior executes this measure. They have the obligation to submit daily and final reports to the investigating judge and public prosecutor on measures they have undertaken (Art. 504m (1 and 2)). The CPC further prescribes that "bodies of the Ministry of Interior shall submit complete documentation consisting of photographs, video, audio or electronic records and all other evidence collected using under-cover investigator to the public prosecutor (Art. 504m (3)). This means that possibilities are expanded for application of measures that restrict the right to privacy. However, such an important limitation is more closely regulated by the CPC only through general provision that the under-cover investigator can use technical means to record conversations and enter peoples' home and other premises if this has been provided by the investigating judge order (Art. 504nj (5)). It is prescribed that all information gathered by these means shall be destroyed if the prosecutor does not initiate proceedings within six months from the day of expiration of measure, and that persons to whom this information relates should be informed about this measure if their identity can be determined (Art. 504n (2)). It is impossible not to know identity of a person since the order of the investigating judge must contain information about the person against the measure is being conducted (Art. 504lj (2)).

The under-cover investigator can be brought as a witness during a trial. Hearing shall be conducted in such manner not to reveal the identity of the witness. This provision is rather vague. It can be concluded that this does not mean the usual exclusion of public (in the sense of Art. 292, CPC) but the complete protection of identity, which means that neither the defence nor the defendant can find out this identity (Art. 504nj (4)).

When there is reasonable doubt that an organised crime offence has been committed, the court can, regardless of the provisions in Articles 82 to 88 and 513 to 520, authorise a measure of temporary confiscation of items and property benefits.

4.7. Protection of Privacy, Family, Home and Correspondence

Article 17, ICCPR:

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

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

Article 8, ECHR:

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

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4.7.1. Privacy

It is customary in law to interpret the privacy of individual in two different ways. According to the usual understanding, the right to privacy serves to ensure protection from undesired publicity, such as unauthorised intrusion of the press into private life, publishing of secretly taken photographs, tapping telephone conversations, apartment search, opening letters, etc. Contrary to this, according to the wider concept, right to privacy is identified with personal autonomy of individual, or his general freedom to determine his own lifestyle without interference by state or other persons. In this respect, the right to privacy is discussed in case of free determination of personal preferences of an individual, such as appearance, sexual orientation, founding and maintaining marital and family relations, upbringing of children, refusal of medical treatment, setting funeral arrangements and the like. The European Court of Human Rights accepts the wider interpretation of the concept of privacy and considers that the content of this right cannot be predetermined in an exhaustive manner. According to the jurisprudence of this Court, privacy encompasses, *inter alia*, the physical and the moral integrity of a person, sexual orientation, relationships with other people, including both business and professional relationships (*Niemitz v. Germany*, ECtHR, 16 EHRR 97 (1992); *Costello – Robert v. United Kingdom*, ECtHR, 19 EHRR 112, (1993)).

The HR HR Charter prescribes that "everyone has the right to inviolability of his physical and psychological integrity" (Art. 12 (1)), as well as "the respect of private and family life, home and correspondence" (Art. 24 (1)). The Montenegrin Constitution guarantees "the inviolability of the physical and psychological integrity of man, his correspondence and personal rights" (Art. 20 (1)), while the Serbian Constitution states that "human dignity and the right to privacy are inviolable" (Art. 18).

Further in the text privacy shall be considered in the sense of: access to personal data, sexual autonomy, criminal law protection of private life, home,

correspondence, honour and reputation, family life and family, name and change of sex by transsexuals.

4.7.1.1. Access to personal data – The collection, storage and use of personal data is protected by Article 8 of the ECHR (see *Leander v. Sweeden*, ECtHR, 9 EHRR 36, (1987); *Hewitt and Harman v. United Kingdom*, ECmHR, 14 EHRR 657 (1992); *Gaskin v. United Kingdom*, ECtHR, 12 EHRR 36 (1989)).

The protection of personal data is guaranteed. Its collection, storage and use can only be dealt with by law. Any use of personal data for a purpose other than the one for which it was collected is forbidden and punishable. Everyone has the right to be informed of the data collected about his person, according to law.

The HR Charter sets up a level of protection which is lower than the one provided by the former Federal Constitution (Art. 33) and the one provided by the Montenegrin Constitution (Art. 31) which contains a similar provision. The HR Charter does not prescribe judicial protection. On the other hand, the Charter does add that any use of data for a purpose other than the one for which it was collected is not only forbidden but also "punishable".

The Serbian Constitution also guarantees the protection of personal data but does not envisage court protection in the case of abuse, nor the right of individuals to be informed about data concerning them (Art. 20).

The Personal Data Protection Act (*Sl. list SRJ*, Nos. 24/98, 26/98) states that personal data may be collected, processed and used only for the purposes specified by the Act, and for other purposes only with the consent in writing of the individual concerned (Art. 13). The report on *Compatibility of Yugoslav Law and Practice with the Requirements of the ECHR* states that this provision does not meet the condition that the purpose of collecting, processing and using personal data must not only be lawful, but also specified before the collection of data even begins.[96]

It also prescribes that individuals may request data about themselves, or may request to see such data, the deletion from records of data that is not in accordance with the law, and prohibition of the use of erroneous data (Art. 12). These rights, however, do not apply to data collected in accordance with the regulations on criminal and national security records (Art. 13). The grounds upon which access to personal data may be denied are very broadly defined and, consequently, give government agencies too much latitude to withhold information it. In early May 2002, Federal Constitutional Court initiated the procedure to harmonise the Artide 13 with the Federal Constitution and the ICCPR, on the initiative by the HLC submitted in October 2001. According to the Constitutional Charter, all undecided cases before the former Federal Constitutional Court are to be decided by the new

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

Court of Serbia and Montenegro, which has not yet began to function as to the completion of this Report.

Another initiative to review the constitutionality of provisions related to personal data protection was submitted in April 2002. The Lawyers Committee for Human Rights (YUCOM) and the Forum for Ethnic Relations have submitted to the Federal Constitutional Court a proposal to review the constitutionality of the Act on the Census of Population, Households and Apartments in 2002 (*Sl. list SRJ*, Nos. 74/99, 21/01). The contested provision of the Act expressly states which persons are obliged to keep as an official secret all personal, property and ownership data they have obtained during the census procedure (Arts. 11 and 12). This obligation, however, does not apply to other persons (such as members of the Ministry of Interior, employees of the Urban Development Institutes) who would accidentally or deliberately obtain these data and, according to YUCOM, thereby violate the constitutional provision which guarantee the protection of personal data (Art. 33, Federal Constitution).[97] The same issue arises on the Montenegrin Act on the Census of Population, Households and Apartments in 2003 (Arts. 15 and 16, *Sl. list RCG*, Nos. 59/00, 12/01, 38/02 and 21/03).

Especially significant from the viewpoint of the right to privacy is the sensitive issue of opening files of the state security services, with two specific issues having special prominence – the right of an individual to review his/her file and the protection of privacy of those persons of whom records were kept from any abuse. The Government of Serbia had passed two decrees in May 2002 – Decree on Opening State Security Service Secret Files which declassified files kept on Serbian citizens (*Sl. glasnik RS*, No. 30/01), and, a week later, the Decree Amending the previous one (*Sl. glasnik RS*, No. 31/01). On the basis of the first regulation, the above-mentioned files had ceased to be secret, and citizens who these files had been kept on had the right to see their contents, as well as to impart on others what they had learned. The second Decree, however, altered the title and Article 1 of the previous Decree, which meant that the text related to removal of the status of secret had been changed, so that the new changes allowed only "the inspection" of files by the persons concerned. This regulation entered into force only after the files had already ceased to be confidential on the basis of the first Decree, so that for renewal of the state secret status it was not sufficient to alter the text of the regulation, but it was necessary to enact another decision on restoring the status of confidentiality.[98]

97 YUCOM, Press Release, 9 April; organisations have also suggested that the court should order discontinuation of the census, given the danger posed by unavoidable damaging consequences that could arise due to its continuation.

98 Therefore the Ministry of the Interior acts inappropriately when they remind citizens, before they read their files, that they are not allowed to disclose to others the contents of the file, because these files are no longer confidential and there are no grounds for restricting circulation of information contained in them.

The Constitutional Court of the Republic of Serbia declared both these decrees unconstitutional (*Sl. glasnik RS*, No. 84/03). In a proceeding initiated by YUCOM and the Serbian Radical Party, declassifying files, publishing a list of all citizens on whom files were kept, enabling those citizens to review their files etc. represent diverse ways of using personal data, which, according to Article 20 (2) of the Constitution of Serbia have to be dealt with by a law, and not by a decree or similar act with inferior legal force than a law.

The opening of secret files is regulated with only one decree in Montenegro, whose Government in September 2001 enacted the Decree on Opening State Security Service Secret Files (*Sl. list RCG*, No. 45/01) kept on Montenegrin citizens. Although Article 1 of the Decree has declassified these filed, citizens, or immediate family of deceased citizen, are only allowed to see the files (Art. 2).[99]

Another problematic aspect of the aforementioned decrees was the fact that these files are still kept under the control of state security services[100]. Moreover, as the Constitutional Court of Serbia affirmed, opening of secret files for public encroaches on the very essence of the right to privacy, and therefore it needs to be regulated by law and not by a decree. In the year 2002 two model laws have been presented on the opening of secret police files, each of them drafted by one of the two Belgrade-based NGOs, Centre for Advanced Legal Studies (CUPS) and Centre for Antiwar Action (CAA). The Christian-Democrat Party of Serbia submitted to the Parliament its own bill on the files of the state security services.[101] CUPS has prepared a model law related to the opening of secret files kept with the Serbian State Security Service, whereas the CAA, together with this model, prepared also a text of the law on opening secret files of all security services at to the federal level. Authors of both models have envisaged that all citizens, including foreigners under specific circumstances, have the right to be informed whether a file has been kept on them, to have an insight into this file, as well as request corrections of data contained in their files. Both models allow the use of files for scientific and other purposes regulated by law, and after the expiry of the period for such use (set to five year in the CAA proposal and ten years in the proposal by the CUPS), these files are handed over to the archives.

Another problem arose with the opening secret files. Namely, among the people who went to see the contents of their files it was noted that many of them contain only the material until early nineties. Doubts were raised whether the following of these people by the State Security indeed ceased at that time. It is highly possible that the later documents have only been classified in a different manner and that access to them is still not possible. Ivan Jaković, "Tajna večera kod *Dva ribara*" (The Last Supper at *Dva ribara*), *Danas,* 2 August 2001.

99 The text of the Decree stresses that a citizen on whom the file had been kept, is only allowed to review it in the premises of the State Security, without the right to take it out and copy the file (Art. 2 (1.1)), whereas no such restriction is mentioned for relatives of the deceased citizen (Art. 2 (1.2)).

100 The mentioned decrees only allow the opening of the files related to "internal enemies, i.e. internal extremists and terrorists", whereas all others remain confidential.

101 See M. Vasić, "Ko seje dosijea", (Who Sows Files), *Vreme*, 7 August 2003.

In respect to the handling of files, all three models state that it is necessary to remove the files from the services in which they had been kept and transfer them to an independent public service for keeping. However, the models significantly differ in respect of that independent public service – according to the DHSS proposal, the National Agency for the keeping of files should be established and controlled by the Government, while the CAA proposal puts this institution under the control of the Parliament. The CUPS model law provides an alternative solution according to which the secret files are not to be opened nor is an independent agency to be established to take them over and protect their use. Pursuant to this solution, significantly different from the basic text, the files are taken over directly by the Serbian Archives, where they are subject to regulations on archive materials.

A second issue arises, closely related to the disclosure of state security files – the regulation of the responsibility of those persons which have in the past violated human rights (*lustration*). Serbia recently passed lustration legislation (the Act on the Responsibility for Violations of Human Rights, *Sl. glasnik RS*, No. 58/03). This Act prescribes that the Comission which carries out the proceeeding to deternines whether a person violated human rights or not, has the right to review the files of state security services and other state organs which perform public duties (Art. 15). The person which is the subject of lustration proceedings also has the right to review all documents on which the Commission based its decision that he/she has violated human rights (Art. 16). In the case of *Rotaru v. Romania* (App. No. 28341/95 (2000), the ECtHR opined that any use of information from the files without providing an opportunity to dispute them constitutes a violation of the ECHR. The Lustration Act does not stipulate the duty of all members of the Commission not to disclose any information which they obtain during lustration proceedings, but that duty is implied if the corresponding files still remain classified. On the other hand, if an oral hearing is to take place before the Commissionn upon an objection of the person which is the subject of lustration proceedings, this hearing is closed to the public and all persons present have to keep any information on the proceedings secret (Art. 20 (4)). The hearing can be public only if the subject of the proceedings so demands (Art. 20 (5)).

The functioning of security services and their powers to collecting information are covered by the FRY Security Services Act (*Sl. list SRJ*, No. 37/02), which deals with the subject on the level of the State Union, and by the Act on the Security and Information Agency which is responsible for the protection of the security of Serbia (*Sl. glasnik RS*, br. 42/02).[102] Under certain provisions of these acts security services are authorised to have insight into personal data of individuals, contained

102 In Montenegro, the State Security Service functions within the Ministry of the Interior, and its separation from the Ministry as a special agency is envisaged by the draft National Security Agency Act, which is currently before the Parliament. See O. Nikolić, "The Montenegrin Parliament considers National Security Agency Act", *BBC Podgorica*, 2 July 2003.

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

The Act on the Security and Information Agency prescribes the duty of all members of the Agency to keep as secret all information which represent a state, military, official or business secret, as well as those whose publication would cause harm to the interests of legal or natural persons (Art. 23). This duty is also prescribed for those persons which participate in the control and oversight of the Agency (Art. 19). The Act on the Security Services stipulates the duty of keeping classified information for the members of the Commission which performs the oversight of these services and for all persons which in any way participate in the work of the Commission (Art. 54).

From the viewpoint of personal data protection, another objection can be raised in relation to both acts. Access, control and protection of records and data in the registers and databases kept in the services themselves are not to be regulated by these laws, but by decrees (Art. 35, Act on the Security Services; Art. 11, the Security and Information Agency Act).[103]

Nevertheless, the federal Act on the Security Services does prescribe that security services are bound by the Constitution and laws in performing their duties, that they are obliged to respect human rights and freedoms, professionalism and proportionality in exercising their authority (Art. 4). Furthermore, the Act deals with the means of obtaining information as well as the instances in which information can be collected covertly (Arts. 24–32), and citizens are allowed to be informed about measures of data gathering undertaken by the services with regard to them. In cases when the services are authorised by law to refuse such a request, citizens have the right to lodge an appeal against a *reasoned* decision of the Service chief (Art. 34). This law also contains an entire chapter on *Democratic Civilian Control* (chapter VII), that regulates the supervision over security services by the Federal Parliament through a standing Committee for Control of the State Services, estab-

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

lished by the Parliament (Art. 47). As to the completion of this Report, this Committee has not yet begun to function.

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

4.7.1.2. Sexual preference – Sexual autonomy is also covered by Article 8 of the ECHR (see *Dugeon v. United Kingdom*, ECtHR, 4 EHRR 149 (1981); *Norris v. Ireland*, ECtHR, 13 EHRR 186, (1988); *Lusting-Prean and Beckett v. United Kingdom*, ECtHR, 29 EHRR 548 (1999); *Sutherland v. United Kingdom*, ECtHR, EHRLR 117 (1 July 1997)[1998]). According to the jurisprudence of the European Court of Human Rights any restriction of sexual autonomy must be prescribed by law, necessary and proportional. A restriction is easy to justify when it concerns the abuse of minors (*MK v. Austria*, ECmHR, 24 EHRR CD 59 (1997)), and relatively difficult to justify when it concerns concensual intercoure between adults (*Dudgeon v. UK; Norris v. Ireland*). In accordance with the Convention the legislation of Serbia and Montengero allows sex between two consenting males over the age of 18, but intercourse with a youth below that age, even with his consent, is a crime and carries a sentence of up to one year in prison (Art. 110 (4), Serbian CC; Art. 91 (4), Montenegrin CC).

Right to express sexual orientation is not explicitly granted in the legal system of SaM. The Serbian Constitution Proposal created by the independent group of experts of the Belgrade Centre for Human Rights,[104] as well as the draft Act against Discrimination, composed by the Institute for Comparative Law in Belgrade, propose that no discrimination is allowed with regard to sexual orientation of an individual.

104 The HR Charter was based upon this Proposal. Unfortunately, sexual orientation as an explicit ground on which differential treatment is not allowed was left out of the Charter. See www .bgcentar.org.yu.

Reliable records on discrimination based on homosexual orientation are not available either in Serbia or in Montenegro. Public opinion is generally not in favour of any public display of homosexual orientation.[105]

4.7.1.3. Protection of privacy by criminal law – The criminal codes of SaM envisage punishment for the invasion of privacy. Thus unauthorised photographing (Art. 195 (a), Federal CC/Basic CC; Art. 71, Serbian CC; Art. 55, Montenegrin CC), publication of another's personal papers, as well as of portraits, photographs, film or audio recordings of a personal nature (Art. 71 (a), Serbian CC; Art. 56, Montenegrin CC), unauthorised wiretapping and audio recording (Art. 195, Federal CC/Basic CC; Art. 70, Serbian CC; Art. 54, Montenegrin CC), violation of the privacy of correspondence (Art. 194, Federal CC/Basic CC; Art. 72, Serbian CC; Art. 54, Montenegrin CC), and disclosure of privileged information (Art. 73, Serbian CC; Art. 53, Montenegrin CC), are criminal offences.

Electronic surveillance and recording of another's conversations or statements without the consent of the individual involved is also punishable (Art. 195, Federal CC/Basic CC; Art. 70, Serbian CC; Art. 54, Montenegrin CC), and aggravated forms of the offences are when they are committed by a person acting in an official capacity.

Protection from infringing the privacy of an individual is also provided by the definition of the offence "illegal photograph taking" in Article 71 of the Serbian CC. Pursuant to this, anyone produces an unauthorised photographic, film or other image of an individual without his consent, and thereby seriously infringes his/her private life, or anyone hands or shows such image to a third party or in some other way enables the third party to have access into such material, shall be fined or sentenced to up to one year in prison. This offence also provides more serious forms if such act is committed by an official person on duty.

Pursuant to the provision of criminal offence "unauthorised publishing of another person's manuscript, portrait, photograph, film or phonogram" stated in Article 71a of the Serbian CC, anyone publishes or displays without authorisation a manuscript, portrait, photograph, film or phonogram of a personal nature without consent of the individual shown in the portrait, photograph or film or whose voice has been recorded on a phonogram or without consent of another person whose consent is required by law, and thereby seriously infringes the private life of this individual, shall be fined or sentenced to up to one year in prison.

Domestic legislation does not provide special protection of public figures privacy. However, decisions of international bodies monitoring the respect of human rights have already made a distinction between the level of protection of pubic figures and other citizens. Hence the right to respect of private life can be restricted to the extent to which the individual himself links his private life to the public life.

105 See more in *Human Rights in Yugoslavia 2001,* II.2.10.

The limits of acceptable criticism are wider in regard to public figures (*Lingens v. Austria*, ECtHR, App. No. 9815/82 (1986) and *Van Oosterwijck v. Belgium*, ECtHR, App. No. 7654/76 (1980)).

In addition to protection by criminal law, the Public Information Act (*Sl. glasnik RS,* No. 43/03) also envisages civil law protection (non-publication of information, surrender or destruction of records, award of material and moral damages and the publication of a judgement, Art. 46) when the media publish personal information on records, such as letters, diaries, digital records or records of appearance or voice. Such information can only be published with the consent of the person on whom they were made and the person for whom they were intended (Art. 43), except in cases prescribed by law, i.e. if information was intended for public use, if information is about events or phenomena of interest to the public, if the record was made at a public assembly and the like (Art. 45, see also *Bruggemann and Scheuten v. Germany,* ECmHR, 3 EHRR 244 (1981) – the right to privacy can be limited in the measure in which the individual himself put his private life into the public sphere). The Montenegrin Media Act (*Sl. list RCG*, Nos. 51/02 and 62/02) does not deal with this issue.

The constitutional guarantee of the inviolability of the mail and other correspondence is more closely regulated by criminal legislation, which prohibits opening another's letter, telegram, package or other matter, delaying delivery or concealing such matter without authorisation, its destruction or delivery to a third person (Art 72, Serbian CC; Art. 52, Montenegrin CC).

Unauthorised disclosure of privileged communications (Art. 73, Federal CC/Basic CC; Art. 53, Montenegrin CC), that is, statements made within a protected relationship such as attorney-client, physician-patient and the like, is also punishable under the law, except when such a disclosure is in the public interest or when the interests of a third person take precedence. The offence is actionable under civil procedure.

4.7.2. The Home

Article 24 (2) of the HR Charter:

> No one can enter the home or other premises of others, against the will of its holder or conduct a search of these premises without a court order. Entering the name or other premises of others or search of these premises without a court order are allowed only if it is necessary for the immediate arrest of a perpetrator of a criminal act of if it is necessary to prevent an imminent and serious danger for persons or property, in a manner prescribed by law.

The HR Charter contains several changes regarding the inviolability of the home and other premises when compared to the former Federal Constitution (Art. 31) and the Constitutions of Serbia (Art. 21) and Montenegro (Art. 29).

Some changes are an improvement over the provisions of the constitutions of the member states and the former Federal Constitution. The HR Charter refers to all persons, not just officials, and forbids the entry *or* search of premises, not cumulatively entry *and* search of premises. Also, the formerly prescribed ground for search without a warrant "in order to save persons an property" has been more precisely defined by the HR Charter as a search necessary to prevent "imminent and serious danger for persons and property". Other changes, on the other hand, cannot be considered as improvements. The HR Charter does not foresee that search has to be conducted in the presence of two witnesses. It also foresees that all limitation of the rights guaranteed have been provided for by constitution or law (Art. 5 (1)).

The constitutions of the member states (Art. 21, Serbian Constitution; Art. 29, Montenegrin Constitution) prescribe that the home is inviolate, and that it can be allowed by law for an officer to enter the home or other premises of others, against their will and conduct a search if so authorized by a court order. The search must be conducted in the presence of two witnesses. An officer can enter the home or other premises of other without a court order if it is necessary to apprehend a perpetrator of a crime or in order to save people and property.

Provisions on search of premises are also provided in the new CPC and have been substantially improved.[106] Hence the search of an apartment can be in order to apprehend the perpetrator of a criminal offence or to find evidence of an offence or objects important for a criminal proceeding. Better guarantees are set on searching attorney's offices. These premises may be searched only in relation to a specific proceeding, act or document (Art. 77 (2)). Search is ordered by the court, through a written reasoned warrant. If the person to whom the search warrant is related requests the presence of a legal counsel or defence counsel, the search shall be postponed until arrival of such person, up to a maximum of three hours. A person subject to search must be specifically informed about the right to have an attorney present during the search (Art. 78). Search can be conducted without prior serving of the warrant, as well as without prior notice to hand over persons or objects, or the information about the right to defence counsel or attorney, if there is possibility of armed resistance or other form of violence, or if there is obvious preparation or action to destroy evidence of a criminal offence or object of importance for criminal proceedings.

In strictly defined cases the CPC permits entry into the home and search without presence of witnesses under explicitly stated circumstances (Art. 81). According to the text, controversial is basis for search allowing entry and search without a warrant or witnesses if "someone is calling for help" (Art. 81 (2)). The

106 Provisions of the old CPC that were declared unconstitutional by the Federal Constitutional Court. See *Human Rights in Yugoslavia 2001,* I.4.7.2.

existence this is difficult to prove, and the burden of proof is transferred to the complainant, i.e. the owner of the apartment. Owner of the apartment who is present has the right to lodge a complaint against the action by the internal affairs bodies (Art. 85 (2)). Internal affairs bodies are obliged to submit a report to the investigating judge about a search undertaken without appropriate court order (Art. 81 (6)).

The Montenegrin Interior Affairs Act (*Sl. list RCG*, Nos. 24/94, 29/94) prescribes, in Article 3, that "authorised officials" may enter and search a home without a warrant and without the presence of witnesses if "necessary to take into custody the perpetrator of a criminal offence or to save human life and property." A major potential for abuse exists since no oversight mechanisms are envisaged.

Violation of the home is punishable under all of the criminal codes. The criminal offences defined are violation of the inviolability of the home (Art. 192, Federal CC/Basic CC; Art. 68, Serbian CC; Art. 50, Montenegrin CC) and illegal search (Art. 193, Federal CC/Basic CC; Art. 69, Serbian CC; Art. 51, Montenegrin CC).

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

4.7.3. Correspondence

Besides letters, the term correspondence includes telephone, telegraph, telex, facsimile, and all other mechanical and electronic means of communication. The Federal Constitution guarantees the privacy of correspondence (Art. 32 (1)). This right may be restricted by federal statute but only with a court order and if required for the conduct of criminal proceedings or national defence (Art. 32 (2)). The corresponding provisions of the republican constitutions are similar (Art. 30, Montenegrin Constitution; Art. 19, Serbian Constitution).

The HR Charter prescribes the inviolability of correspondence and other means of communication and foresees that any exceptions can only be temporary in character, based on a court order and necessary for the conduct of criminal proceedings or the defense of the country (Art. 24 (3)). Restrictions can only be imposed by a law (Art. 5 (1)). The constitutions of the member states protect this right in a similar manner (Art. 19, Serbian Constitution; Art 30, Montenegrin Constitution).

The CPC goes into more detail with regard to restrictions on the privacy of correspondence.

Unlike the former CPC, the new CPC introduces a restriction with regard to the possibility that an investigating judge can have insight into letters, telegrams or other means of communication addressed to the defendant or sent by him; this

restriction is allowed this only if there are circumstances on the bases of which it can be expected that these would serve as evidence in the proceedings (Art. 85 (1)). If the interests of the proceedings allow, the contents of the consignment can be communicated in its entirety or partly to the defendant or to person it had been addressed to, or can be delivered to him. If the defendant is absent, the consignment shall be returned to the sender if this is not contrary to the interests of the proceedings (Art. 85 (3)).

The status of convicts is regulated by the Act on Execution of Criminal Sanctions (*Sl. glasnik RS*, No. 16/97), which allows no restrictions on the right of correspondence of persons serving prison sentences (Arts 65 and 66). The Montenegrin Act on Execution of Criminal Sanctions (*Sl. list RCG*, Nos. 25/94 and 29/94) is more restrictive – a prisoner has the right to communicate with the members of his immediate family, while communication with others is subject to approval (Arts 46, 47).

The Serbian Interior Affairs Act (*Sl. glasnik RS*, Nos. 44/91, 79/91 and 54/96) envisages a procedure whereby the police may inspect letters and other correspondence (Art. 13). At the request of the republican Public Prosecutor or Minister of Interior, the Serbian Supreme Court may authorise opening of correspondence and electronic surveillance if required for the conduct of criminal proceedings or for the security and defence of Serbia. The request is decided upon by the President of the Supreme Court or a justice designated by him, after which the Minister may order the taking of "measures departing from the principle of the privacy of correspondence with respect to certain individuals or organisations" (Art. 13 (3)). The statute clearly is not in line with the Serbian or the HR Charter, neither of which envisages the interests of "security" as grounds for opening and reading another's correspondence.[107]

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

107 Moreover, as this is a republican law, it violated a provision of the former Federal Constitution which provides that such restrictions can only be prescribed by a federal law; therefore in January 2001 the Federal Constitutional Court (*Sl. list SRJ*, No. 5/01) established that this provision was not constitutional.

this procedure is entirely under the jurisdiction of military bodies, such way to regulate secret data collection offers a some guarantee that security services cannot use their authority that can infringe human rights and freedoms arbitrarily.[108]

Pursuant to the Act on Security and Information Agency, the Director of the newly established Agency can, if this is required by the security interests of Serbia, issue an order based on a prior court decision, requesting that against certain natural or legal persons measures be undertaken that depart from the principle of inviolability of the privacy of correspondence and other means of communication (Art. 13).

This Act once again ignores constitutional provisions in the field of privacy of the individual prescribing the permitted restrictions of this right. In this process the said decision by the Constitutional Court has seen neglected, and the protection of the interest of "security Republic of Serbia" is stated as a reason for infringing privacy. Consequently, the legislator did not find it legally relevant that the Serbian and the former Federal Constitution, state only two reasons as grounds for permitted restriction of the principle of inviolability regarding the privacy of correspondence and other means of communication, and only in cases when such limitation of privacy is necessary for the conducting the criminal proceedings or for the defence of the FRY or Serbia. Neither did they consider the decision of the Federal Constitutional Court pursuant to which it was not permitted to expand the list of grounds by citing "reasons of security of Serbia". This Act, which ignores constitutional provisions and the jurisprudence is contrary to the rule of law.

Although these provisions could be considered to be unconstitutional, from the viewpoint of the former Federal Constitution and both the Constitution of Serbia and the HR Charter, it is not entirely incompatible with international standards. Article 8 (2) of the ECHR expressly states that national security and public safety are allowed grounds for restriction of the right to privacy. International instruments establish minimal standards of the protection of human rights and thus national legislation can provide broader protection. The opinion of the former Federal Constitutional Court that any limitations on the right to privacy are to be construed restrictively is also commendable. Yet the question is there a point in separating defense from security and proclaiming the latter an unconstitutional ground for limiting privacy is also valid. In any case, what is not commendable is the fact that the authors of the Act and the Charter did not consider the ruling of the Federal Constitutional Court and had not paid more attention to the grounds of restriction.

The procedure for taking measures to restrict one's privacy pursuant to this Act is as follows: it is necessary that the proposal by the director of the Agency to

108 According to the Constitutional Charter, the jurisdiction of the military judiciar y is to be transferred to bodies of the member states (i.e. the civillian judiciary), by a special law which s huold be passed within six months of the entry into force of the Constitutional Charter (Art. 66, Const itutional Charter; Art. 24, Act on Implementation of the Consitutional Charter).

undertake measures be approved by the President of the Supreme Court of Serbia, or another authorised judge, within 72 hours from the submission of the proposal. The approved measures can be enforced for up to six months maximum, and can be extended for another six months maximum on the basis of a new proposal (Art. 14).

Some concern is raised by the provision of Article 15, pursuant to which when so required by reasons of urgency, and a typical example of this is said to be internal and external acts of terrorism, the Director of the Agency may decide to order application of privacy restriction measures, even without a decision by the Supreme Court of Serbia. In this case it is required only to have a "prior written consent to initiate adequate measures by the president of the Supreme Court or an authorised judge". It is unclear on the basis of which data is a judge of the Supreme Court supposed to issue such an authorization. In such a case, the Director of the Agency must then initiate the usual proceedings before the Supreme Court only 24 hours after the moment he received the written consent, by submitting a written proposal, on which the Court must decide within 72 hours. The Court decision would then either approve the extension of already undertaken measures, or suspend them. Therefore, in this particular "case of emergency" it is imaginable that the Director of the Agency would by himself restrict the privacy of an individual for the duration of 96 hours, without an appropriate decision by the Supreme Court, based on relevant facts and data.

The HLC submitted in December 2002 an initiative to the Constitutional Court of Serbia to review the constitutionality of the mentioned articles of this Act. According to the HLC opinion, the contested provisions are imprecise, incomplete and unclear, and therefore open the way to arbitrary interpretation and other forms of misuse.[109]

The three criminal codes define as punishable the violation of the privacy of correspondence. The criminal offences prescribed are violation of the privacy of correspondence (Art. 194, Federal CC/Basic CC; Art. 72, Serbian CC; Art. 52, Montenegrin CC) and unauthorised wiretapping and recording (Art. 195, Federal CC/Basic CC; Art. 70, Serbian CC; Art. 54, Montenegrin CC).

4.7.4. Honour and Reputation

In accordance with Article 17 of the ICCPR, Code of Obligations envisages a provision of compensation for damages in case of insult against honour and spreading false information. The court can also rule that the judgment be publicly announced, or correction made at the expense of the injuring party, or order the injuring party to withdraw the statement by which the damage had been caused or something else whereby the purpose of compensation can be achieved (Arts. 198–200).

109 HLC, Press Release, 2 December.

Criminal codes of the member states still envisage criminal offences against honour and reputation, such as slander, defamation and exposing personal and family circumstances (Chapter XI, Serbian CC; Chapter IX, Montenegrin CC).

Pursuant to the modern human rights protection standards, it is recommended that states abandon criminal responsibility for violations of honour and reputation and instead use measures of civic law that accomplish the same purpose. These criminal offences may have justification only when the injured parties are private citizens and not public figures, holders of public functions, especially politicians, insulted and slandered by the media in the process of reporting or commenting issues of public interest.[110] According to the jurisprudence of European Court of Human Rights, the level of criticism allowed is broader for politicians, when they are performing a public function (*Oberschlick v. Austria* (No. 1), Series A No. 204 (1991); *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, Series A No. 302 (1994)).

The Serbian Act on Public Information prescribes the right to claim damages caused by the publication of an untruthful, incomplete or other forbidden information (Art. 79). The journalist who is the author of the information can be held responsible if it proven that he was culpable (Art. 81), while solidary liability of the journalist, the editor in charge, and the legal person which is the founder of the medium exists if they could, with due diligence, establish the untruthfulness or incompleteness of the information before it was published (Art. 80). The proceedings on a claim for damages are to be conducted with due haste (Art. 86). The Act narrows down the scope of the privacy of persons who perform a political or state function. Their privacy can be limited if the information is important to the public, in a manner proportionate to the justified public interest in each particular case (Art. 9, see also *Oberschlick v. Austria* (No. 2), ECtHR, Reports 1997-IV. App No. 47/1996/666/852, (1997)) – the extent of the protection of politicians from critiscism must be weighed with the interest of the public in a democratic society for openess of discussion on political issues),. The Media Act of Montenegro does not contain any detailed rules, but it does give a person whose honour or integrity have been violated the right to sue for damages (Art. 20).

4.7.5. Family and Domestic Relations

The legislation of SaM is on the whole in accordance with the requirements to protect the family and domestic relations.[111] Thus, Article 25 (2) of the HR Charter lays down the equality of legitimate and illegitimate children, as do also the constitutions of the member states (Art. 60 (2) Montenegrin Constitution; Art. 29

110 See 4.9.5. It is interesting that the ECHR, unlike the ICCPR, does not protect the right to honour and reputation as a separate right, but mentions reputation and rights of others as a legitimate restriction of the freedom of expression, which should be interpreted very narrowly, like any other form of restriction of human rights (see Art. 10 (2), ECHR).

111 On the protection of the family see more at 4.15.

(4) Serbian Constitution; see also *Marckx v. Belgium*, ECtHR, App. No. 6833/74 (1979); *Vermeire v. Belgium*, ECtHR, A 214 C, App. No. 44/1990/235/301 (1991)); though the husband of a woman is considered to be the father of their child, the law does provide for the possibility of civil action to determine a child's paternity; common law marriages produce certain consequences under family law, and the like.

However, the concept of protection of the family as a component of an individual's privacy is not yet to be found in the law of SaM. While the Federal Constitution guaranteed the inviolability of the home (Art. 31), of the mail and other correspondence (Art. 32), and protection of personal data (Art. 33), and the Serbian adds the right to a private life, none of the constitutions treat the family as part of the private sphere. The HR Charter for the first time protects the family within the right to privacy, prescribing, "everyone has the right to the respect of his private and family life, home and correspondence" (Art. 24 (1)).

The two constitutions deal with the family mainly from the aspect of the society as a whole. Under Article 28 (1) of the Constitution of Serbia and Article 60 (1) of the Constitution of Montenegro, "the family, mothers and children enjoy special protection."

The HR Charter guarantees the right to marry, based on a freely given consensus by the future spouses, and prescribes that the entry into, the duration and the dissolution of marriage are based on spousal equality (Art. 25 (1)). The Montenegrin Constitution also envisages that a marriage is valid only with a freely given assent of a man and woman (Art. 58), while the Serbian Constitution does not contain a similar provision. The provision of the Montenegrin Constitution effectively renders any legislation allowing homosexual marriages unconstitutional. Article 12 of the ECHR also gives the right to marry only to "men and women".[112]

Nor is the regulation of family life by the Marriage and Family Relations Act any better. Indeed, the Act does not even contain a definition of the terms family and family life and speaks only of relations "between parents and children," implying that the quality of family life has to do merely with relations between parents and children, or adopted children and their adoptive parents (Art. 151, Marriage and Family Relations Act). Only the interests of the child and the society are protected. Thus Article 7 (1) of the law prescribes that "parents exercise their rights and duties in the upbringing of their children in accordance with the needs and interests of the child and the interests of the society," and makes no mention of the interests of the parents. The inadequate regulation of family relations is evident also where the role of the child welfare agency is concerned. In proceedings involving parent-child relations, the agency represents the child on behalf of the state (Art. 11, Marriage and Family Relations Act) and no special procedural protection of the interest of

112 See more 4.15.2.

parents to be with their children is envisaged. The interests of parents are not a factor the court is bound to consider in deciding to whom custody of a child will be awarded (Art. 125 (2)).

The failure of the law to view the family through the interests of each of its members has a detrimental effect. Perhaps the most glaring example of this is the lack of any regulation of a child's relations with relatives other than his parents, e.g. grandfather or grandmother. Since the law does even not mention this relationship, it may be concluded that it enjoys no legal protection.

4.7.6. Change of Sex of Transsexuals

In the SaM there is no legal provisions that regulate the conditions under which data referring to sex of the person could be changes after the operation. However, municipal administrations in charge of registers have in practice been responsive to requests for the alteration of data on sex. Contrary to experiences of foreign legal systems in which as a rule there was an initial reluctance of registrars and courts to legally recognise change of sex, absence of legal regulations in the SaM has incited municipal administrative bodies to act as if this was a correction of an erroneous entry of sex at birth, although in cases of trans-sexualism there had not been any mistake either at the initial entering of sex in the registry, or until the person in question has not undertaken the surgical operation of sex change. The only condition for the correction is to submit appropriate medical documentation

However, it seems that leaving to personal preferences and expertise of competent persons in our municipalities to decide on such important issue as the sex change, gives rise to legal insecurity, which may sooner or later imperil the position of trans-sexuals. Sex change is a fact that can be determined only in a special administrative or court procedure on the basis of professional opinion of competent experts and with respect of the elementary right to human dignity,

According to the more recent decisions of the European Court of Human Rights, no consensus has yet been reached concerning the treatment of transsexuals, and thus states cannot be expected upon to change their legislation and allow changing the registers (see *Rees v. United Kingdom*, ECtHR, 9 EHRR 56 (1986)). However, the Court mentioned in several of its decisions that it is entirely likely that it will change its opinion on the issue in the future (*Sheffield and Horshman v. United Kingdom*, ECtHR, 27 EHRR 163 (1998)).

4.8. Freedom of Thought, Conscience and Religion

Article 18, ICCPR:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion

or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

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

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

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

Article 9, ECHR:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The HR Charter and both constitutions of the member states guarantee the freedom of thought and conscience (Art 26, HR Charter; Art. 45, Serbian Constitution; Art. 34 (1 and 2), Montenegrin Constitution). Furthermore, freedom of belief is explicitly guaranteed by the Montenegrin Constitution. These are absolute freedoms and may not be derogated from even during a state of war (Art. 6 (9), HR Charter). Among the grounds on which discrimination is prohibited, the HR Charter (Art. 3 (3)) cites religion, political or other beliefs.

The freedom of religion is regulated almost identically by the Serbian and Montenegrin Constitutions (Arts. 41, 11 and 34, respectively), which in addition proclaim the separation of church and state, the freedom of religious communities to perform their rites and administer their affairs, found religious schools and charitable organisations, and provide also for the possibility of state assistance for these purposes.

Until the adoption of the HR Charter, the widest difference between the constitutional provisions of SaM and the international standards of religious freedom was with regard to the freedom of adopting a new religion or belief. General

Comment 22 (48) of the Human Rights Committee (1993) is explicit that an individual's freedom "to have or adopt a religion or belief of his choice" (Art. 18 (1), ICCPR) is to be interpreted as the right to change one's religion. This right is also protected by Article 18 of the Universal Declaration of Human Rights. The HR Charter explicitly provides the freedom to change one's beliefs. Article 26 of the HR Charter is entirely in accordance with both the ICCPR and ECHR, and even uses the exact wording of these international instruments.

Article 27 of the HR Charter foresees equality of religious communities and their separation from the state. Furthermore, it emphasises that religious communities are free in independently deciding upon their internal structure, religious services and that they have a right to establish religious schools and charity organisation, in accordance with law.

Basic consitutional principles of separation of church form the states and equality of religious communities (Art. 27, HR Charter; Art. 41, Serbian Consituti-on) are seriously violated by ceratin acts of government, which indicate preferential treatment of Serbian Ortodox Church.[113]

Under the ICCPR freedom of religion includes the right to manifest religion or belief in worship, observance, practice and teaching. The Serbian Constitution guarantees these rights, with the exception of teaching. It does make it possible for religious communities to establish their schools but, rather than defining religious instruction as a component of the right of every individual to freedom of religion, the Constitution characterises it as an activity of religious communities.

Under Article 18 (4) of the ICCPR, the states parties undertake "to have respect for the liberty of parents and, when applicable, legal guardians, to ensure the religious and moral education of their children in conformity with their own convictions." The constitutions of the member states do not guarantee this right. Interpreted in conjunction with Article 13 (3 and 4) of the ICESCR,[114] the provision means that parents have the right to establish private schools for the education of their children in conformity with their convictions. Until the recent enactment of new legislation in Serbia (Act on the Bases of the System of Education *Sl. glasnik RS,* Nos. 62/03 and 64/03) and in Montenegro (Act on Elementary Education, *Sl.*

113 See more 4.12.1.1.

114 Article 13 (3 and 4), ICESCR:

> 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents ... to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
>
> 4. No part of this article shall be construed so as to interfere with the liberty of individuals and authorities to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

list RCG, No. 64/02), elementary schools could only be founded by the state and not by private citizens, although this right is explicitly prescribed by the ICESCR.

The Act on Amendments and Changes to the Act on Elementary Schools (*Sl. glasnik RS*, No. 22/02) and the Act on Amendments and Changes to the Act on Secondary Schools (*Sl. glasnik RS,* No. 23/02) regulate religious education and teaching of an alternative subject in Serbian schools. In July 2001 the Serbian Government adopted the Decree on Organisation and Conduct of Religious Education and Alternative Subject Education in Primary and Secondary Schools (*Sl. glasnik* RS, No. 46/01). It introduced courses in religious and civic education in schools. In November 2003, Constitutional Court of Serbia delivered a decision that these provisions were in accordance with the Constitution and international obligations of SaM, and therefore rejected an initiative to rule them unconstitutional and illegal (filed by non-governmental organisation *Forum Iuris* and YUCOM).

According to the Constitutional Courts view, the religious education foreseen by Decree and respective Acts does not violate constitutional principle of separation of church and state provided by the Article 41 of the Serbian Constitution. The introduction of religious education is in accordance with curricula, which is on the proposal of traditional churches adopted by Minister of Education and Sports and Minister of Religion. Furthermore, Constitutional Court of Serbia holds that defining seven churches as traditional ones, which religious education will be financed by the state has not violated the principle of equality of religious communities, since the Decree and Acts do not prohibit any community to independently finance its religious education. Moreover, students are not obliged to enroll in religious education courses, but they have the right to choose between that and civil education (*Sl. glasnik RS*, No. 119/03).

Both subjects are optional. The decision on attendance of religious or alternative subject classes in elementary schools is taken by parents or, if applicable, legal guardians. In the secondary schools students decide about the subject themselves, with the obligation to inform their parents or legal guardians about their decision. Classes on this subject are held in all eight grades of elementary school and all four grades of secondary school, with students having to decide each year. Parents or legal guardians (in primary schools) and students (in secondary schools) have to decide on attending one of the proposed subjects. According to the previously adopted decree classes on these subjects were fully optional, meaning that attending them was not compulsory. Pursuant to current law, religious education is obligatory for the pupil or student who decides to take it up, and the same rule applies to classes in the alternative subject with ethical-humanist content, for the running school year. The Decree allowed for the attendance of both subjects, whereas the current legal provision does not allow that. This fact further instills in the public the impression of conflict and opposition between religion and human rights.

Despite the fact that less than half of the pupils and students applied for classes for one of the optional subjects, the Serbian Government decided to institutionalise to a greater extent religious education in primary and secondary schools.

Amendments to the Act on Elementary and Secondary School contain the provision stating that the religious education in schools is organised for the traditional churches and religious communities: the Serb Orthodox Church, the Islamic Community, the Roman Catholic Church, the Slovak Evangelical Church, the Jewish Community, the Reformed Christian Church, and the Evangelical Christian Church.

It remains unclear why some of those churches cited are defined as traditional and which criteria were applied.

"Conscientious objection" is not explicitly mentioned in the international instruments, but it originates from the freedom of thought, conscience and religion. The right to conscientious objection is contained in and recognised by the recommendations and resolutions of the Parliamentary Assembly and the CoE Committee of Ministers.[115] However, the jurisprudence of the European Commission of Human Rights established that conscientious objection is not protected by the Convention. Since Article 4 (3b) provides that "*in case of conscientious objectors in countries where they are recognized*, service exacted instead of compulsory military service" is not considered to be forced or compulsory labour, which clearly shows that it is upon member states to decide whether they will provide conscientious objection in their legal system (see *Autio v. Finland*, ECmHR, 72 DR 241 (1991); *X v. Austria*, App. No. 5591/72, 43 Coll 161. The HR Charter explicitly recognises the right to conscientious objection in Article 28:

> Conscientious objection is recognized in the State Union of Serbia and Montenegro.
>
> No one is required to perform a military duty or other duty which involves the use of arms contrary to his religion or beliefs. Such a person may be called upon to perform an adequate civilian service, in accordance with the law.

At the beginning of 2002, the Federal Assembly adopted the Act on Changes and Amendments of the Yugoslav Army Act (*Sl. list SRJ*, No. 3/02) which reduces military service from 12 to 9 months, whereas the civilian service takes 13 months. This is certainly a better solution than the previous one contained in the Yugoslav Army Act (*Sl. list SRJ*, Nos. 43/94, 28/96, 44/99, 74/99), according to which the

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

recruits who invoke the conscientious objection have to perform military service twice as long – 24 months. However, it is important to mention that the longer duration of civilian service itself is not contrary to human rights standards, as long as this difference in duration does not have a punitive, discriminatory character which *de facto* prevents the use of the right to conscientious objection. The European Court of Human Rights established in its jurisprudence on Articles 9 and 14 of the Convention that even two times longer civilian service can be justified (see *G v. The Netherlands*, ECtHR, App. No. 11850/85 (1987) and *Autio v. Finland*).

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

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

Pursuant to the Article 297 (1) of the Yugoslav Army Act, civilian service is performed in the units and institutions of the Army and the Federal Ministry of Defense. Civilian service means the possibility of serving in civilian institutions (humanitarian organisations, old people's homes...) and not in the institutions of the army. Legislators has failed to establish the difference between performing military service without arms (which can be done in the institutions of the army) and civilian service. This is a very unusual omission, given that the previous legal provision had correctly interpreted the issue of the civilian service. The Act on Changes and Amendments of the Yugoslav Army Act (*Sl. list SRJ,* No. 44/99), has changed the Article 297 which until then had read:

> Military service in the civilian service is performed in military economic, health care institutions, general rescue organisations, organisations for rehabilitation of the disabled and other organisations and institutions performing services of public interest.

The Council of Ministers of Serbia and Montenegro passed a Decree on Military Service (*Sl. list SRJ,* Nos. 36/94, 7/98; *Sl. list SCG*, No. 37/03), which corrected most of the discrepancies between the Yugoslav Army Act and Article 28

of the HR Charter and international standards. The Decree differentiates between performing military service without bearing arms, deciding on by the draft board (Art. 26), and civilian service, deciding on by a special commission, comprised of a psychologist, theologist, physician and two representatives of the military district who are not professional soldiers (Arts. 21a and 26a). The conscientious objector is to perform his service in medical institutions, general rescue organisations, institutions for rehabilitation of invalids and in other institutions and organisations which perform a public service and are so designated by the Minister of Defence, if possible in the place of residence of the objector (Art. 27). Requests for serving without bearing arms or in civilian service can be made no later than the end of the first third of the duration of the military service. This allows the possibility to change one's beliefs, in accordance with the HR Charter and international standards, although with a relatively reasonable limitation intended to prevent abuse of this right (Arts. 26 (5) and 26a (5)). A person who possesses a licence to bear or have arms, or who has been convicted of a crime or a misdemeanour with elements of violence in the past three years, or who has applied for a licence to bear or have arms in the past three years, or who is a member of a hunting or sharp shooting association, or who sells or repairs weapons or munitions cannot invoke the right to conscientious objection (Art. 27a).

The Decree itself is a temporary solution, which is sometimes even contradictory to the very Act it supposes to implement. It is furthermore quite inappropriate for such an important area to be regulated by a decree which is of less legal force than the Act, but having in mind the operating peculiarities of the legislative body of SaM this solution is far better than applying the Act alone.

4.9. Freedom of Expression

Article 19, ICCPR:

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

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

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

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

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

Article 10, ECHR:

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

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

4.9.1. General

SaM law guarantees the right to hold opinions and freedom of expression. Formally, guarantees in the highest legal acts of SaM are divided into two groups: one in which the freedom of opinion and expression are guaranteed, and the second, providing guarantees for the freedom of the media. Provisions regarding freedom of expression in all important international treaties are usually contained in one single article. Right to freedom of expression of opinion is guaranteed by both state constitutions, as well as by the HR Charter (Art. 29, HR Charter; Art. 34 (2) and 38, Montenegrin Constitution; Art 45, Serbian Constitution). The HR Charter enters into more detail regarding the means used (speech, writing, images or other manner), as well as regarding the rights constituting the freedom of expression (seeking, obtaining and imparting information and ideas). The Montenegrin Constitution, in Article 34 (2) provides that "No one shall be forced to express his/her opinion".

According to the HR Charter, this freedom can be restricted by law, if necessary for the protection of rights and dignity of other persons, preserving the independence and impartiality of courts, national security, public health and moral or public security (Art. 29 (3)). These provisions are in keeping with the ICCPR, though they mention public security rather than public order. An additional reason for restriction – preservation of independence and impartiality of court – has been taken from the European Convention on Human Rights.

Special provisions in all highest legal acts in SaM are dedicated to freedom of the press and other media (means of public information). Freedom of the press is guaranteed, publication of newspapers is possible without prior authorisation and

subject to registration (Art. 30 (1), HR Charter; Art. 46, Serbian Constitution; Art. 35 (3), Montenegrin Constitution). Television and radio stations can be established in accordance with law (Art. 30 (1), HR Charter; Art. 46 (4), Serbian Constitution), whereas the Montenegrin Constitution stipulates that the radio broadcasting system shall be regulated by law (Art. 35 (4)).

Censorship of the press and other media is prohibited (Art. 30, HR Charter; Art. 46 (6), Serbian Constitution; Art. 37 (1), Montenegrin Constitution). No one can prevent the distribution of press or dissemination of information and ideas via other means of public information, unless it has been determined by a decision of the competent court that it is necessary for the prevention of propaganda of war, prevention of instigation to immediate violence or advocacy of racial, ethnic or religious hatred, which constitutes instigation to discrimination, hostility or violence (Art. 30 (5), HR Charter).

When listing the grounds for prevention of distribution of the press and other information, the Serbian Constitution adds "no one shall prevent the distribution of press and dissemination of other information ... unless they *provoke and incite* to ethnic, racial or religious intolerance and hatred" (italics added, Art. 46 (6)). The Montenegrin Constitution employs only the term "*provokes*", and as grounds for restrictions, besides the already listed ones, mentions also the *infringement of territorial integrity of Montenegro and FR Yugoslavia* (italics added, Art. 37 (2))

The right to correction is guaranteed by the Serbian Constitution (Art. 30 (3)) while the Montenegrin Constitution and HR Charter guarantee the right to correction as well as the right to response (Arts. 36 and 46 (5)).

The Serbian Constitution imposes the obligation of unbiased and timely information via media, financed from public revenue (Art. 46 (7)).

The novelty related to the freedom of expressions in SaM law is the provision in the HR Charter, which guarantees the right to seek, receive and disseminate information and ideas, as well as the right to access data in possession of state organs, in keeping with the law, thereby completing the international standards in this field (Art. 29 (1 and 2)).

Provisions of the HR Charter related to the freedom of expression represent a step forward in comparison with the former Federal Constitution, as well as with those present in constitutions of republics forming the state union.

4.9.2. Republic of Serbia – New Public Information Act

It was not until the third year since the democratic changes in October 2000 that the new and modern Public Information Act[116] was passed, formally replacing the one of 1998.[117]

116 *Sl. glasnik RS*, No. 43/03.

117 For more on the provision of the Public Information Act of the Republic of Serbia from 1998, see the *Human Rights in Yugoslavia 1999*, *2000*, *2001* and *2002*.

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

Besides defining the concept of public means of information, the Act envisages that, except in the case of news agencies, among the founders of a public information service cannot either directly or indirectly be included state and territorial autonomies, neither institutions, companies or other legal persons with predominant state ownership or entirely or partly funded from public revenue, except in cases determined by a separate act (Art. 14). Registration of public means of information is free, without discrimination contrary to market principles. The competent municipal court can, if proposed by the public prosecutor, prohibit the distribution of information if it has established that such action is necessary in a democratic society in order to prevent incitement to violent overthrow of constitutional system, infringement of the territorial integrity of the Republic, war propaganda, incitement to immediate violence or advocacy of racial, ethnic or religious hatred that represent incitement to discrimination, hostility or violence, and when such information could have serious unredeemable consequences the occurrence of which cannot be prevented in any other way (Art. 17). Confiscation of copies of newspapers can be ordered if such action is the only way to achieve the purpose of prohibition (Art. 18). The court can order a temporary ban until the termination of legal proceeding, which is urgent (Arts. 19 and 20).[118]

As regards the set of rules regulating the position of editors, journalists and professional associations of journalists, an important provision allows a journalist not to disclose data related to the source of information, unless the data refer to a criminal offence, or a perpetrator of a criminal offence punishable by prison sentence of minimum five years (Art. 32). Within the chapter on special rights in public information, the Act provides the duty to temporary keep records (60 days for the press and 30 days for electronic media) and the right to insight into the recordings. Presumtion of innocence applies to all persons mentioned in a public

118 See the case of the ban of the magazine *Svedok*, in II.4.9.2.2.

information service (Art. 37). This chapter especially forbids hate speech,[119] protects the right of minors so that contents and distribution of public information shall not injure the development of minors; it also stresses in a separate article the prohibition of public exposure to pornography (Art. 42).

The Act regulates in detail the concept, procedure and deadlines for exercising the right to correction and right to response (Arts. 47–70) and the failure to publish information on outcomes of criminal proceedings (Arts. 71–78). The right to compensation of damages, material and non-material, can be exercised based on this Act, independently of other legal available remedies. The responsibility of journalists, editors-in-chief and legal entity that is the founder of the public information service is excluded if false or incomplete information has been literally conveyed from a public parliamentary debate or a public debate in a parliamentary body or from the court proceedings or from a document of a responsible state body; on the other hand, their responsibility has been expanded if they could have established the falsity or incompleteness of information with due diligence (Arts. 79–90).

The implementation of this act is supervised by the corresponding ministry of the Republic of Serbia, while in the territory of autonomous provinces the supervision of implementation is exercised by provincial bodies in charge of public information issues. Penal provisions provide for economic offences and misdemeanors for non-adherance to this Act. Fines are quite high but not draconic, as was the case with the previous Act.

By the date of entry into force of this Act the provisions of the Public Information Act (*Sl. glasnik RS*, No. 36/98; *Sl. glasnik RS*, No. 11/01) related to inscription in the register of public information services and publishing response and correction have become obsolete, as well as the Act on the Base of the Public Information System (*Sl. list SFRJ*, No. 84/90; *Sl. list SRJ*, Nos. 11/93, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96) and the Act on Importing and Distributing Foreign Means of Mass Communication and on Foreign Information Activities in Yugoslavia (*Sl. list SFRJ*, Nos. 39/74 and 74/87; *Sl. list SRJ*, Nos. 24/94 and 28/96), with the exception of provisions on the position of foreign information institutions and representatives of foreign information services (Art. 102).

4.9.3. Establishment and Operation of Electronic Media

During 2002 laws were passed in Serbia and Montenegro that regulate the establishing and operation of electronic media.

The Broadcasting Act (*Sl. glasnik RS*, No. 42/02), regulates the conditions and ways of performing broadcasting activities, establishes the Republic Agency for Broadcasting, as well as institutions of public broadcasting service, stipulates the conditions and procedure for issuing permits for broadcasting radio and television

119 See more in 4.9.6.

programmes and regulates other important issues regarding the sector of broadcasting (Art. 1).

The Telecommunications Act (*Sl. glasnik RS,* No. 44/03), among other things and in keeping with international legal standards, regulates *inter alia* the conditions and methods of operation in the field of telecommunications and establishes the Republic Telecommunications Agency. Provisions of this Act do not relate to the right of physical and legal persons to transmit or broadcast radio and television programme intended for an unlimited group of users, with the exception of the right to use radio frequencies and to place, use and maintain telecommunication equipment (Art. 2).

4.9.3.1. Broadcasting Act of the Republic of Serbia – Basic achievement of the new laws on broadcasting in Serbia and Montenegro (*Sl. list RCG*, No. 51/02) is the establishing of independent and self-governed regulatory bodies in this field, which has represented a grey area in the freedom of information during the previous period, due to the dominant role of the state in issuing permits for programme broadcasting, as well as to numerous legislative regulations and gaps in law. In drafting new regulations the legislators were guided by international standards, especially the Recommendation of the CoE Committee of Ministers on Independence and Operation of the Regulatory Authorities in the Broadcasting Sector.[120]

In Serbia, the Republic Agency for Broadcasting (Agency) is founded on the basis of the Act as an independent and self-governed organisation performing public authorities and having the status of a legal person. The decision-making body is the Council and the Agency is represented by the Council Chairperson. The Agency has a multi-sided jurisdiction, from determining the broadcasting development strategy to issuing permits for programme broadcasting, monitoring the application of the Act and deciding on submissions and requests of broadcasters and other persons. The Agency is also responsible for adopting measures in the field of broadcasting aimed at protection of minors, application of copyright regulations and prevention of broadcasting of programmes that incite to discrimination, hatred or violence against individuals or groups of people on the basis of sex, religion, race, nationality or ethnicity (Art. 8 (2)).

Members of the Council are elected by the Republic of Serbia National Parliament, upon the proposal of eight authorised nomination bodies (National Parliament, Assembly of the AP Vojvodina, Republic of Serbia Government, Executive Council of the AP Vojvodina, deans of the Republic of Serbia Universities, professional associations, local non governmental organisations involved in protection of human rights, churches and religious communities, Art. 23) who each propose two candidates for the election of each individual member of the Council,

120 Recommendation of the Committee of Ministers on the Independence and Operation of the Regulatory Authorities in the Broadcasting Sector, Rec. No. 23/2000.

baring in mind that these candidates should be prominent experts in fields relevant for Agency operation. The ninth member, who must be from Kosovo and Metohija, is subsequently elected by the eight elected members. Unfortunately, the procedure to elect members of the Council has led to violation of the law and subsequently to the resignations of legitimately elected members, which has compromised the legality and authority of this body. Until the time of publishing this report, the Council has not done anything in terms of preparing a public tender for *licensing* broadcasting programmes.[121]

The role of state bodies in the election procedure for Agency bodies is much higher than in Montenegro (see below 4.9.3.2). A special regulation prescribes who shall not be eligible for Council membership in keeping with the principles of conflict of interest and preserving the independence of Agency operation (Art. 25). There is a detailed regulation of the reasons and in particular the procedure of dismissal of Council members, about which the decision is taken based on a justified proposal and following the implemented procedure to allow the possibility of the Council member concerned to state his/her case. The final condition for dismissal is that it should receive the majority of votes of the National Parliament members (Art. 29). The income of the Agency consists of the compensation fees for programme broadcasting, whereas the shortfall in funds is covered from the budget. There is a special provision stating that this circumstance should not influence the independence of the Agency (Art. 35).

Permit and the procedure for issuing permits for programme broadcasting – the condition is the prior obtaining of the permit for radio stations issued on the request of the Agency by the regulatory body responsible for the field of telecommunications, in accordance with the specific act regulating the sector of telecommunication and based on the Plan of radio frequency allocation, adopted by the respective telecommunications ministry. This body is obliged to issue a permit if it is in keeping with the Act and the Plan (Art. 39).

Only a domestic natural or legal person, registered or residing in Serbia can become a permit holder. If the founders of a local legal person are foreigners whose capital originates from the country where it is not permitted or it is not possible to determine the origin of the founding capital, such legal person does not have the right to participate in public tenders for the issuing of permits (Art. 41). The presence of foreign capital in the founding assets of the permit holder cannot exceed 49%, unless otherwise specified by an international agreement. Moreover, foreign capital cannot be a part of the founding investment of public broadcasting services (Art. 41).

121 See II.2.9.1.

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

The permits are issued by way of a public tender. The Act stipulates the reasons on the grounds of which a permit can be withdrawn even before it has expired.[122] In such case the Agency conducts a procedure in which the broadcaster concerned must be given an opportunity to state his case and be present at the session debating the withdrawal of his permit, after which a reasoned decision is made. There is the right to appeal against this decision, as well as the right to initiate a judicial review and administrative proceeding against the decision of the Agency with regard to this appeal (Art. 62).

The broadcasters have the right to fully, timely and freely inform and to protect children and youth against pornography, violence, drug abuse propaganda etc. (Art. 68). The bearers of the public broadcasting service in the Republic are the Broadcasting Institution of Serbia (former Serbian Radio and Television) and provincial broadcasting institutions. Public broadcasting service produces and broadcasts programmes of general interest. These programmes have various contents, and the bearers of the public broadcasting service are obliged to provide balance and equality of such contents "that support the democratic values of modern society, in particular the respect of human rights, cultural, national, ethnic and political pluralism of ideas and thought" (Art. 77). The Act particularly stresses the obligation of broadcasting institutions to ensure the respect of the impartiality and objectivity principles with regard to the informative programme (Art. 79).

The Management Board of the Broadcasting Institution of Serbia, which together with the General Manager represents the management structure, is nominated by the Agency from the ranks of recognised experts in the fields of journalism, media, management, law and other prominent individuals (Art. 87). Among other duties, the Management Board passes the Statute of the Broadcasting Institution of

122 The permit shall be withdrawn from the broadcaster if it informs the Agency in writing that he has no intention of broadcasting the programme, if he has stated false information in the application for the public tender, if he has not commenced the broadcasting of programme within given deadline, if he has not performed a technical inspection of the broadcasting station within given deadline, if he has ceased programme broadcasting without justified reason (for a period longer that 30 consecutive days or 60 days within one calendar year), if he violates the regulations on the prohibited media concentration and if despite the expressed warning does not meet the obligation of paying the fee for the permit. Also, if the relevant body in charge of telecommunications should annul the permit, if the Agency withdraws the permit from the broadcatesr on the grounds of violation of obligations or disregard of conditions stipulated by the permit or if one of the founders should after the issuing of permit become a foreign legal person registered in a country where it is not possible or not permitted to determine the origin of the founding capital, the programme broadcasting permit shall cease to be valid before the end of the period for which it had been issued (Art. 61).

Serbia, adopts activity plans, nominates and dismisses the General Manager, as well as the managers and editors-in-chief of radio and television programmes, and passes financial plans. The Programmes Committee is an advisory body representing the interests of viewers and listeners, which reviews the programmes' concept. Members of this Committee are elected by the National Assembly, 6 among the delegates in the Assembly and 12 from professional associations, scientific institutions, citizens' associations, religious communities, NGOs, etc. (Art. 91).

The Broadcasting Institution of Serbia and the Broadcasting Institution of Vojvodina are financed from the revenue collected by way of subscription.[123]

The Act also contains provisions on preventing the prohibited media concentration,[124] provisions on advertising and sponsorship, adapted to the intention to preserve independence, impartiality and variety of the media scene. It is prohibited to advertise political parties outside pre-election campaigns and it is also prohibited to receive sponsorship from state bodies and political organisations, as well as from those dealing in production or sale of goods and services whose advertising is not permitted (tobacco, alcoholic beverages, etc.).

4.9.3.2. Media legislation in Montenegro – In 2002, Montenegro has enacted the new Act on Media, Act on Broadcasting and Act on Public Broadcasting Services, Radio Montenegro and Television Montenegro (*Sl. list RCG*, Nos. 51/02, 62/02).

In comparison with the Public Information Act from 1998, the Act on Media regulates this field more fully and more liberally. For the first time there is a prohibition on state establishing individual media (Art. 7), whereas it is allowed to establish the media without permission, on the basis of simple application, with exception of electronic media regulated by another law (Art. 8). Particularly important are the provisions that guarantee the right of journalists to protect their sources of information and the freedom to publicise information regarded as state, military or other secret if there is a justified interest of the public (Art. 21). The right to response and correction is also guaranteed (Arts. 26–35). The Act obliges the media to protect the integrity of minors (Art. 22). A particular novelty is the obligation to

123 Given that the deadlines for establishing the register of subscribers and commencing the collection of subscription have expired based on existing legislative provisions, Serbian Government has suggested changes and amendments to this act, including the one to provide funding for broadcasting institutions based on the law on taxes of financial transactions until the subscription collection begins (1 July 2004). More details about the Amendments to the Broadcasting Act, see www.srbija.sr.gov.yu/vesti/2003–03/06/333940.html.

124 Media concentration, in other words the prevailing influence on public opinion, can arise when the broadcaster violates the principle of pluralism of thought by way of participating in the founding capital of another broadcaster, press and publishing company or a news agency. Prohibited media concentration exists also when the broadcaster is the only one broadcasting both radio and television programmes in a certain area, as well as in the case when the founder of a press and publishing company or news agency participates in the founding capital of the broadcaster thus leading to the violation of the principle of pluralism of thought in the public information media (Art. 98).

publish information on effective dismissal of criminal proceedings, disallowance of indictment or acquittal from charges of a person about whom the media had published information on criminal proceedings being initiated against him/her (Art. 25). The operation of foreign media in Montenegro is also regulated on the basis of simple application and can be banned only by a court decision (Arts. 36–41).

The Act on Broadcasting established for the first time as an independent regulatory body – the Agency for Broadcasting, governed by a Council whose members are nominated among prominent experts by the Government, University, associations of broadcasters, NGOs working on protection of human rights, NGOs working with media, whereas the Montenegro Assembly only ratifies these nominations (Art. 12). Agency for Broadcasting is financially independent. Its jurisdiction encompasses, among other things, adoption of the strategy and plan for issuing broadcasting frequencies, issuing permits for frequency use, passing sentences on fines and enacting specific regulations. The procedure for issuing permits for frequency use envisages organising a public tender that must contain non-discriminatory, objective and measurable decision-making criteria (Art. 37). Any participant at the public tender, dissatisfied with the Agency's decision, has the right to file a complaint to the Agency Council, and subsequently, if need be, institute a judicial review of the Council decision (Art. 40). The Act also regulates the operation of public broadcasting services, established by the Republic or local administrations, which broadcast programmes of general interest intended for all layers of the society, especially bearing in mind children, youth, minority ethnic groups, disabled, socially and medically deprived, as well as broadcasting programmes in languages of national and ethnic minorities (Art. 95). The Act prevents the prohibited media concentration, as well as regulates the subject matter of advertising and sponsorship (Arts. 105–114). The holder of permit for broadcasting and transmitting broadcasting signals can be a domestic or foreign natural or legal person with residence, domicile, or seat in Montenegro. Foreigners cannot participate in the core capital of public broadcasting services (Art. 32). Religious community or other religious organisation or legal person founded by it, can obtain a permit for programme broadcasting only on local level, whereas political parties, organisations or coalitions and legal persons founded by them are not eligible for obtaining a permit for broadcasting (Art. 33).

The Act on Public Broadcasting Services Radio Montenegro and Television Montenegro defines the Radio and Television of Montenegro as public services governed by a Council representing the interests of citizens and independent from state bodies and all persons involved in the production or broadcasting of radio and television programmes (Art. 14). Members of the Council – who cannot be assembly delegates, state officials and members of political party bodies, or persons previously convicted of particular felonies or those who can be assumed to have a conflict of interest – are nominated by the civil society institutions: NGOs, professional associations, artistic and sports organisations, University, etc., and are ratified by

the Montenegro Assembly without the right to decline (Art. 16). The Act guarantees and ensures the independence of the Council work – its members cannot be dismissed during their mandate, except in strictly defined cases (Art. 22). Special guarantees are given for editorial independence with regard to contents, time and way of broadcasting programmes, given that these programmes should meet the interests of the public on national and local levels and contain equal proportions of informative, cultural, educational, sports and entertainment programme (Art. 7). The means of funding further ensure the independence of the public broadcasting services – besides broadcasting subscription and taxes on vehicle radios and numerous other forms of income from the Republic Budget, the right to produce and broadcast commercials is also envisaged (Arts. 9–12). This solution could lead to unfair competition with commercial media that have no other guaranteed sources of income.

4.9.4. Other Draft Legislation in Relation to Freedom of Expression

In 2003, Ministry of Culture and Information of Republic of Serbia has submitted draft legislation on free access to information of public interest.[125] This draft provides for the right to access to information of public interest in possession of public authorities.[126] According to the draft, information of public interest is information in possession of a public authority related to all issues that any person has a justified interest to know, i.e. which has originated from the work or in relation to the work of public authority or body, or which has been filed with a public authority based on an official order, in the name or on behalf of a public authority, irrespective of whether the source of such information is the pubic authority or other person, irrespective of the carrier of information (paper, tape, film, electronic media or other), irrespective of place where information has been filed, on whose order, in whose name, or on behalf of who information has been filed, as well as irrespective of the date of information, the way in which it was obtained (immediately, through listening, watching or other, or indirectly, through insight into the document in which the information is contained etc.) or any other characteristic of such information.

125 As the basis for the Act, draft model legislation proposed by the CUPS was used, as well as the Recommendation of the Committee of Ministers of the CoE on Access to Official Documents, 2002, Rec (2002)2.

126 In light of the ratification of the ECHR by Serbia and Montenegro, it is important to mention that a general right to free access to official information does not exist. The Strasbourg Court has taken the position that Art. 10 of the ECHR shall not be interpreted as a general right of access to information in possession of public authorities, but that the public has the right to receive information of public interest and significance (*Observer and Guardian v. United Kingdom,* ECtHR, App. No. 13585/88 (1991). On the other hand, Art. 8 of the ECHR gives the right to individuals to obtain from the government bodies information pertaining directly to themselves (see e.g. *Leander v. Sweden*, ECtHR, App. No. 9248/81 (1987)).

The draft legislation envisages certain limitations, if necessary in a democratic society for the protection from serious harm to a priority interest based the constitution and law.

In short, the procedure is the following: the request is submitted in writing, without stating the reason. The responsible government body decides on the request without delay, at the latest within 20 days of submission. Compensation for the copy of the document covers the necessary cost of reproduction. If the request is denied, a complaint can be lodged within 15 days. The complaint is reviewed by the Trustee for Public Information, elected by the National Assembly of Serbia. Administrative action can be initiated against the decision of the Trustee.

The Trustee is bound to produce and update a manual containing practical instructions, to contribute to the effective work of government bodies and simplify the legal procedure for the citizens.

This draft represents an ambitious attempt to encompass all necessary issues related to the right of free access to information. The CoE, in collaboration with the Ministry of Culture and Information, has commented upon this draft legislation.[127] In addition, OSCE has organised several round tables in several Serbian towns in order to hear the opinion of the expert and general public. Without intention to enter into a detailed analysis of the proposed legal provisions and comments made by the CoE experts and the public, the most important comments made in relation to the existing draft legislation can be summarized as follows: 1) Remove the potential confusion between the term "public information" and "information of public interest", as a possible confusion in relation to the standards of "justified interest"; 2) define more precisely exceptions from the rule of free access to information; 3) rearrange provisions on appeal and complaint procedure so as to allow the right to complain against decisions by highest state bodies and; 4) reduce formalities prevailing in the draft legislation.

4.9.5. Criminal Law

During 2002, the criminal law in SaM has undergone positive changes.[128] For freedom of expression in Serbia it is particularly important that the offence of spreading false rumours (Art. 218, Serbian CC) was reformulated so that instead of criminal responsibility for "spreading false rumours with intent to incite discontent or disturbance of citizens" it now lays down the punishable act of "stating and spreading rumours that are known to be false, with intent to provoke serious disturbance of public order and peace, upon which such disturbance indeed occurs". Such formulation is in accordance with international standards and practice of the

127 ATCM(2003)021, 1 September 2003, Strasbourg.

128 See the Act Amending the Serbian CC, *Sl. list RS*, Nos. 10/02, 11/02 as well as the Act Amending the Montenegrin CC, *Sl. list RCG*, No. 30/02.

European Court of Human Rights that justify criminal prosecution as a form of restricting the freedom of expression only in exceptional cases. Therefore, freedom of expression can be restricted only when justified by reasons of "absolute social necessity", such as preventing violence and crime and in the interest of public security, when such expression, given the circumstances, can lead or has lead to violence, as currently prescribed in the Serbian CC (compare *Sürek v. Turkey*, ECtHR, App. No. 24122/ 94, (1999)).

Moreover, in Serbia criminal responsibility has been annulled for the unauthorised possession and use of a radio station, once a criminal offence pursuant to Article 219 of the Serbian CC, which was used over the past years for criminal prosecution of the independent media,[129] especially the provision in the third paragraph that had prescribed a punishment of one to eight years of imprisonment for "spreading false rumours or disturbing citizens by way of unauthorised possession and use of a radio station". Today, broadcasting of programme without permission of the Republican Agency for Broadcasting is a misdemeanour that is prosecuted through administrative procedure and does not carry a prison punishment (Art. 113 (1), Broadcasting Act). The Montenegrin CC still prescribes the offence of unauthorised possession or use of a radio station, punishable by fine or imprisonment up to one year, whereas spreading false rumours through such means carries a punishment of up to three years in prison (Art. 194, Montenegrin CC). There are no special provisions with regard to spreading false rumours and information.

However, criminal codes in SaM still contain several criminal offences from the group of acts against honour and reputation (slander – Art. 92, Serbian CC, Art. 76, Montenegrin CC; insult – Art. 93, Serbian CC, Art. 77, Montenegrin CC exposing personal and family situation – Art. 94, Serbian CC, Art. 78, Montenegrin CC), which are not in conformity with modern human rights standards. The key problem is that these are imprisonable offences, which is today considered an inadequate way to protect the honour and reputation, as well as a disproportionate restriction of the freedom of expression, especially considering the media an their role in the democratic society. In criminal codes of Serbia and Montenegro imprisonment is prescribed as the only sanction when these offences are committed through the media.[130] The position of the Human Rights Committee and the European Court of Human Rights is that the permitted restriction of any human right is to be construed as undertaking only those measures that are absolutely necessary to achieve the legitimate aim – in such a way that the same aim is not achievable in a less restrictive way. It is deemed that a prison sentence or criminal liability in general are not necessary for the protection of honour and reputation, and that apart from the right to correction and other extra-judicial procedures it is

129 See *Human Rights in Yugoslavia 2001* , I.4.9.5.
130 See Chapter 11 (Art. 92–102) Serbian CC; Chapter 9 (Art. 76–85) Montenegrin CC.

enough to ensure civil liability in the form of indemnity in a corresponding amount.[131]

Criminal Codes of SaM do not discriminate between the injured parties, whereas according to the European Court practice it cannot be same whether it is a private citizen, public servant or a politician. The politicians have to withstand a lot more criticism, even insults. More serious forms of slander, punishable by a longer prison sentence, are defined in our legislation as acts committed by way of using the media and where "the false statement stated or spread is of such importance that it could have lead to more serious consequences for the injured party" (Art. 92 (3), Serbian CC; Art. 76 (3), Montenegrin CC). The courts interpreted this provision in the favour of injured parties – civil servants, with the arguments that the consequences for their reputation are more serious precisely because they are known by a large number of people. In sharp contrast to this, the European Court holds firmly that politicians and other people in public office need to withstand much more criticism than the others (see *Lingens v. Austria*, ECtHR, App. No. 9815/82 (1986)), for the contrary see *Prager and Obershlink v. Austria*, ECtHR, App. No.15974/90 (1995)).

The same offences prescribed in Article 98 Serbian CC and Article 82 Montenegrin CC were used to protect the reputation of the FRY member republics and their flags, coats of arms, anthems, presidents, assemblies, governments, speakers of the assemblies and prime ministers in relation to the performance of their functions, with a prison punishment of up to three years. This protection is still in force in Serbia, whereas after the change in Article 82 of the Montenegrin CC, *only* the reputation of the FRY member republics and their flags, coats of arms and anthems is now protected.[132] Both member states codes also still prescribe the criminal offences of contempt of the people or members of national or ethnic groups in the FRY/SaM.[133] In Serbia, the aforementioned offences carry a prison punishment of up to three years, whereas in Montenegro this punishment is from three months to three years.

The Human Rights Commission has particularly appealed to the states to abolish the offences of contempt for the State and its bodies, frequently used by non-democratic regimes for persecution of individuals who oppose them.[134] The

131 See Conclusion of the Report by Special Rapporteur of the UN Committee for Human Rights on the Freedom of Expression, E/CN.4/2000/63, para. 205; for the view that criminal responsib ility for slander does not represent a proportionate measure to protect reputation, see judgment of the European Court in *Dalban v. Romania*, 1999; for the amount of reparation see *Tolstoy Miloslavsky v. United Kingdom*, 1995.

132 It is interesting that Montenegro never adopted the National Anthem Act, meaning that it does not have an anthem that could be protected by this provision.

133 Art. 83, Montenegrion CC; Art. 100, Serbian CC.

134 See Conclusions of the Special Rapporteur of the UN Commission for Human Rights on Free dom of Expression, E/CN.4/2000/63, para. 50.

state, especially its symbols, cannot have the right to protection of honour and reputation, because these are rights belonging only to people as individuals.

The exclusion of responsibility for the acts against honour and reputation is also provided for in SaM laws, *inter alia*, in the case of serious criticism, scientific or literary work and works of art, in journalism, etc., *if from the manner of expression it could be determined that it had not been done with the intent of contempt*. Contrary to this, the European Court of Human Rights has articulated a clear attitude that freedom of expression also includes the right to disclose information and opinions that are *insulting* and *shocking*, if it is the matter of public interest, as well that freedom of the press includes the right to exaggerate and be provocative to a certain extent (see *Prager and Oberschlick v. Austria*).

Our laws also exclude responsibility if the accused *proved the authenticity of his claims* or if there had been sufficient grounds for him to believe in their authenticity.[135] However, such placing of the burden of proof, deviating from the guaranteed assumption of innocence, is not in accordance with international standards (see *Lingens v. Austria*).

Finally, in Serbian and Montenegrin criminal codes, besides "stating false rumours" their "spreading" is also punishable. In the case of *Thoma v. Luxemburg*, (App. No. 38432/97 (2001)), the ECtHR found that a journalist must not be held responsible for quoting or conveying the text of a colleague journalist since the obligation of the journalist is to constantly and formally distance himself from the contents of the quotations that could offend or injure someone's reputation cannot be reconciled with the role of the press in reporting on current events and ideas.

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

Article 20, ICCPR:

> 1. Any propaganda for war shall be prohibited by law.
>
> 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Though SaM law contains provisions meeting the requirements of this ICCPR article, prosecution for incitement of national, racial or religious hatred was seldom seen in practice in spite of the frequency of hate speech and war propaganda immediately before and, in particular, after the breakout of armed conflicts in the former Yugoslavia in 1991.

The HR Charter and constitutions of member states do not explicitly prohibit propaganda for war, but it is defined as a criminal offence by the Federal CC/Basic

135 Applicable only to slander, however, but one can always be punished for the offence of i nsult and reproach by contempt (see Art. 92 (4), Serbian CC; Art. 76 (4), Montenegrin CC).

CC, Article 152, which states that a person who advocates or incites to a war of aggression will be punished with one to 10 years in prison. The difference between this wording and that of the ICCPR, which prohibits "*any* propaganda for war," is immediately obvious (italics added).

In view of the interpretation given by the Human Rights Committee, however, the provisions of Federal CC/Basic CC may be deemed satisfactory. The Committee, namely, constructed the term as meaning propaganda aimed at an act of aggression or a breach of the peace in contravention of the UN Charter, and not the sovereign right to self-defence or the right of peoples to self-determination (General Comment No. 11 (19) of 29 July 1983). Where application of Article 152 of the Federal CC/Basic CC is concerned, the major problem is in determining whether the war advocated is a war of aggression, of self-defence or a war for the self-determination of peoples.

The problem does not arise, however, with regard to the prohibition of incitement or encouragement of national, racial, or religious hate, HR Charter forbids and penalises (Art. 51):

> It is forbidden and subject to punishment to incite and promote national, racial, religious and other intolerance, as well as provoking and promoting national, racial, religious and other hatred and intolerance

A similar provision is contained in the Article 43 of the Montenegrin Constitution, whereas the Serbian Constitution contains no explicit prohibition of hate speech and only two indirect references to "incitement and encouragement of national, racial or religious intolerance and hate": first, as a permissible ground to ban political, union or other organizations and their activities (Art. 44) and, second, as a ground to prevent the distribution of the press and dissemination of other information (Art. 46). Articles 37 and 42 of the Montenegrin Constitution are also along these lines. The provisions from the HR Charter are in accordance with the obligations under Article 20 of the ICCPR, which is not the case with the Serbian since it prohibits incitement of hate only in connection with the rights to freedom of association and information and fails to mention any other forms it may take.

The HR Charter and Montenegrin Constitution go further than required by Article 20 of the ICCPR, and their relevant provisions may be interpreted as including incitement of hate against other minority groups, homosexuals for example. On the other hand, while international instruments speak of "advocacy of hatred," HR Charter also proclaims as punishable the "incitement of inequality" and "fomenting of intolerance." The first term is in all probability encompassed by the general prohibition of discrimination, whereas the second is rather imprecise. The greater precision of the ICCPR's Article 20 is evident also in that it establishes a causal relation between "advocacy" and incitement. Not every advocacy of hate is punishable, but only those forms that constitute "incitement to discrimination, hostility and violence." The Federal Constitution contained an identical formulation,

as well as the present Article 51 of the HR Charter, thereby omitting the opportunity to add this useful provision

Article 134 of the Federal CC/Basic CC, which expressly prohibits incitement of national, racial or religious hate, discord or intolerance may also be subjected to criticism:

> Whoever incites or encourages national, racial or religious hatred, discord or intolerance among the nations and national minorities living in the Federal Republic of Yugoslavia shall be punished with a term of imprisonment of one to five years.[136]
>
> If the offence referred to in paragraph 1 of this Article is committed under coercion or ill-treatment, or endangering of safety, by defamation of national, ethnic or religious symbols, damage to the property of others, desecration of monuments, memorials or graves, the perpetrator shall be punished with a term of imprisonment of one to eight years.
>
> Whoever commits the offence referred to in paragraphs 1 and 2 of this Article through abuse of official position or authority, or if the act results in disorder, violence or other serious consequences on the life together of the nations and national minorities living in the FRY shall be punished for an act referred to in paragraph 1 of this Article with a term of imprisonment of one to eight years, and for an act referred to in paragraph 2 of this Article with a term of imprisonment of one to ten years.

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

Another two provisions of the Federal CC/Basic CC deal with incitement to national, racial or religious hate. Article 100 defines as a criminal offence the defamation of nations, national minorities and ethnic groups but, again, only those living in FRY/SaM, while Article 145 Federal CC/Basic CC criminalises incitement of genocide and other war crimes, more or less as they are defined by Article 20 of the ICCPR.

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

136 While adopting the Basic CC (*Sl. glasnik RS,* No. 39/03) the word "FRY" has not been changed into Republic of Serbia.

Acts of member states regulate in more detail the issue of hate speech. It is forbidden to publish ideas, information and opinions that incite to discrimination, hatred or violence against persons or groups of persons on the grounds of their race, religion, nationality, ethnic group, gender or sexual preference (Art. 38, Public Information Act; Art. 23 (1), Media Act). Responsibility is excluded if such information is a part of a scientific or journalistic or other authorised work dealing with a public matter and was published (1) without intent to incite to discrimination, hatred or violence, (2) is a part of an objective journalistic report or intends to critically review such occurrences (Art. 40, Public Information Act; Art. 23 (1 and 2), Media Act).

4.10. Freedom of Peaceful Assembly

Article 21, ICCPR:

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

Article 11, ECHR:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

4.10.1. General

The freedom of peaceful assembly is guaranteed by the HR Charter and in both constitutions of the member states, while their laws cover the subject matter more closely (Serbian Act on Assembly of Citizens, *Sl. glasnik RS*, No. 51/92; Montenegrin Act on Public Assembly, *Sl. list RCG*, Nos. 57/92, 27/94). The HR Charter (Art. 31) lays down that:

> The freedom of peaceful assembly is guaranteed.

No prior permission or application is required for gatherings in enclosed spaces.

A requirement of prior notification of the competent authorities may be prescribed by laws of member states for gatherings and demonstrations in open spaces.

Freedom of assembly may be restricted by laws of member states if it is necessary for the protection of public safety, public health or morals, national security or protection of rights of others.

Similar provisions are also contained in the Serbian Constitution (Art. 43) and the Montenegrin Constitution (Art. 38), except that they use the term "public" instead of "peaceful" assembly. The relevant provisions of the HR Charter are in line with international treaties dealing with the right to peaceful assembly.

The articles of the HR Charter on limitations of the freedom of peaceful assembly are in conformity with international standards. The Charter (Art. 31 (4)) provides that the freedom of assembly may be restricted by law (of a member state) and "if it is necessary for the protection of public safety, public health or morals, national security or protection of rights of others." The allowed grounds for restriction prescribed by the Charter substantially correspond to the grounds prescribed by the ICCPR and the ECHR. Though the Charter lacks specific grounds such as "public order" (ICCPR) or "the prevention of disorder or crime" (ECHR), the possibilties of restriction according to the Charter are in accordance with international standards, because these grounds can be subsumed under a wider one wich is prescribed by the Charter (such as public safety).

The Montenegrin Constitution (Art. 39 (2)) deals with the possibility of restrictions on the freedom of assembly in a way similar to the HR Charter, envisaging that it may be "provisionally restricted by a decision of the competent authorities in order to obviate a threat to public health or morals or to protect the safety of human life and property." The former Constitution of Yugoslavia contained the same provision.

The HR Charter prescribes that the restriction must be "necessary in a democratic society" (Art. 5 (2)), in accordance with the ICCPR and the ECHR. Neither of the constitutions of member states prescribes this condition. The absence of the principle of proportionality with respect to restrictions on human rights was a flaw of the entire legal system of Serbia and Montenegro. See more I.1. and I.3.

To the grounds provided for in the HR Charter and the Montenegrin Constitution, the Serbian Constitution (Art. 43) adds "preventing a disruption of public traffic." Every disruption of public traffic does not necessarily represent a threat to public law and order or some other interest on the basis of which international instruments allow restrictions to be imposed on the freedom of peaceful assembly. If, on the other hand, it did constitute such a threat, it would be covered by the grounds already envisaged, and setting it out as a separate ground is unnecessary.

"Disruption of public traffic" figures also in the Serbian Act on Assembly of Citizens, though it is here moderated by a provision stating that a public gathering may be held in a space reserved for traffic on condition that it is possible to temporarily alter the traffic regimen (Art. 2 (3)).

Considering a petition to examine the constitutionality of the Act, the Federal Constitutional Court[137] in a 2001 decision found it to be in conformity with the Constitution. The Court was of the opinion that a public assembly in a location where the traffic regimen cannot be changed would in fact constitute a threat to life and property and, hence, is among the grounds for restrictions envisaged by the Constitution (Decision on the constitutionality of Article 2 (2) in the part reading "disruption of public traffic," and Articles 8, 13, 15 (1.3 and 2), Act on Assembly of Citizens, *Sl. glasnik RS*, No. 29/01). The Court proceeded from a correct restrictive interpretation according to which disruption of public traffic may be a ground for restricting the freedom of assembly *only* if it is not possible to alter temporarily the traffic regimen.

The formulation of the HR Charter that "the freedom of peaceful assembly is guaranteed" means that this right is guaranteed to everyone, as prescribed by the international standards. However, the constitutions of member states guarantee the freedom of peaceful assembly only to "citizens". As the HR Charter (Art. 2 (2)) and ratified international treaties are directly applicable, the contradicting provision of the constitutions of member states should not represent an obstacle to the enjoyment of the right of peaceful assembly of everyone.[138]

It is important to mention that provisions of the ECHR, namely Article 16, Article 10 (freedom of expression), Article 11 (freedom of assembly and association), and Article 14 (prohibition of discrimination) do not prevent states from imposing restrictions on the political activity of aliens, whereas the ICCPR does not contain a similar provision. The restrictions allowed by Article 16 pertain only to "political activity" and therefore do not justify restrictions on the right of aliens to peaceful assembly if their goals are not of a political nature. Furthermore, in keeping with the accepted construction that "restrictions" do not imply exemption, i.e. denial of a right, it is not permissible completely to deny aliens the right to freedom of assembly.

As it originally stood, the Serbian Act on Assembly of Citizens envisaged that an alien could convene a gathering subject to a prior permit from the police; such a permit was necessary also for an alien to address the gathering (Art. 7). The

137 The Federal Constitutional Court, as well as the Federal Court, has been abolished by the Constitutional Charter of Serbia and Montenegro. The new Court of Serbia and Montenegro was established, which will, *inter alia*, have jurisdiction over individual complaints of citizens who allege that an institution of Serbia and Montenegro or of the member states encroached upon ther rights and liberties guaranteed by the Charter, if there are no other legal remedies availa ble (Art. 19). However, this Court has not began to function as to the end of 2003. See 4.6.1.

138 See 1.2. and 1.3.

Federal Constitutional Court, however, found these provisions unconstitutional since regulation of the rights of aliens is in the purview of the federal, not the republican authorities.[139] The ruling left a legal void in the Serbian Act, which could in practice, in spite of the guarantees of the HR Charter, result in denying aliens the right to peaceful assembly simply because the manner of exercising the right is not regulated. Such viewpoint would of course be erroneous, since the Charter guarantees the right of peaceful assembly to everyone, and it is directly applicable as well as the relevant ratified international treaties. The fact that the exercise of the right is not regulated by a law does not mean that it does not exist. Analogously, it may be inferred that aliens must comply with the same obligations foreseen by the Serbian Act for citizens when organising public gatherings.

The Serbian Act states that public gatherings may be at a fixed location or along a specified route (Art. 3 (1)), see also *Christians against Racism and Fascism v. United Kingdom*, ECmHR, 21 DR 138 (1980)), a provision that makes sense in a country without a tradition in demonstrations by private citizens. It defines a public gathering as "convening and holding a meeting or other gathering in an *appropriate space* (Art. 2 (1), italics added) and goes on to define such a space:

> A space is considered appropriate for a public meeting if it is accessible and suitable for a gathering of persons whose identity and number is not known beforehand, and in which a gathering of citizens would not disrupt public traffic or constitute a threat to public health or morals or to the safety of human life and property (Art. 2 (2)).

The statute envisages prior designation by municipal or city authorities of "appropriate" locations for public assembly. The Belgrade City Assembly thus made a list of such locations, a number of which are situated outside the city centre (Decision on Designation of Locations in Belgrade for Public Gatherings, *Sl. glasnik grada Beograda*, No. 13/97). As one of the main purposes of most public gatherings is to draw attention, holding them in out of the way locations would hardly achieve the desired effect.

This provision on prior designation of suitable locations is too restrictive and creates a potential for abuse as it makes it possible to ban gatherings at any location not listed, even when they would not constitute a threat to any of the interests cited in the Constitution.

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139 In this Decision, the Federal Constitutional Court ruled unconstitutional Art. 8 (right of aliens to convene, hold and address a public gathering with a prior permit from the police), Art. 1 3 (organizer of a public gathering is bound to compensate any damage resulting from the public gath ering), Art. 15 (1.3) (an alien who convenes, holds, or addresses a public gathering without a permit may be fined up to 1,000 new dinars or sentenced to a jail term of up to 60 days), and para. 2 of thi s Article. An alien who commits the offences referred to in Art. 15 (1.3) may be deported from Yugoslavia. The Decision was based on Art. 77 of the Federal Constitution under whic h only the federal authorities formulate policy, enact and enforce federal legislation in th e spheres of contractual relations and the status of aliens.

The Serbian Act on Assembly of Citizens provides that a public gathering cannot be held in the vicinity of the Federal or Republican Parliament buildings, immediately prior to or during sessions (Art. 2 (4)). The question is under what grounds for limitation set forth by the HR Charter could this prohibition be placed. It probably deals with the security of people or property, but such a general restriction cannot be set. It is necessary to determine that it exists in each individual case. Bearing in mind that the Act leaves to the competent bodies to which the gathering is reported (police) to determine what is considered a venue "in the vicinity" of the Parliament and what is considered the "immediately prior to the session" and in respect of the HR Charter and the Constitution of the Republic of Serbia definitions that the session of the parliament is the period in which the sessions are being held (two regular sessions lasting several months each with the possibility of emergency sessions), one could reach the legitimate conclusion that the freedom of public assembly can be completely denied in particular cases.

The same objection is valid with regard to the possibility of denying the freedom of assembly pursuant to the Act on Strikes (*Sl. list SRJ*, No. 29/96), which is not supposed to be in force according to the Act on the Implementation of the Constitutional Charter (see below). This Act allows strikers to assemble only on their company's premises or grounds (Art. 5 (3)) and, consequently, prevents them from staging public demonstrations. The Federal Constitutional Court dismissed a petition to examine the constitutionality of this provision, considering that it did not pertain to the manner of exercising the human rights then guaranteed by the Federal Constitution. According to the Court:

> Legally confining the assembly of strikers to their [company] premises does not constitute a restriction on the personal and political freedoms of citizens, which are manifested in the freedom of all citizens to movement, thought, speech and assembly (Decision IU No. 132/96 of 9 October 1996, *Decisions of the Federal Constitutional Court*, pp. 33–34).

In handing down this decision, the Court apparently proceeded from the opinion that workers were not included in the term "all" citizens and, hence, restriction of their freedom of assembly did not constitute a restriction of their human rights and liberties. This reasoning is unacceptable. Freedom of assembly is guaranteed to all citizens and they may exercise it as individuals, as employees, or as members of any other grouping. Furthermore, imposing restrictions on the rights of one group, in this case employees, solely on the basis of their status and without determining the interests necessary in a democratic society that would justify such a distinction is in contravention of the international instruments prohibiting discrimination.

However, this article of the Act on Strikes should not be applied from the moment of the entry into force of the Constitutional Charter. The Implementation Act in Article 20 (4) prescribes that the former federal laws, in areas which are not

within the jurisdiction of the State Union of Serbia and Montenegro will be applied only partially, in those parts which are not in collision to the Constitutional Charter. As the HR Charter is considered to be a fundamental part of the Constitutional Charter itself (Art. 8), and the prohibition of assembly of employees outside of company premises is not in conformity with the international standards on the freedom of peaceful assembly and the prohibition of discrimination from the Charter, a reasonable conclusion would be that these provisions of the Act on Strikes should no longer be applicable.

Under the republican statutes, organisers of public meetings are bound to notify the police, at least 48 hours in advance in Serbia and 72 hours in Montenegro, of the gathering (Art. 6 (11), Serbian Act; Art. 3 (1), Montenegrin Act). If the gathering is to be held in a space reserved for public traffic and the traffic regimen has to be changed, the Serbian Act requires notification five days in advance (Art. 6 (2)). The Serbian Act also states that police will disperse a gathering that is being held without prior notification to the authorities and "take measures to restore public order and peace" (Art. 14).

4.10.2. Prohibition of Public Assembly

The Serbian Act makes it possible for the police to ban a public assembly on the constitutionally determined grounds (threat to public health, morals or to the safety of human life and property) as well as disruption of public traffic (Art. 11 (1)). The organisers must be informed of the ban at least 12 hours before the gathering is scheduled to start. An appeal against the decision is possible but does not stay its execution, and the final decision may be challenged by instituting administrative proceedings.

The police authorities may provisionally prohibit a public assembly if it is aimed at a forcible overthrow of the constitutional order, violation of the territorial integrity of Serbia, violation of human rights, or incitement of racial, religious or ethnic intolerance and hate (Art. 9 (1)). These grounds of limiting the freedom of assembly are not prescribed by either the federal or Serbian constitution, but it is possible to legitimately implement this limitation in light of the permitted limitations of the freedom of expression. The organisers must be notified of the ban at least 12 hours before the gathering is due to start. The difference between such a provisional ban and the permanent ban envisaged by Article 11 is that the former can be pronounced permanent only by a court decision. If the police authorities seek to impose a permanent ban, they must file a request to that effect with the competent district court within 12 hours, and the court has 24 hours from the receipt of the request to hand down its decision. The organiser may appeal to the Serbian Supreme Court within 24 hours of receiving the court's decision, and the Supreme Court must rule within 24 hours of receiving the appeal (Art. 10).

It is unclear why the law provides better legal protection by prescribing time periods and the involvement of courts in the case of the provisional ban envisaged

by Article 9, while in the case of a permanent ban under Article 11 the organiser is directed to institute administrative proceedings. The preferable solution would be to apply the better legal protection under Article 9 in both these cases, especially since the law does not oblige the police authorities to take into account proportionality when imposing permanent bans, which gives them broad discretionary powers.

The police may disperse a gathering Article 12 (1) in the event of any of the circumstances envisaged by Articles 9 (1) and 11 (1).

In Montenegro, a public assembly may be banned or dispersed on grounds similar to those envisaged by the Serbian Act for imposing a provisional ban (e.g. forcible overthrow of the constitutional order; Art. 7 of the Montenegrin Act on Public Assembly), if disorder breaks out, or if it represents a threat to public order and peace, safety of traffic and the like (Art. 6 (1) in conjunction with Art. 5 (3)). The police authorities may provisionally ban a gathering if necessary to protect the safety of persons and property, public health or morals (Art. 8).

Where remedy is concerned, the Montenegrin statute envisages the possibility of appeal to a higher administrative agency, and institution of administrative proceedings to appeal the final decision of the agency. It also prescribes that a public gathering may be held if the competent agency fails to decide on the appeal within 24 hours of receiving it (Art. 10 (4)).

4.11. Freedom of Association

Article 22, ICCPR:

> 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protections of his interests.
>
> 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
>
> 3. Nothing in this Article shall authorise States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in that Convention.

Article 11, ECHR:

> 1.Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

4.11.1. General

The Constitutional Charter and the constitutions of member states, guarantee the freedom of association. The language of the Montenegrin Constitution is the same: "The freedom of political, trade union and other association and activities shall be guaranteed, without the requirement of a permit, subject to registration with the competent authorities" (Art. 40 (1), Montenegrin Constitution). The wording of the corresponding article of the Serbian Constitution is similar (Art. 44 (1)). The HR Charter as its integral part in Article 8 provides that "everyone shall have the right to association" and, unlike constitutions of member states that do not mention the right not to form associations, encompasses the right of everyone "not to be a member of some organisation" (Art. 32, HR Charter). Thereby for the first time protection is offered against forcible association, in keeping with the position of the European Court of Human Rights that a state must guarantee to everyone the right not to be associated with others and not to become a member of an association (*Sigurour A. Sigurjonsson v. Iceland*, A–264 (30 June 1993)).

The HR Charter and the constitutions of both Serbia and Montenegro guarantee the freedom to form and join trade unions as one of the elements of the freedom of association, but do not state the aims of such association, unlike the ICCPR and ECHR, the which stipulate that the freedom to associate in trade unions represents the right of every person to form and join trade unions for the protection of "his interests" (the ICCPR adds that access to trade unions is free), thereby stressing the role of trade unions in fighting for the rights of their members. Besides, the Commission is of the opinion that the freedom of trade union association encompasses not only the right to form and join trade unions, but also to participate in the governing bodies of a trade union (*X v. Belgium*, ECmHR, Apl. 1038/61 (1961)).

Given that regulating, ensuring and protecting human and minority rights and civic liberties now come under the jurisdiction of member states and that this matter has been already regulated by statutes of member states, after entering into force of the Constitutional Charter the Act on Association of Citizens in Societies, Organisations and Political Organisations in the territory of SFRY is no longer applicable.

In Montenegro, the Act on Non-Governmental Organisations is in force (*Sl. list RCG,* Nos. 27/99, 9/02, 30/02); it substituted the former Citizens' Associations Act (*Sl. list SR CG*, Nos. 23/90 and 13/91 and *Sl. list RCG*, No. 30/92), as well the Endowments, Foundations and Trusts Act (*Sl. list SRCG*, No. 24/85).

Serbia has two laws: the Act on Social Organisations and Citizens' Associations (*Sl. glasnik* SRS, Nos. 24/82, 39/83, 17/84, 50/84, 45/85 and 12/89; *Sl. glasnik RS*, Nos. 53/93, 67/93 and 48/94) regulating the establishment and activities of social organisations and citizens' associations, and the Act on Political Organisations (*Sl. glasnik RS*, Nos. 37/90, 30/92, 53/93, 67/93 and 48/94). There are two laws in Serbia because the Act on Social Organisations and Citizens' Associations was adopted back in 1982 during the one-party system.

All these statutes were enacted before the constitutions and therefore do not conform fully with them. Pursuant to Article 20 of the Act on Implementation of the Constitutional Charter member states are required to harmonise their statutes and other legislative acts with the Constitutional Charter, international treaties ratified by the State Union of Serbia and Montenegro, as well as the legislation of the State Union of Serbia and Montenegro by 31 December 2003.[140]

4.11.2. Registration and Termination of Associations

The HR Charter and constitutions of member states guarantee the freedom of association without the requirement of a permit and subject to registration with the competent authorities (Art. 32 (2), HR Charter; Art. 44 (1), Serbian Constitution and Art. 40 (1), Montenegrin Constitution). Registration is a formal requirement for an association to commence its activities but the constitutional acts do not lay down the need for any prior approval. An association may be banned only as an exception and as prescribed by the constitutions (Art. 32 (4) HR Charter; Art. 44, Serbian Constitution; Art. 41, Montenegrin Constitution).

Political organisations are registered with the competent Ministry of Justice (Art. 7, Serbian Act on Political Organisations), and trade unions with the competent Ministry of Labour (Art. 130, Serbian Labour Act, *Sl. glasnik RS*, Nos. 70/01, 73/01; Art. 4, Rules on Entry of Trade Union Organisations in Register, *Sl. glasnik RS*, Nos. 6/97, 33/97, 49/00 and 18/01; Art. 136, Montenegrin Labour Act, *Sl. list RCG*, No. 43/03), and on the day of registration acquire the status of a legal person. Pursuant to Article 10 of the Serbian Political Organisations Act the procedure starts with an application to the competent authority, which is bound to enter the organisation in the register within 30 days of receiving the application if it has been established under the law.

Citizens' organisations in Serbia are registered with the republican Ministry of Interior pursuant to the procedure prescribed by the Act on Social Organisations

140 See 1.2.

and Citizens' Associations. The Ministry must decide on entry into the register within 30 days of receiving the application, whereupon the organisation acquires the status of a legal person and may commence its activities (Arts. 34 and 35).

The socialist-era Act, however, lays down the purposes for which an association may be founded: "developing personal affinities and creativity in social, humanitarian, economic, technical, scientific, cultural, sports, educational and other activities." This clearly does not conform with the ICCPR, Serbian Constitution and the HR Charter, neither of which envisages any restrictions as to the purposes of an organisation, but only with respect to its activities. The HR Constitutional Charter allows the banning of an organisation if its activities are directed towards violent overthrow of the constitutional order, violation of guaranteed human rights or incitement to racial, national or religious hatred, while the Serbian Constitution adds to this list the activities aimed at violation of the territorial integrity and independence.[141] In practice, this unconstitutional provision gives the Ministry of Interior broad discretionary powers and is frequently abused to deny registration. A typical example was the Ministry's refusal to register the Serbian Association of Judges and, regrettably, its decision was, at one point under the former regime, upheld by the Serbian Supreme Court when it considered the Association's appeal in 1999.[142] The Court reasoned, unconvincingly, that the Serbian Act on Social Organisations and Citizens' Associations was a regulation of substantive law on the basis of which applications for entry into the register were decided upon and, although it was not in conformity with the Constitution, there was no need to apply the Constitution in this case. The Court did not find it necessary to explain why, in a case of a statute conflicting with the Constitution, it considered that the statute should take precedence.

In view of the fact that the manner of exercising the constitutional freedom of organisation and operation is regulated by the Act on Social Organisations and Citizens' Associations, which was adopted back in 1982 in line with the constitutional arrangement of the then Socialist Republic of Serbia and whose latest amendments were brought in 1989 (after which only fees in penal provisions were altered), the Ministry of Justice of the Republic of Serbia presented several draft acts on non-governmental organisations. The last draft, elaborated with participation of non-governmental organisations themselves, became the official one – Draft act on Associations. The objective of the draft is to bring into conformity the manner of exercising the constitutional freedom of organisation and activities of citizens in order to achieve common goals guaranteed by the constitution, and the constitutional order and, at the same time, the standards stipulated in the ICCPR and the ECHR.

141 See 4.11.4.1.

142 The Serbian Association of Judges applied for entry into the Register of Citizens' Associations on 29 May 1998 and was turned down by the Ministry of Interior on 7 September. When its appeal against this decision was dismissed, it filed an administrative action with the competent court. The Serbian Supreme Court finally disposed of the case by dismissing it on 17 February 1999.

This distinction could only reflect on the financing of associations of public interest by granting subsidies from the budget, since in other countries too these organisations enjoy larger financial benefits than others. In elaborating such a conception the working group of the Ministry of Justice and Local Self-government took into account above all the experience of the Federal Republic of Germany, but also appropriate legislative arrangements of Hungary and Slovenia. However, it seems that the implementation of such a division of associations in our society, which does not have a democratic tradition, could lead to numerous problems and abuses, since, under the draft, the change of status depends on the assessment of the competent republican administrative authority as to whether the goals and activities of an association are of public interest or not. In order to oppose the "nationalization" of non-governmental organisations, representatives of some non-governmental organisations in the working group of the Ministry proposed that an independent commission (council) should be established to grant the status of an association of public interest, whose members would be, among others, representatives of an association of public interest. The proposal was not accepted, but a "concession" was made – it was envisaged that an expert council should be established, members of which would be outstanding experts and representatives of an association of public interest in a particular sphere. However, this provision of the draft will not solve the problem given the fact that members of the expert council should be appointed by the competent minister and that this council only offers a non-binding opinion in the procedure of establishing the status of an association of public interest.

The Act on Non-governmental Organisations passed in Montenegro in 1999 deals with non-governmental associations, foundations and foreign non-governmental organisation (*Sl. list RCG*, Nos. 27/99, 9/02 and 30/02), and repealed the 1990 Act on Citizens' Associations (*Sl. list SRCG*, Nos. 23/90 and 13/91; *Sl. list RCG,* No. 30/92) provisions on association of citizens in social organisations and associations and the Act on Endowments, Foundations and Funds (*Sl. list SRCG*, No. 24/85). This is a concise (35 articles) and liberal piece of legislation but for this very reason does not regulate all matters of importance for the activities of NGOs and creates room for widely differing interpretations.

In February 2002 the Constitutional Court of Montenegro adopted a decision according to which the provisions of Articles 26 (2) and 29 (2) of this Act were declared unconstitutional. Those provisions related to the powers of the Government to prescribe the criteria, manner and procedure of granting material assistance to non-governmental organisations and its powers to decide on the division of property of a non-governmental organisation which is deleted from the register. Furthermore, in June 2002 an act on amendments to this act was adopted, regulating in detail the criteria, manner and procedure of granting material assistance to non-governmental organisations, putting it in the competence of the Commission for the Distribution

of Resources to Non-governmental Organisations appointed by the Assembly of the Republic of Montenegro.

For the purpose of harmonization with the law, Article 33 prescribes that organisations and associations of citizens entered in the register of social organisations and in the register of citizens' associations, and foundations, funds and endowments entered in appropriate registers, are obliged under this act to reregister as non-governmental associations or non-governmental foundations within 6 months from its entry into force. Otherwise, their activities will terminate by operation of law.

In order to bring the activities of NGOs into conformity with the Act, its Article 22 prescribes that registered social organisations and citizens' associations must within six months of entry into effect of the Act re-register as NGOs. Owing to the short period allowed for re-registration, the number of NGOs in Montenegro marked a sharp decline (only 200 NGOs, or 15 percent of the previous number, were able to re-register within the time-period set). The Serbian Draft Act On Associations contains a similar provision (Art. 66), envisaging a period of one year from the day of entry into force of this act to bring the statute and other general acts of social organisations, citizens' associations and their unions into conformity with the provisions of the law.

How termination of the activities of a political or trade union organisation is regulated, i.e. the grounds for its deletion from the register, has a major impact on the exercise of the right to freedom of association and Article 65 of the Serbian Act on Social Organisations and Citizens' Associations prescribe that an organisation ceases to exist: a) by a decision of an organisation; b) when its membership falls below the number required for its establishment; c) if an organisation has been banned; and d) if it is established that an organisation terminated its work (except for political organisations in Serbia).

According to the Montenegrin Non-governmental Organisations Act an organisation can be banned in the following cases: a) expiry of the time-period for which the association was formed; b) adoption of the decision to terminate its activities, c) banning (Art. 28). However, it fails to say who is authorised to ban the work of a non-governmental organisation and on what grounds.

Article 4 of ILO Convention No. 87 on trade union freedoms and rights stipulates that administrative agencies may not disband or suspend trade union organisations. In Serbia, however, a union may be banned by the competent municipal police department (Art. 67, Serbian Act on Social Organisations and Citizens' Associations). Furthermore, the Serbian Act does not even require any explanation to be given for the decision. This law contains, in addition, a provision under which a banned organisation must cease its activities on the day of receipt of the decision, not the day when it becomes final. Against the decision to ban its activities the

association can lodge a complaint which suspends the execution of the decision, but no judicial protection has been envisaged, i.e. there is no effective legal remedy.

Decisions on banning political organisations are in Serbia taken by the Supreme Court, at the proposal of the Public Prosecutor (Art. 12 (5), Serbian Act on Political Organisations). An appeal may be lodged against a decision of the Supreme Court; an appeal will be decided on by the chamber of the same court (Art. 13 (4)). In Montenegro, political organisations and citizens' organisations may be banned by the Constitutional Court, at the proposal of the Public Prosecutor or the administrative agency that keeps the relevant register (Act on the Constitutional Court of Montenegro, *Sl. list RCG*, No. 21/93).

4.11.3. Association of Aliens

In accordance with the ICCPR and ECHR, the HR Charter and the Serbian Constitution do not discriminate between citizens and aliens guaranteeing the freedom of association to "everyone", whereas the Montenegrin Constitution guarantees this right only to "citizens".

The right of aliens to association is not completely denied by statute. The Montenegrin Non-Governmental Organisation Act allows foreign NGOs to operate in the territory of this member state, whereas the Serbian Act on Social Organisations and Citizens' Associations allows such associations on condition that their aims are not political, trade union or similar. Aliens' associations are subject to a regimen laid down by the Federal Act on Movement and Residence of Aliens (*Sl. list SFRJ*, Nos. 56/80, 53/85, 30/89, 26/90 and 53/91; *Sl. list SRJ*, Nos. 24/94, 28/96, 68/02). In keeping with Article 9 of the Constitutional Charter and Article 20 of the Act on Implementation of the Constitutional Charter, the Movement and Residence of Aliens Act is still applied as a general act in member states after the entry into force of the Constitutional Charter, given that this matter is not regulated by other regulations of member states. Article 68 (1) states that "associations of aliens are established on the basis of permissions issued by the administrative body competent for internal affairs." The same provision is laid down in the Act on Social Organisations and Citizens' Association of Serbia (Art. 69 (2)). Furthermore, both acts define precisely that this right is enjoyed only by aliens who reside in the country, taking into account the special conditions required for that by the Act on Movement and Residence of Aliens (Arts. 31–60).

Under the Montenegrin Act on Non-governmental Organisations, the only requirement for a foreign NGO to operate is its entry into the register at the Ministry of Justice, with the obligation of a non-governmental organisation to be registered as such in the country of domicile (Art. 19).

Besides being subject to a very restrictive permit system, no court protection is envisaged in exercising the freedom of association of aliens. Under the Serbian Act on Social Associations and Citizens' Associations, an appeal may be lodged

with the Government against a decision on rejecting a request for approval required for establishing an association of aliens, or a decision on banning the work of an association of aliens. No administrative litigation is envisaged in case the government brings a decision on the rejection of an appeal (Art. 70). Therefore, there is no effective judicial protection. The same provision is contained in the on Movement and Residence of Aliens Act (Art. 73). In the same case the Montenegrin Act on Non-governmental Organisations does not allow an appeal against a decision of the competent authority but envisages the possibility of an administrative litigation (Art. 18).

On the level of the state union and in Serbia, there is still no legislation specifically treating foreign NGOs although in October 2001, the Federal Ministry of Justice came out with a draft law on foreign NGOs in order to establish a legal basis for their activities in Yugoslavia. The draft defines these NGOs as non-profit organisations based in another country, established and registered pursuant to the regulations of that country for the purpose of realising a common or general interest or goal, and with representative offices in Yugoslavia or Serbia. As legal persons, the organisations would have to be entered in the Register of Representative Offices of Foreign NGOs, the terms for which would be in accordance with the standards embodied in the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations of 24 April 1986.

4.11.4. Restrictions

4.11.4.1. Banning of organisations – All constitutional acts in SaM allow the banning political, trade union and other form of association and activity. The constitutions of both Serbia and Montenegro prohibit activities aimed at a forcible overthrow of the constitutional order, violation of the territorial integrity and independence of the country, violation of the constitutionally guaranteed human and civil rights, or incitement of national, racial or religious intolerance or hate (Art. 44 (2), Serbian Constitution; Art. 42, Montenegrin Constitution). The provision in Art. 32, paragraph 4 of the Charter differs from the relevant provisions of members states' constitutions only by not mentioning the violation of territorial integrity and independence. Such activities are also defined by law as criminal offences. The requirements of the ICCPR and ECHR are the basis for determining legal grounds for imposing restrictions on political and union activity, to which the Montenegrin Constitution adds the prohibition of incitement to "other intolerance or hatred" but without characterising it, thus leaving it a source of legal insecurity. Acts on freedom of association provide that political and trade union organisations can be banned if their activity is directed at aims prohibited by law.

Legal systems of member states do not recognise the principle of proportionality with respect to restrictions on human rights and fails to take into account that they must "be necessary in a democratic society," as laid down by the ICCPR and

ECHR in connection with the freedom of association. However, it can be expected that constitutions and statutes of member states would accept this standard after harmonising with the Constitutional Charter, given that the HR Charter envisages the principle of proportionality (Art. 5 (2)). Besides, the Charter distinguishes between banning an organisation and restricting the freedom of association, which are permitted, like in the ICCPR and ECHR, if they are provided by law and if necessary to protect public safety, public health and morality, national security or rights of other persons (Art. 32 (3)).

The present legislation impermissibly expands the possibility of banning organisations and associations.

The Serbian Act on Political Organisations states in Article 12 (2) that a political organisation may be banned if it admits minors to membership "and/or abuses them for political purposes." Though the aim obviously is to protect minors, the wording of the provision should be far more specific.

4.11.4.2. Financing of political parties – The financing of political parties is regulated by specific statutes (Federal Act on Financing of Political Parties, *Sl. list SRJ*, No. 73/00; Montenegrin Act on Financing of Political Parties, *Sl. list RCG*, No. 44/97; Serbian Act on Financing of Political Parties, *Sl. glasnik RS*, No. 32/97). Given that the federal Financing Political Parties Act is a federal act in a field not defined by the Constitutional Charter as belonging to the jurisdiction of the state union, it is therefore no longer applied as a general act of member states.

Both Serbian and Montenegrin statutes envisage the annual allocation of a proportion of the respective budgets to parties (Arts. 2, 3 and 4, Montenegrin Act; Arts. 2, 3 and 4, Serbian Act).

The statutes furthermore allow political parties to receive funding from other sources (Arts. 2 and 8, Montenegrin Act; Art. 2, Serbian Act; Serbian Act on Political Organisations (Art. 12 (3)). Only the Serbian laws expressly prohibit financing by the government, other bodies and organisations of foreign states and other foreign persons, by state bodies and local self-government bodies, by anonymous persons over the amount of 3% of the annual net revenue of the political organisation in the previous year and by public companies in which the state has over 20% of founding capital (Arts. 2 and 5, Serbian Act). This provision aims to prevent foreign states from exerting an influence on national politics but is not proportional with the interest that is being protected. The provision is too vague and it is not clear who is actually included in the term "other foreign nationals." These broadly worded and unspecific provisions cannot be deemed necessary in a democratic society.

Opinion on these restrictions, which aim to preclude undue foreign influence on parties and political life in this country, is divided. Since it is a question whether a foreign donation always entails undue influence, the purpose would probably be

better served by introducing stringent controls of spending of these funds, or prohibiting parties from taking funds from foreign governments and their agencies.

In July 2003, Serbia enacted the Financing Political Parties Act (*Sl. glasnik RS*, Nos. 72/03 and 75/03) but its application has been postponed until 1 January 2004, when the current Financing Political Parties Act (*Sl. glasnik RS*, No. 32/97) and the Financing Political Parties Act (*Sl. list SRJ*, No. 73/00) shall expire. The new Act distinguishes between funds used for financing regular operations of a political party and those used for funding electoral campaigns for the President of the republic, deputies, mayors, municipal presidents and delegates. All funds can be raised from public sources (budget) and private sources (membership fees, contributions, revenue form promotional activities of the political party, revenue from property of the political party and legacies). Prohibitions with regard to the origin of funds exist only in relation to financing the regular operations of the political party, but are more restrictive. This act regulates more precisely the responsibilities of political parties with respect to keeping financial records and mandates stricter financial control to be exercised by the Republican Electoral Commission and the ministry in charge of financial matters.

More on financing political parties in 4.14.3.

4.11.4.3. Other restrictions – Under the Montenegrin Act on Association of Citizens and the Serbian Act on Political Organisations, persons who have been convicted of certain criminal offences may not establish political and trade union organisations (in Serbia only political organisations) for a period of five years after the judgement by which the person was convicted of some of the mentioned offences becomes legally valid (Art. 5, Montenegrin Act; Art. 5 (2), Serbian Act). The criminal offences cited are in the category of "criminal offences against the constitutional order and security of the FRY." To this the Montenegrin Act adds offences against the Yugoslav armed forces, against humanity and international law, against human and civil rights, and incitement of national, racial or religious hate or intolerance.

Associations are banned if their activity is directed at a violent overthrow of the constitutional order, incitement of racial or national hate, and the like. In this case, the punishment is for the consequence – banning an organisation is the extreme penalty for its unlawful activity. But founding of organisations by persons who have been convicted of the cited crimes and have served their time does not necessarily mean that their organisations will engage in unlawful activity. The law thus completely does away with the right of such persons to freedom of association, which includes the right to found political parties or trade unions. There are other ways to monitor the work of parties and unions and preclude their illegal activities or the possible illegal activities of convicted persons. Denying them freedom of association is the severest possible measure and certainly is not necessary in a democratic society.

4.11.5. Restrictions on Association of Members of the Armed Forces and the Police

The ICCPR and ECHR allow states to impose restrictions on the right to association of members of the armed forces and police and, in the case of the Convention, on the administration of the state too (Art. 22 (2), ICCPR; Art. 11 (2)), ECHR). The HR Charter does not mention the freedom of association of professional members of the Army, while the Serbian Constitution does not prohibit trade union organising of the members of the police force. The Montenegrin Constitution does not prohibit trade union organising of members of the police, but its Article 41 (2) stipulates that "professional members of the police force may not belong to political parties, shall not have the right to form trade unions and do not have the right to strike."

Because it excludes a significant proportion of the population from political affairs, the prohibition of belonging to political parties to police officers is debatable and constitutes a serious restriction on the freedoms of association and expression. In its report on human rights in Yugoslavia in 1998, the Belgrade Centre for Human Rights was of the opinion that the broad general prohibition was not in accordance with the ICCPR and ECHR.[143] In *Rekvény v. Hungary* (ECtHR, App. No. 25390/94 (1999)), however, the European Court of Human Rights ruled in 1999 that prohibiting police officers from belonging to political parties and taking part in political activities was not in contravention of Art. 10 (freedom of expression) and Article 11 (freedom of association) of the ECHR. In view of this judgement, it may be said that the relevant legal provisions in principle impose permissible restrictions.

In *Human Rights in Yugoslavia 2000*, the Belgrade Centre took the position that a complete prohibition of trade union activity by members of the armed forces and police constituted an impermissible restriction on the freedoms of association and expression since it prevents them from protecting their professional interests and can hardly be considered necessary in a democratic society. For its part, the European Commission of Human Rights has found that prohibiting members of the armed forces, police and state administration from organising in trade unions is in accordance with the ECmHR (*Council of Civil Service Unions v. United Kingdom*, ECmHR, App. No. 1160/85 (1987)). The Commission considered that states should have a large measure of freedom in judging what measures are required to defend their national security (see *Leander v. Sweden*, A–116, 1985).

The Montenegrin constitution envisages some personal restrictions on freedom of association that is not provided for by international instruments nor by provisions of the Charter and should therefore be considered from the aspect of the generally allowed restrictions. The Constitution of Montenegro prescribes in its Article 41 (3) that "judges, the judges of the Constitutional court and the state

143 See *Human Rights in Yugoslavia 1998*, I.4.10.5.

prosecutor cannot be members of *organs* of political parties" (italics added). The Court of Serbia and Montenegro Act (*Sl. list SCG*, No. 26/03) provides that judges cannot belong to political parties (Art. 22 (2)). The Serbian Constitution does not contain a similar prohibition but Article 47 of the Serbian Act on the Public Prosecutor's Office (*Sl. glasnik RS*, Nos. 63/01, 42/02, 39/03) and Article 27 of the Act on Judges (*Sl. glasnik RS*, Nos. 63/01, 42/02, 60/02, 17/03, 25/03, 27/03) envisage that a judge, the public prosecutor and his deputy cannot be members of a political party. However, judges, public prosecutors and deputies are expressly recognised the right to associate in that capacity in order to protect their interests and in order to take measures to protect and maintain their independence (public prosecutors and deputies) or their independence and autonomy (judges).

The aim of these restrictions of the right of judges, prosecutors and deputies to belong to political organisations is legitimate – to ensure an impartial and independent judiciary and, furthermore, to protect the public order. Hence, and like the prohibition of political organising of members of the armed forces and police, it may be considered necessary in a democratic society.

The Serbian Act on Labour Relations in Government Agencies (*Sl. glasnik RS*, Nos. 48/91, 66/91, 44/98, 49/99, 34/01, 66/91, 44/98, 49/99, 34/01 and 39/02) extends the restriction on freedom of political organising to those employed in the government administration and appointed officials. Article 4 (3) of the Act states that these persons "may not be members of organs of political organisations" which is in accordance with the ECHR. Unlike the Convention, the ICCPR envisages such a restriction only with respect to members of the armed forces and police and does not include the state administration. In this case, the restriction should be evaluated in accordance with the general conditions for restricting freedom of association. Since the state administration includes translators, typists, librarians and the like, the prohibition is too broad.

The Montenegrin Constitution prohibits "political organising in state agencies" (Art. 41 (1)). In its Article 6, the Act on the State Administration (*Sl. glasnik RCG*, Nos. 20/92, 6/93, 48/93, 53/93, 67/93, 48/94 and 49/99) furthermore prohibits the founding of political parties and other political organisations or any internal forms of these in state administration agencies. This prohibition is in accordance with international standards for its purpose is to prevent state agencies from identifying with political parties or organisations.

4.11.6. The Right to Strike

The right to strike is guaranteed by Article 8 (1.d) of the ICESCR, Article 6 (4) of the European Social Charter, but not explicitly by the ICCPR or ECHR.[144]

144 Unlike the Human Rights Committee which decided, in a controversial opinion, that the right to strike was not included in the right to freedom of association guaranteed by the ICCPR (*Alberta Union v. Canada*, Com. No. 18/1982), the European Court of Human Rights recognised the

The HR Charter and constitutions of member states guarantee the right to strike. Pursuant to the HR Charter and Serbian Constitution, "employees have the right to strike, in accordance with law" (Art. 41, HR Charter; Art. 37, Serbian Constitution). The Montenegrin Constitution states that "employees shall have the right to strike for the protection of their professional and economic interests" (Art. 54 (1)).

The ICESCR prescribes that the right to strike is to be exercised in conformity with the laws of the particular country (Art. (8.1.d)), which permits the imposition of certain restrictions in order to mitigate the effects and consequences of strikes on public order; however, the right to strike itself cannot be denied. The Montenegrin Constitution also places restrictions on the right to strike by stipulating its lawful objectives, that is, protection of professional and economic interests, which is allowed by international instruments.

Under the Strike Act (*Sl. list SRJ*, No. 29/96) the right to strike is limited by the obligation of strikers' committee and workers participating in a strike to organize and conduct a strike in a manner which does not jeopardize the safety of people and property and people's health, which prevents causing direct material damage and enables the continuation of work upon the termination of strike. Besides that general restriction, a special strike regime is also established: "in public services or other services where work stoppages could, due to the nature of the service, endanger public health or life, or cause major damage" (Art. 9 (1)). Activities of public interest are those implemented by an employer in the following spheres: power generation industry, water supply industry, transport, information, PTT services, public utilities, staple foods production, health and veterinary protection, education, social care for children and social welfare, as well as activities of general interest for the defence and security of the FRY/SaM and affairs necessary for the implementation of the FRY/SaM's international obligations. Fields in which work stoppage could jeopardise people's life and health or cause major damage are: chemical industry, ferrous and non-ferrous metallurgy (Art. 9 (2–4)). In that case the right to strike can be exercised if special conditions are met, which means to "ensure the minimum process of work which secures the safety of people and property or is an irreplaceable condition for life and work of citizens or life of another enterprise or a legal or natural person performing an economic or other activity or service" (Art. 10 (1)). The minimum process of work is established by the director, and for public services and public enterprises by the founder, in the manner established by the general employment act, under the collective contract;

importance of the right to strike for the promotion of the freedom of trade union association, but its scope and importance remain to be elaborated in the jurisprudence of the Court (*Schmidt and Dahlstrom v. Sweden*, A 21, 1976). The ILO Committee on Freedom of Association also took the view that the right to strike, which is not explicitly mentioned in ILO Convention No. 87, constituted a legitimate and indispensable means for unions to protect the interests of employees. (Com. No. 118/1982, para. 2.3).

the director and the founder have the obligation to take into account opinions, remarks and proposals of trade unions (Art. 10 (3 and 4)).

Though there is no doubt as to the need for a special regime for strikes in services that are indispensable for the normal functioning of the country, it should be ensured through other means. The necessity of a minimum of the work process in vital installations is acceptable only in some services. The rules setting the minimum work process should be very restrictive but with regard to the employer, not the work force. The Strike Act's definition of the minimum is so broad as to put into question the possibility of a strike or its effectiveness. Moreover, vague formulations such as "compliance with international obligations" make it possible completely to ban industrial action in some cases, for example in companies that are exclusively export-oriented. Thus the established regimen of strikes to an extent denies the very right to strike.

Article 8 (2) of ICESCR allows countries to restrict by law the right to strike of members of the armed forces, the police or of the state administration. Pursuant to the Montenegrin Constitution (Art. 54 (2)) "employees in state administration and professional members of the police shall not have the right to strike". This Constitution has resorted to prohibition rather than restriction for these categories of employees and fully denied them the right to strike. The Serbian Constitution not containing such a provision, the only proper interpretation would be that employees in state administration and members of the police in Serbia have the right to strike.

The Act on Implementation of Constitutional Charter provides that former federal laws will be applied except in those parts which are in collision with provisions of the Constitutional Charter (Art. 20 (1)). Since the Constitutional Charter does not foresee restrictions of the right to strike of employees in state administration bodies, members of armed forces and the police, therefore Article 18 of the Strike Act should not be applied.

4.12. Peaceful Enjoyment of Property

Article 1, Protocol No. 1 to the ECHR:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.

According to the jurisprudence of the European Court of Human Rights, Article 1 of the Protocol No. 1 to the ECHR in principle guarantees the right to

property, namely the right to own and use the property and freely dispose with it (*Hentrich v. France*, ECtHR, A–296, 1994).

Right to property is comprised of three different rules. The first rule, expressed in the first sentence of Article 1(1), general in nature, outlines the principle of peaceful enjoyment of property. The second rule, formulated in the second sentence of the same paragraph, regulates the deprivation of property and subjects it to certain conditions. The third one, in paragraph 2, recognises the right of state parties to control the use of property based on public interest. According to the European Court's jurisprudence, second and third rule should be interpreted in light of the general principle expressed in the first rule (*Holy Monasteries v. Greece*, ECtHR, A–301, 1994).

In its jurisprudence, the ECtHR has held that a balance between the public interest and the rights of individuals must be found in every case of interference in the right to peaceful enjoyment of property. The need to balance these interests, stated in Article 1 of the First Protocol, is characteristic of the Convention as a whole. The extent of state interference (expropriation or restrictions on the use of property) must be justified by the circumstances of the particular case and conditional on fair compensation. The question of monetary compensation does not arise only with respect to expropriation and may be sought also in the case of restrictions on the use of property (*Sporrong and Lonnroth v. Sweden*, ECtHR, A–52, 1982).

4.12.1. General

The right to property is guaranteed by the HR Charter in Article 23:

> The right to property and the right to inheritance are guaranteed. Use of property may be limited by law, in accordance with the general interest.
>
> No one may be deprived of his property, except when required by the public interest, as determined by law, and subject to fair compensation at market value, or in order to insure the payment of taxes, other dues or fines.
>
> Any disputes on the amount of the compensation are to be resolved by a competent court.

The Montenegrin (Art. 45) and Serbian (Arts. 34 and 63) Constitutions contain very similar guarantees; hence the two constitutions as well as the HR Charter are in accordance with international standards. The guarantee that a person may be deprived of his property only when required by the public interest, in accordance with law, and subject to compensation at market value is of particular importance.

Until the enactment of the Constitutional Charter, the competence with regard to property relations was divided. The federal state, through its agencies, regulated the principles and system of property relations while other issues were in the

purview of the constituent republics (Art. 77 (5), Federal Constitution). The most important law regulating this area at the federal level was the Act on the Principles of Property Relations (*Sl. list SFRJ*, Nos. 6/80, 36/90; *Sl. list SRJ*, No. 29/96). According to the Constitutional Charter all property relations fall within the competence of the member states, and thus the Act on the Principles of Property Relations is applied as a law of each member state.

Only those provisions of national law that do not conform to international standards will be discussed here.

4.12.1.1. Taxes without Laws – Government of Serbia adopted Decree on publishing supplemental postal stamp "Erecting Memorial Temple of St. Sava" (*Sl. glasnik RS*, No. 112/03).[145] This Decree introduced an obligation for every letter or other piece of mail to have this supplemental stamp. Money raised in this way will be used for erecting and decorating Temple of St. Sava. In this way basic democratic principle of no taxes without laws was violated.

4.12.2. Expropriation

An action for the review of constitutionality of the provisions of Articles 3 and 58 (1 and 2) of the Expropriation Act (*Sl. list RCG*, No. 55/00) was commenced before the Montenegrin Constitutional Court. The contested provisions prescribe that, with the date of the effective expropriation order, the title to the property shall be transferred, as well as the type of ownership shall be changed. Besides, the property right and other rights on the expropriated real property shall be entered into registry on the basis of effective expropriation order and the request for registration may be submitted by any of the parties concerned. The court ruled that the disputed provisions are not in accordance with Article 45 of the Montenegrin Constitution, which prescribes that minimum compensation for the expropriated property has to be set. The upper limit for compensation is not set by the Constitution. The court has held that, since deprivation or restriction of the right to property is indivisibly linked to fixing and payment the compensation for expropriated real property that could not be lower than the market value, fixing and payment of compensation must be done prior to the transfer of right to property or must be effected simultaneously with the transfer of property at the latest. Contrary to this, contested provisions had prescribed that with the date of effective expropriation order the beneficiary of the expropriated real property shall register his/her right and thereby deprive the previous owner of the right to property prior to the payment of compensation for this property. Moreover, it may happen even before fixing this compensation if parties have not reached an agreement on forms and amount of compensation and transfer of property prior to the effective expropriation order (Decision of Montenegrin Constitutional Court, U-No. 14/01, 12 February 2002, *Sl. list RCG*, No. 12/02).

145 Decree came in force on 1 December 2003 and will be in force until 10 May 2004.

When and how an individual in Serbia may be deprived of real property or his rights in respect of such property may be restricted, both of which constitute serious interference with the right to peaceful enjoyment of property, is regulated by the Republic's Expropriation Act (*Sl. glasnik SRS*, Nos. 40/84, 53/87 and 22/89; *Sl. glasnik RS*, Nos. 6/90, 15/90, 53/95, 23/01).

The administration of the municipality where the real property in question is located conducts the proceedings pursuant to the expropriation proposal and renders the appropriate order (Art. 29 (1)). Appeal against this order is heard by the Serbian Ministry of Finance (Art. 29 (5)).

Under the Act, the beneficiary of an expropriation may take possession before a decision on compensation for the property becomes final, i.e. before a contract on compensation is concluded, if the Ministry of Finance considers this necessary because of the urgency of the matter or construction work (Art. 35 (1)). The language of this provision is too broad and imprecise to meet European standards. Under the ECHR, the law must, *inter alia*, provide protection from arbitrary decision-making by state bodies (*Kokkiniakis v. Greece*, ECtHR, A–260 (1993) and *Tolstoy Miloslavsky v. United Kingdom,* ECtHR, A–316 (1995)).

Article 20 of the Serbian Act, however, does not oblige the government to consider the interests of the owner of a property when determining the existence of a public interest for expropriation, or to examine whether the owner's interest in continuing to own the property and running his business prevails over the public interest. The manner in which the government has hitherto established the existence of a public interest amply demonstrates that the interests of individuals were not taken into consideration.

Individual interests are threatened also in the procedure before municipal bodies that decide on expropriations. In the majority of cases at this stage, an owner is not allowed to build on his land, and his right to dispose with his property is impaired by the entry of expropriation notices into land and other real property registers. The Act fails to fix a time limit within which this stage of the procedure must be concluded, and does not envisage the possibility of compensation in the event of it being unduly prolonged, sometimes, as practice has shown, for more than 10 years.

Similar problems arise when a decision on expropriation has been taken but the amount of compensation remains to be fixed. Since the law allows the beneficiary of the expropriation to take possession of the property immediately upon the decision to expropriate, the owner is now in fact the owner only on paper. Furthermore, if Article 35 (1) of the Act is applied, the owner loses even this safeguard, without compensation having been paid. This stage of the procedure also occasionally lasted for over 10 years. How the amount of compensation is determined and the long delays in its payment often resulted in owners receiving far below the market price of their property as prescribed by Article 44 of the Act. This article was set aside by the Federal Constitutional Court in 2001 (*Sl. list SRJ*, No. 16/01).

Article 36 of the Expropriation Act does not provide for any time limit within which the previous owner of the expropriated real property can file a request for annulment of the effective expropriation order, but only a time limit within which, if the beneficiary of the expropriated real property has not put the facilities into proper use, the effective expropriation order can be annulled. Under the previous Expropriation Act (*Sl. glasnik RS*, No. 6/90), Article 39 (4 and 6), a request for annulment of an effective expropriation order could not be filed upon expiration of five-year period from the date of the effective expropriation order, or six years if it concerned a complex. Provisions from the Article 39 were deleted due to changes to this Act.

Provisions of Article 44 of the Expropriation Act, prescribing the manner and criteria for fixing the compensation for expropriated real property, ceased to be in force, pursuant to the decision by Federal Constitutional Court. According to the ruling, just compensation should be fixed pursuant to this provisions of the Expropriation Act on the basis of three elements. First element is the construction price for residential real estate, determined as the market value. Second is the 1–2% of the average market price of residential real estate, determined depending on the conditions that give specific characteristics to the real property. Third element is the need to establish the lower and upper limit of these percentages and require of competent bodies to render just decision within this scope, without questioning the market price of such property (*Sl. list SRJ*, No. 16/01).

The Expropriation Act calls for the procedure following the proposal for expropriation, which has not been concluded before the day of its entry into force, to be completed based on regulations effective prior to the entry into force of this Act, "except in cases where the expropriation proceedings have not been effectively finalised, *and involve business and housing facilities*" (italics added) (Art. 71 (1)). With regard to this formulation it is unclear whether this concerns the expropriation of business and housing facilities or the expropriation of the property where business and housing facilities are to be constructed. Pursuant to the ruling of the Supreme Court of Serbia on the cited provision, the relevant criterion is the type of real property that is expropriated (U. 3294/98, 12 July 2000).

4.12.3. Inheritance

The constitutional acts explicitly guarantee the right to inheritance (Art. 23 (1), HR Charter; Art. 34 (2), Serbian Constitution; Art. 46, Montenegrin Constitution). The Inheritance Act of Serbia (*Sl. glasnik RS*, No. 46/95) prescribes that a man of military age who leaves the country to avoid taking part in its defence and does not return until the death of the testator, is considered unfit to inherit the assets willed to him (Art. 4 (5)). In our previous Reports, the Belgrade Centre for Human Rights pointed out the manifest unconstitutionality of such a provision.[146] By a

146 See *Human Rights in Yugoslavia 1998, 1999, 2000, 2001, 2002* .

decision of 25 September 2003 the Constitutional Court of Serbia finally declared this provision to be unconstitutional (*Sl. glasnik RS*, No. 101/03). The *obiter dicta* emphasises that "any prescription of limitations to the right to inheritance of those called upon to perform military service is contrary to the constitutional principle of legal equality of citizens, since this principle of nondiscrimination prohibits differential treatment of same or essentially similar situations or equal treatment of essentially different situations". Also, any basis for unfitness to inherit must be connected to the inheritor relationship with the testator, and not to any of his offences against the state.

The Montenegrin Inheritance Act contains a similar provision, under which a person who has committed an act against the constitutional order, the security and independence of the country or its defence capability may be excluded from inheriting (Art. 42 (3)).

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

Immediately after the victory of democratic parties in the 1996 local elections, the Milošević regime, which was in power until 2000, rushed through Parliament a law enabling it to nationalize socially owned and municipal property in a centralised manner. The aim was to prevent the newly elected local authorities from managing and disposing with such property.

The Act on Assets Owned by the Republic of Serbia (*Sl. glasnik RS*, No. 54/96) defined these assets as all those acquired by government agencies, organs and organisations of units of territorial autonomy and local governments, public services and other organisations founded by the republic or the territorial units, and all other assets and revenues released on the basis of the investment of government funds. In addition, the Act restricted management and disposition of property by local governments by requiring the Serbian government's approval for the sale of real property used by public-service organisations (Art. 8).

4.12.5. Restitution of Unlawfully Taken Property and Indemnification of Former Owners

Although denationalisation and indemnification of former owners is an important component of transition, the issue has not yet been dealt with comprehensively in the SaM. Absence of appropriate legal framework in this field has a negative impact primarily on the privatisation process, since foreign investors are reluctant to place significant investments into the local economy due to the lack of legal certainty and safeguards with regard to intangibility of property. In 2002 the Foreign Investments Act was passed (*Sl. list SRJ,* No. 3/02), providing additional safeguards for the foreign investors' rights by way of simplifying the procedure for approval of investment contracts and expanding the list of economic activities where foreign citizens may be majority shareholders.

During 2002, at the Serbian Government initiative, a special committee was formed to draft an Act on Restitution of Property and Indemnification. However, several draft acts on denationalisation have hitherto been drafted in Serbia. The CUPS, together with the Serbian Ministry of Finance and Economy, organised an international conference on denationalisation in October 2002. It was decided, *inter alia,* to establish a working group within the Ministry of Finance and Economy to draft a new Act on Denationalisation, as well as to form a special section for denationalisation matters.[147]

This Report contains only the analysis of the Act that was available to public before the Report was completed. This Draft act has not yet been discussed in the republican Government.[148]

This Draft act regulates conditions, manner and procedure for restitution of property on the territory of Serbia that was nationalised through confiscation from former owners, natural and legal persons, following the decrees and statutes on dispossession without market compensation, passed and applied in the period from 1945 onwards (Art. 1 (1)). The property subject to restitution or indemnification is: farming and forest land, forests, building land, residential and business premises, companies, funds and associations, intellectual property, movable property, securities and financial assets (Art. 12). In Chapter II of the Draft act, dealing with market compensation, it is provided that the value of nationalised property shall be fixed according to its condition at the time of nationalisation and taking into account its value at the time of rendering the decision on restitution or indemnification (Art 32 (1)). If the current value of property cannot be determined, the value shall be fixed pursuant to Article 52 (1) of the Draft, within two months from the date of entry into force of the Act, a directive shall be passed on standards and methodology for determination of the nationalised property's value (Art. 32 (6)).

The Draft act calls for the restitution of property, in the form of same or other property, and in case when this is not possible (for instance, when the property no longer exists in its physical form), a market based indemnification shall be paid in the form of securities or cash, the priority being given to the restitution of property (Art. 1 (2 and 3)). If the property cannot be fully restituted, the possibility of partial restitution is given, and market based indemnification is paid for the remaining difference in value (Art. 13 (2)).

Former owners of the confiscated property or their heirs are beneficiaries of the right to restitution or indemnification (Art. 6 (1)). The condition for exercising this right is the possession of Yugoslav/SaM citizenship at the time of the Act is passed, whereas for foreign citizens it is provided that the restitution of property shall be made according to international agreements (Art. 6 (2)). If the former owner

147 See more at www.cups.org.yu/projekti/html/denacionalizacija.html.
148 See www.srbija.sr.gov.yu.

of property has deceased or has been declared as deceased, the right to restitution of property is passed to his heirs, and the right to inheritance is determined pursuant to provisions of the republican Act on Inheritance (Art. 9 (1 and 2)). The right to restitution of property was established also in favour of legal persons, such as churches and other religious organisations, endowments and other not-for-profit legal persons (Art. 8).

The Draft act prohibits any transaction with the property that is subject to the obligation of restitution, from the date of entry into force of the Act, as well as the use of such property for mortgage, lease or collateral security (Art. 53 (1)).

In 2002, the Montenegrin Assembly adopted the Act on Just Restitution that prescribes conditions, manner, procedure and deadlines for restitution of ownership rights to former holders of these rights on real and movable property that had been unlawfully confiscated from them pursuant to regulations from 1945 onwards (Art. 1 (1)). Beneficiaries of the right to restitution are natural and legal persons, former holders of ownership and other rights on real and movable property and assets, at the time of the confiscation, as well as their heirs, regardless of whether probate proceedings have been conducted after their death (Art. 10 (1 and 2)). The holder of the right to restitution can also be a religious organisation or community (Art. 10 (7)).

The Act exempts acquisition of real property, other property or property rights, or financial indemnification pursuant to this Act from taxation within one year from the day of acquisition, that is of entry into possession by holder of the right to restitution (Art. 9). Serbian Draft Act on Denationalisation does not mention a similar provision.

The Montenegrin Government shall establish the Restitution Fund within 60 days from entry into force of this Act, which should provide means for restitution and payments of compensation in the course of the denationalisation process (Art. 33). The novelty are provisions enumerating the sources for the Fund: revenue from sale of state property (in the amount of 10%), revenue from sale of government bonds (10%), revenue from privatisation of companies or their parts (10%), revenue from concession compensations (15%), revenue from tax, loans from international organisations for the purpose of compensation and other sources (Art. 33 (2)). The same article introduces the obligation of the Government to submit annual report to the Parliament, together with the proposed budget, on the implementation of restitution process.

With regard to the privatisation of previously nationalised property, Article 61 (2) of the Privatisation Act does not envisage making this property a separate estate in the privatisation process but does prescribe that five percent of revenue from its sale plus other budget funds will go to recompense the former owners. The efficacy of this provision is not clear since a law that will more closely regulate the restitution of nationalised property and compensation of its former owners still remains to be adopted.

The Federal Parliament revoked a decree by which the Karađorđević royal family were stripped of their Yugoslav/SaM citizenship and their property confiscated (*Sl. list SRJ*, No. 9/01), thereby invalidating the legal basis on which this property was confiscated. Under Article 2 of the new law, the terms for the restitution of the property will be prescribed in a separate act.

Acquisition of property under SaM law requires both a legal basis and a *modus.* The new law has in principle created the legal basis (by revoking the decree under which the property was confiscated) but did not establish the *modus,* leaving this to be done by a future law. However, on 12 July 2001 (E. P. No. 132), the Federal Government placed the property at the disposal of Prince Aleksandar Karađorđević and other members of the royal family, but without giving them outright ownership. This created a legally ambiguous situation: it is not known who has title to the property as there is no longer any legal basis for it to be state property, nor is there a *modus* for it to belong to the Karađorđevićs.

In addition to being an untoward legal solution whose lack of clarity constitutes a threat to property rights in general, the government's decision also raises the issue of discrimination against other owners of nationalised property. The reason why it should be in the public interest to afford special treatment to the Karađorđević family is not clear. It would appear that the decision was prompted by the needs of day-to-day policy. It sets a bad precedent in that it makes it possible for the authorities to use their discretion when deciding on the restitution of confiscated property, in violation of the equality of citizens and the prohibition of discrimination, and to avoid passing a law that would deal comprehensively with this serious and complex problem.

4.12.6. Tax on Extra Profit and Extra Property Act

In 2001 the Serbian Parliament passed the Act on Tax on Extra Profit and Extra Property acquired by way of using special privileges (hereinafter: Act on Extra Profit, *Sl. glasnik RS*, No. 36/01). According to this Act, the subject of taxation is profit and property acquired by a natural or legal person through taking advantage of special privileges not accessible to all individuals, in the period from 1 January 1989 until the entry into force of this Act (Art. 2 (1)). The tax return was due to be submitted to the competent revenue service within 30 days from the entry into force of this Act (Art. 11 (1)). In case the taxpayer should consider that there are circumstances justifying exemption from this tax, he/she shall submit evidence on such circumstances together with the tax return (Art. 11 (4)). The Act also provides for the possibility of *ex officio* commencement of the proceedings by the revenue service to determine and enforce the payment of this tax, by filing a report of the Serbian Government's Commission for Investigation of Abuses in the Economy or a report of the police, customs or other state bodies should they learn of facts indicating the existence of the subject of taxation (Art. 12).

The Federal Constitutional Court reviewed the constitutionality of this Act (*Sl. glasnik RS*, No.18/02). Parties submitting this motion contested its grounds for enactment, claiming that the contested Act covers the matters that according to the Federal Constitution fall under the exclusive federal jurisdiction. The question of retroactive application of the Act was also raised, stating that the entire Act is of retroactive nature and not only several of its provisions, as allowed by the Constitution in certain cases. According to the opinion of the moving parties, retroactive introduction of a new form of taxation changes the conditions for economic activity, the relationship that had already been regulated from the aspect of corporate or income tax, and thereby compromises the equality of arms in the market economy. It was also asserted that the contested act is in violation of the federal Obligations Code with regard to the statute of limitation for claims. The moving parties further stated that the contested Act compromises the principle of equality of citizens before law, since pursuant to this Act property and profit acquired in a certain period of time is taxed, and not on a continual basis. The same principle was breached due to taxation of acquired residential space of certain individuals, if their size is over 90 m^2 (Art. 3 (12)), as well as due to the amount of tax rate for the space above this limit (Art. 10). The motion asserted that the appeal against the revenue service's decision on one time tax does not delay the enforcement, hence directly contravening the principle that the determination of whether someone is a taxpayer may only be made by the court. Another objection was that the tax return is not to be filed *ex officio*, as laid down by Article 12 of the Act.

The Federal Constitutional Court found that the Serbian Parliament had not violated federal rules on jurisdiction to prescribe of the FRY, because the contested Act of Serbia has, in accordance with the Federal Constitution and the federal Act on the Bases of Taxation System, introduced a form of taxation already envisaged in the federal legislation.[149] With regard to the objection to retroactive effect, the Federal Constitutional Court held that the Federal Constitution, Article 117 (2), enables a deviation from the general rule of prohibition of retroactivity, having in mind that certain provisions of certain statutes must have a retroactive effect to legal relationships from the past. The Federal Constitutional Court indicated that the Serbian Parliament, when passing the contested Act, had in mind the general interest for which it was necessary that contested provisions in Articles 2, 3 and 8 of the Act on Extra Profit should have a retroactive effect, and that is "the necessity that by means of a one-time tax appease, or to the greatest possible extent remove, great injustices that occurred in the distribution of profits, made by abuse of special

149 Provision in Article 2 of the Federal Act on the Bases of Taxation System, prescribes types of taxes that can be introduced inthe FRY, among them the tax on financial transactions and extrao rdinary taxes (items 6 and 9). In Article 142e of the Act on the Bases of Taxation System it is prov ided that a statute, republican or federal, can introduce new taxes. In the contested act Serbia introduced a tax that has the characteristics of an extraordinary tax.

privileges, which were accessible only to certain natural and legal persons". According to the opinion of the Federal Constitutional Court, the issue of retroactivity of this Act cannot be brought into question, since this kind of tax always relates to property that exists at the time of taxation, and was, by definition, acquired beforehand. The Court therefore concluded that the contested Act on Extra Profit on the whole does not violate the provisions in Article 117 of Federal Constitution.

The contested provision in Article 3 (1.18) of the Act on Extra Profit, which sets forth that the abuse of special privileges also includes the privileged payments of old foreign currency savings, was found to be unconstitutional, since the beneficiaries of privileged payments of old foreign currency savings cannot be subject to special tax, because they have not gained any extra profit.[150]

The Federal Constitutional Court also determined that the provision of Article 11 of the Act on Extra Profit, which regulates the submission of a tax return, is not in accordance with the Federal Constitution, as it is usual practice that citizens submit their tax returns personally. The contested provision permits the tax return submitted by the citizen be delivered, without delay, to the Republic's Prosecutor Office. Hence, the Court held that it represents not only a tax return, but also a criminal complaint, i.e. the act of self-incrimination, which is prohibited pursuant to provisions of domestic statutes and international agreements.

The contested provision of Article 19 (4), excluding the appeal against the decision on enforcement of the tax on extra profit payment, was held contrary to Article 26 (2) of the Federal Constitution, guaranteeing to everyone the right to appeal against decision about his right or lawful interest.

According to the ruling of the Court, provision in Article 31 of the contested Act, which prescribes that in the course of the proceeding related to determination and payment of one time tax, provisions of the Obligations Code covering the statute of limitations of claims shall be derogated from, does not belong in this statute. The Court ruled that the Obligations Code regulates matters of private law, which is not the case with the contested Act, regulating public law (fiscal) matters.

While reviewing the constitutionality of the Act on Extra Profit, the Federal Constitutional Court had not entered into deliberation on many other issues related to the implementation of the act, reasons for its enactment and consequences of its enforcement, concluding that "these are matters of the legislators' tax policy and their responsibility for this policy".

150 The court took the position that the transaction employed by the owner of a savings account in order to receive the payment of his foreign currency savings, can give rise to moral contempt, but cannot constitute any grounds for a special tax obligation.

4.13. Minority Rights

Article 27, ICCPR:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The rights of minorities are among the most frequently debated but not the most effectively legally protected human rights. The absence of effective instruments for the protection of human rights of persons belonging to minority groups is not peculiar only of SaM. Namely, until 1995 there was no multilateral instrument fully dedicated to the protection of national minorities. Article 27 of the ICCPR was for a long time the only international instrument binding SaM which contained provisions on national minorities.

Until the Framework Convention for the Protection of National Minorities was adopted in 1995, rights of persons belonging to minorities were partially protected by prohibition of discrimination. Also significant was the 1993 UN Declaration on the Rights of Members of National or Ethnic, Religious and Language Minorities.[151]

SaM is a party to the CoE Framework Convention for the Protection of National Minorities, and its accession to the European Charter on Regional and Minority Languages is under way. The FRY Parliament ratified the Framework Convention on 3 December 1998 (*Sl. list SRJ (Međunarodni ugovori)*, No. 6/98), but the ratification instruments were deposited with the CoE only on 11 May 2001, so that it has applied to FRY only since that date.[152] The Framework Convention contains the obligation of states parties to report to the CoE Secretary General and the Committee of Ministers on measures taken to implement the principles proclaimed by the Convention. Reports are submitted periodically, with the obligation to submit the initial report within the first year after the Convention has entered into force for the relevant state party.[153]

151 Resolution of the General Assembly A/RES/47/135 of 18 December 1992.

152 The Federal Parliament ratified the Framework Convention for the Protection of National Minorities on 3 December 1998 (*Sl. list SRJ (Međunarodni ugovori)*, No. 6/98). However, after ratifying the Framework Convention the ratification instrument were not deposited with the Council of Europe. Such action the FRY justified by the position that it was not a member of CoE and that it was not invited by the CoE to accede. After the democratic changes in 2000 FRY was invited to accede and the ratification instruments were deposited.

153 On 1 September 2002, the Federal Government, on the basis of Art. 25 (1) of the Framework Convention, submitted to the CoE Secretary General its Report on legislative and other measures undertaken to implement the principles enshrined in the Convention. The Humanitarian Law Centre drafted its alternative report on the implementation of the Framework Convention in FRY and

Constitutions of member states and the State Union of Serbia and Montenegro guarantee certain minority rights. However, there remain crucial disparities in defining and protecting the rights of persons belonging to minority groups. Such situation had already existed while the Federal Constitution was in force. Disparities became even larger by the enactment of the Constitutional Charter and the HR Charter, given that the member states' legislation in this area has remained unchanged.

The Article 9 of the Constitutional Charter prescribes that member states shall regulate and protect human and minority rights. The State Union is due to monitor the implementation of human and minority rights and ensure protection in case it has not been ensured in member states. Article 9 (2) of the Constitutional Charter contains the guarantee of the acquired rights, i.e. provides that the attained level of human and minority rights may not be lowered. This rule was confirmed by Article 57 of the HR Charter, pursuant to which the guarantee for acquired rights pertains to individual and collective human rights and minority rights. Article 10 of the Constitutional Charter provided direct application of international human and minority rights treaties binding SaM, while Article 16 prescribes that ratified international treaties and generally accepted rules of international law shall take precedence over the SaM law and the laws of member states.

Article 47 of the HR Charter governs the foundations and the framework of rights of persons belonging to minority groups. Provisions on prohibition of discrimination (Art. 49) and prohibition of forcible assimilation of national minorities (Art. 50) are a novelty compared to previous constitutional solutions on the federal level, while the wording of the provision on prohibition of incitement to racial, religious and national hatred is almost identical to that in the former Federal Constitution. Article 47 (2) of the HR Charter contains an explicit provision that guarantees to national minorities not only their individual but also their collective rights.

Although the solutions on the State Union level are far more comprehensive than the ones in member states, it occurs that the guaranteed rights are not exercised

submitted it to the CoE bodies in early 2003. According to this report, although federal authorities had admittedly taken measures to improve the situation (enacting a federal law, election of national councils), they remained of limited reach. Namely, most areas of social life of importance to minorities (education, use of language, culture) are under the jurisdiction of the republics. In addition, numerous acts and regulations contain provisions of indirect discrimination in education, official use of language, media, social protection, personal status and relation towards religious communities, which affects the implementation of the Convention. In March 2003 another alternative report was produced on the implementation of the Framework Convention in SaM. This report was jointly submitted by the Centre for Multiculturalism and the Vojvodina Centre for Human Rights. Research presented in this report was conducted in Vojvodina and therefore the report deals primarily with the situation of national minorities in this territory. The report contains a comprehensive analysis of the implementation of the provisions of the Framework Convention by monitoring the position of largest national minority communities in Vojvodina. The CoE Committee of Ministers has still not rendered its opinion on these reports.

in practice, most often due to ineffective harmonisation of the statutes with the Constitutional Charter.

The Serbian Constitution contains no separate provision that in general guarantees minority rights and their protection.[154] The Montenegrin Constitution is far more precise and comprehensive in this regard.[155]

Unlike the solution adopted in the HR Charter, Serbian and Montenegrin constitutions do not guarantee the protection of collective rights of minorities, but only contain provisions on the rights of *persons belonging to* other nations, national and ethnic groups or ethnic minorities.

All three constitutions in force in SaM provide that law shall prescribe the manner for exercising rights and freedoms and consequently the minority rights guaranteed by the constitutions. In February 2002, the Federal Parliament adopted the Act on Protection of Freedoms and Rights of National Minorities Act (*Sl. list SRJ,* No. 11/02). The content of this Act discloses the intention to adapt to standards established by the Framework Convention and its enactment was favourably viewed by representatives of national minorities. However, problems related to this Act do not mainly pertain to its contents, but to its implementation. The SaM Ministry for Human and Minority Rights is in charge of the implementation of the Act, but the delay in constituting the Court of Serbia and Montenegro has led to the unclear situation to which body the Ministry could complain if it believes that a violation occurred of the constitutional rights and freedoms of a person belonging to a national minority.[156]

The Act provides for the establishment of national councils "for the purpose of exercising rights to self-government in the field of use of language and script, education, information and culture" (Art. 19). Until the end of 2003 national councils have been established by Hungarians, Romanians, Ruthenians, Croats, Bosniaks, Slovaks, Bulgarians, Roma, Ukrainians and Bunjevci (minority of Croatian descent). The establishment on 10 May of the national council of Bulgarians was followed by certain controversies,[157] while the Sandžak Democratic Party led

154 The Serbian Constitution does not recognise the term "national minorities", but uses the word "nationalities". The HR Charter provides that instead of the term "national minorities" other expressions may be equally used if so determined by constitutions and statutes of member states.

155 Provisions on the rights of nationals belonging to minority groups are mostly contained in the section entitled "Special rights of national and ethnic groups ".

156 During the existence of the Federal Constitutional Court, the Ministry was the only body authorised to act on such cases (Art. 23 (2), Act on Protection of Rights and Freedoms of National Minorities). However, the Constitutional Charter abolished the Federal Court, providing for the establishment of the Court of Serbia and Montenegro. Pursuant to Art. 46 (3), Constitutional Charter, this Court shall entertain complaints of citizens if an institution of Serbia and Montenegro should violate their rights and freedoms guaranteed by the Constitutional Charter, in the situation where no other legal remedies do not exist for the protection of these rights and freedoms.

157 The establishment of this body was boycotted by almost all authentic organisations of the Bulgarian minority in Serbia, because the Council was formed more under the pressure of the Ministry for

by the SaM Government Minister Rasim Ljajić did not take part in the establishment and work of the national council of Bosniaks[158] (See more on this in II.2.13).

Article 52 of the HR Charter enumerates the rights of national minorities. Constitutions of member states contain special provisions on certain rights. Their harmonisation has not yet been accomplished.

4.13.1. The right to preserve the identity of minorities – This right is guaranteed by Article 52 of the HR Charter. The State Union of SaM guarantees the members of national minorities the rights pertaining to expression, maintaining and developing national, cultural and religious specificities. From this basic group of national minority rights, a variety of other rights are derived that should ensure the preservation of identity of minorities.

The provision that guarantees to persons belonging to national minorities the protection of national, ethnic, cultural, language and religious identity is also contained in the Montenegrin Constitution, Article 67 (1). Unlike the Montenegrin Constitution, the preservation of identity of minorities is not explicitly mentioned in the Serbian Constitution, but this guarantee can be indirectly derived by interpreting the article of the Constitution that guarantees "personal, political, *national*, economic, social, cultural and other rights of person and citizen" (italics added; Art. 3 (2)). The said solution in the Serbian Constitution is undoubtedly scarce in language and inadequate in a multiethnic state such as Serbia.

4.13.2. Freedom of expression of national belonging – The HR Charter in Article 48 guarantees the freedom of expression of national belonging, as well as that no one shall be compelled to declare his/her national background.

A similar provision exists in the Protection of Right and Freedoms of National Minorities Act. Namely, its Article 5 (1) act stipulates that no one shall suffer damage or injury due to his/her affiliation or expression of national background or due to associating for the purpose such action, which is certainly a more precise formulation.[159] Serbian and Montenegrin Constitutions do not contain such a provision.

4.13.3. The right to use national symbols of minorities in public places – This right is secured by Article 52 (2) of the HR Charter. This right is also recognised by Article 69 of the Montenegrin Constitution, whereas the Serbian Constitution does not contain a provision related to this.

National Minorities than by the will of members of the Bulgarian minority" – stated the Helsinki Committee for the Protection of Rights and Freedoms of Bulgarians in Serbia and Montenegro.

158 Ljajić's Sandžak Democratic Party and Murić's Party for Sandžak, which stated that the legal and political conditions are not yet ripe for the establishment of such council, did not take part in the work of the Electoral commission.

159 The Framework Convention for the Protection of National Minorities deals with this issue identically (Art. 3 (1)).

The Act on Protection of Rights and Freedoms of National Minorities provides that members of national minorities shall have the right to use national symbols and insignia which however cannot be identical with symbols and insignia of a foreign state. Pursuant to Article 16 of the Act on Protection of Rights and Freedoms of National Minorities, national symbols, insignia and holidays of national minorities are proposed by the national councils of minorities and confirmed by the council on national minorities. The Act also provides the right to officially use national symbols on buildings and in premises of bodies and organisations with public authorities in areas where the language of national minority is in official use, with the obligation to put out the symbols and insignia of the FRY/SaM or the member states.

In August 2002 the Human Rights Committee in Bujanovac submitted to the Federal Constitutional Court an initiative for review of Article 16 of the Act, as the Yugoslav Constitution prescribed the use of national symbols in accordance with international law, as no international instrument under which the FRY is bound contains restrictions in regard to the choice of symbols. On 25 September 2002, the court rejected the initiative, ruling that "the provision does not ban the use of national symbols of national minorities which they themselves choose; it prohibits the use of symbols a foreign state has already selected as its own symbols" (*Sl. list SRJ*, No. 57/02).[160] However, it seems that the logic of the former (and current) constitutional framework of the state should have resulted in different decision of the Court. Namely, Article 11 of the Federal Constitution guaranteed to national minorities the use of national symbols "in accordance with international law", although the international instruments in force in Federal did not contain any provisions on the use of national symbols or on restricting the choice of these symbols.

4.13.4. Freedom to use language and script – Official use of language and script of national minorities is not prescribed in the same way in constitutions in force in SaM. The HR Charter does not contain provisions that would generally guarantee the official use of language of minorities where necessary. Instead, the HR Charter contains several provisions on this issue. In Article 52 (4) it is provided that "in communities having a *considerable* minority population, state authorities *shall conduct proceedings* also in the language of the minority population concerned"[161] (italics added). However, as already mentioned, both acts contain provisions that guarantee acquired rights.[162] The Federal Constitution that was in force prior to the promulgation of the Constitutional Charter, provided in its Article 15 (2):

160 HLC Report, *Albanians in Serbia – Preševo, Bujanovac and Medveđa* , 2002.
161 The draft HR Charter provided the right of minorities "to officially use their languag e and script privately and publicly, as well as officially, in accordance with law ."
162 Art. 9 (2), Constitutional Charter and Art. 57, HR Charter.

> In regions of the FRY/SaM *inhabited by national minorities*, languages and scripts of these minorities shall also be in official use in the manner prescribed by law (italics added).

Although this provision was much more comprehensive, the practice has shown that its interpretation and application have been unfavourable for persons belonging to national minorities.[163]

The Serbian Constitution (Art. 8 (2)) contains a provision similar to the one in the Federal Constitution (right to official use of language of minorities is guaranteed in "regions of the Republic of Serbia inhabited by nationalities") specifying that languages and scripts of nationalities are in official alongside the "Serbo-Croatian language and Cyrillic script" (Art. 8 (1)). This right is exercised "in accordance with law" (Art. 12 (2)). The Montenegrin Constitution more restrictively proclaims the right to official use of language, linking it only to municipalities where a *majority or considerable part* of the population belong to national or ethnic groups.

The Act on Protection of Rights and Freedoms of National Minorities guarantees in Article 10 the right to free, private and public use of language and script. This provision discloses the intention to act in accordance with Article 7 of the European Charter on Regional or Minority Languages, to which SaM is about to accede.

The Act on Protection of Rights and Freedoms of National Minorities provides in its Article 11 that the language and script of national minorities shall be introduced into official use in the self-government units where the minorities account for over 15% of the overall population of the region, according to the official census. However, these provisions have not yet been implemented, except in municipalities where representatives of national minorities in the local self-government bodies are in majority (See more in II.2.13).

In addition, there is an obligation to maintain the existing level of official use of language and script in local self-government units where the language of national minority was in official use at the time of passing the Act on Protection of Rights and Freedoms of National Minorities.[164] Such provision is in accordance with the Constitutional Charter and the HR Charter. This Act leaves the possibility to introduce minority languages into official use also in units of self-government where national minority members account for less than 15% of the overall population, if so decided by the relevant unit.

The Roma are in a specific situation compared to other minorities due to their scattered residence. Namely, although they are amongst the largest minorities in SaM, there are very few municipalities where the Roma minority accounts for over

163 Examples from the alternative report of HLC.
164 Art. 11 (3) of the Act on Protection of Rights and Freedoms of National Minorities.

15% of the population. This example shows that the 15% census, although seemingly reasonable, is by no means just in every case.[165]

In Serbia, the right to official use of language and script is more closely regulated by the Official Use of Languages and Scripts Act (*Sl. glasnik RS*, No. 45/91). According to this Act, the decision on whether the languages of minorities would be in official use is taken by the municipalities where minorities live. This Act did not define the criteria to be used by municipalities when determining which language would be in official use. This deficiency has led to municipalities resolving this issue in a variety of manners.[166]

The Statute of AP Vojvodina governs the official use of language of national minorities in the work of AP Vojvodina administration. Alongside the Serbian language and Cyrillic script, Hungarian, Croat, Slovak, Romanian and Ruthenian languages and scripts are in official use in the province (Art. 6).

4.13.5. Right to education in the language of minorities – This right is guaranteed by all three SaM constitutions (Art. 52 (5), HR Charter; Art. 32 (4), Serbian Constitution; Art. 68, Montenegrin Constitution). Besides, minorities are guaranteed the right to establish private educational institutions at all levels.[167]

The Act on Protection of Rights and Freedoms of National Minorities provides that the right of children to receive education in their own language in public institutions of pre-school, primary and secondary education. The novelty in the SaM legal system is the provision in Article 13 (6) of the Act on Protection of Rights and Freedoms of National Minorities according to which representatives of national minorities, through their national councils, shall participate in the creation of school curricula for teaching in subjects that reflect peculiarities of national minorities in the minority languages, for bilingual instruction and for learning languages of national minorities with elements of national culture.

With regard to republican statutes, pursuant to the Montenegrin General Act on Education (*Sl. list RCG*, No. 64/02), "in municipalities where the majority or the significant proportion of inhabitants are members of national and ethnic groups, the instruction shall also be done in the languages of national or ethnic groups".

In Serbia, the possibility of education in minority languages is more precisely defined: if over 15 pupils should enrol in the class, instruction must be done in the minority language (Serbian Act on Elementary Schools, *Sl. glasnik RS* No. 50/92). Pursuant to the provision in Article 5 of the same act, if less then 15 minority pupils

165 For instance, in Vojvodina the regulations dealing with official use of language and script omit the Romany language, which is highlighted as discriminatory in the Alternative Report of the Centre for Multiculturalism and Vojvodina Centre for Human Rights.

166 Miroslav Samardžić, *Situation of Minorities in Vojvodina* (*Položaj manjina u Vojvodini*), Belgrade, 1998.

167 Art. 52 (6), HR Charter.

should enrol in the class, instruction can be done in the minority language with approval of the Minister of Education. Instruction can be conducted only in the minority language or bilingually. If the instruction is conducted only in the minority language, it is compulsory to also attend the Serbian language classes.

4.13.6. The use of place names and other geographical names in native language – The HR Charter guarantees to the members of national minorities the right to "to use their own name and surname in their own language" (Art. 52 (7)).[168] The Art. 52 (8) of the HR Charter provides the inscription of traditional local names, names of streets and settlements, as well as topographic signs in the minority languages in regions inhabited by a significant minority population.

Article 9 of the Act on Protection of Rights and Freedoms of National Minorities establishes the right of members of national minorities to the "free choice and use of personal name of their children, as well as the right to have these names registered in all public documents, archives and personal data records *according to its language and orthography of the national minority*" (italics added). However, there have been cases when the registration of the names of newborn children according to the tradition of minorities was refused.[169]

The Act on Protection of Rights and Freedoms of National Minorities provides in Article 11 that in regions where the languages and scripts of the national minorities are in official use, names of bodies exercising public authorities, names of units of self-government, settlements, squares and streets and other geographical names shall be written in the languages of national minorities which are in official use, according to their *tradition* and orthography.

On the other hand, Article 19 of the Serbian Official Use of Languages and Script Act prescribes:

> In areas in which minority languages are in official use, place names and other geographical names, names of streets and squares, names of organs and organisations, traffic signs, public information and warnings and other public signs shall be inscribed in the languages of the minorities.

However, Article 7 of this Act does not allow the geographic and personal names on public signs to be replaced by others, stating that they should only be inscribed in the languages of minorities in accordance with their spelling. The interpretation of such provision leads to the conclusion that official geographic and personal names on public signs in Serbian must not be replaced by traditional names in minority languages, allowing only for the transliteration of Serb names. Hence the traditional minority language names should not be publicly used even if they only represent the translation of the official geographic and personal names from

168 Art. 11 of the Framework Convention for the Protection of National Minorities also contains such formulation.

169 Alternative Report of HLC on the implementation of the Framework Convention, 2002.

the Serb language, which is not in accordance either with federal legislation or the Framework Convention.

The Serbian Constitutional Court has confirmed in its jurisprudence the interpretation that only inscriptions are allowed of official geographic names in the spelling of minority languages, disallowing the translation of the name. In its three decisions dated 25 January 2001, the Serbian Constitutional Court has taken the following position:

> [T]he cited provision of the Act does not permit the replacement of geographic names with minority language names, and that the legal formulation that such names are "inscribed in the minority language in accordance with the standard usage of the language" excludes the possibility of translation of geographic names. (*Sl. glasnik RS*, No. 10/01, Decisions of the Serbian Constitutional Court dated 25 January 2001; IU–111/93; IU64/94; IU350/93).

This interpretation by the Serbian Constitutional Court renders inconsequential the official use of minority languages in the area of geographic names reducing it merely to the minority language orthography. Minority communities are dissatisfied with this decision, particularly because traditional names have been freely used before. Provisions of the Act on Protection of Rights and Freedoms of National Minorities dealing with the official use of language and script of national minorities undoubtedly take precedence over the provisions of the Serbian Official Use of Languages and Scripts Act and it remains not only to correct the discrepancies, but also to implement in practice the provisions of the Protection of Rights and Freedoms of National Minorities Act, which is more liberal for national minorities.

4.13.7. Proportional representation – Unlike the Serbian Constitution, the HR Charter and the Montenegrin Constitution explicitly guarantee to national minorities and ethnic groups the right to *proportional representation in public services, government agencies and bodies and local self-government*.[170]

The Act on Protection of Rights and Freedoms of National Minorities dedicates an entire section to the effective participation of national minorities in decision-making in the issues of peculiarity, in government and administration. This Act provides that the employment policies of public services shall take into account the national composition of the population and knowledge of languages spoken in the area of their jurisdiction.

Effective participation in certain spheres of social life of significance for national minorities will be enabled with the assistance of national councils of national minorities designed as bodies with certain public and legal authorities that may be entrusted to them in the field of education, information and culture. Under the express provision of Article 19 of the Act on Protection of Rights and Freedoms

170 The Federal Constitution did not contain a provision to this effect.

of National Minorities, national councils *represent* national minorities in the sphere of the official use of language and script, education, information and culture. National councils will be elected by assemblies of electors of national minorities pending the adoption of a special law. Under Article 24 of the Act on protection of rights and freedoms of national minorities, electors of national minorities may be federal and republican deputies and deputies in the assemblies of autonomous provinces elected to office as members of a national minority or as persons declaring themselves as members of a minority and speaking the language of a minority. Electors for the election of national councils may also be deputies in assemblies of units of local self-government who belong to a national minority and were elected in units of local self-government in which a minority language is in official use. Electors for the election of national councils may also be citizens who declare themselves as members of a national minority and enjoy support of at least one hundred members of a minority with the voting right, or are nominated by a national organization or an association of a national minority. Under Article 14 of the Rules on the Method of Operation of Assemblies of Electors for the Election of National Councils of National Minorities (*Sl. list SRJ*, No. 41/02), national councils will be elected on the assembly of electors in accordance with the D'Hondt electoral system.

A set of special measures provided in the Act on Protection of Rights and Freedoms of Minorities is also designed to promote the effective participation of minorities in social life. Article 4 of the Act prescribes that under the Constitution and the law, the SaM authorities will adopt regulations, individual legal acts and will undertake measures to ensure full and effective equality between members of national minorities and members of the majority nation. A special provision lays down the obligation to undertake such measures in order to improve the position of persons belonging to the Roma national minority. Thus the SaM legal system is harmonized with Article 4 (2) of the Framework Convention for the Protection of National Minorities.

Lack of constitutional provisions on proportional representation of national minorities in public services and state administration resulted in the adoption of the Election Act organising Serbia as one single electoral district and prescribing a minimum of 5% of vote for a party to enter into the parliament (Elections Act, *Sl. glasnik RS* No. 35/00). Consequently, political parties of smaller national minorities are practically excluded from parliamentary life unless they form coalitions.

4.13.8. Right to information and public information in minority languages – The HR Charter and the Montenegrin Constitution guarantee to national minorities the *right to information and public information in minority languages* (Art. 52, HR Charter; Art. 68, Montenegrin Constitution). The Serbian Constitution does not guarantee this right. The HR Charter also guarantees the right of minorities to establish their own public media (Art. 52).

The Article 17 of the Act on Protection of Rights and Freedoms of National Minorities provides that the state shall ensure news and current affairs, cultural and

educational programs in minority languages in public service broadcasting systems. It also provides for the possibility of establishing radio and television stations with entire programs in minority languages. Participation of minority representatives in the management of such media would be regulated by separate republican legislation given that this subject matter falls within the competence of the republics. However, no such regulations have been adopted to date.

4.13.9. Educational and cultural organisation – The HR Charter guarantees the *right* to national minorities to establish, in accordance with law, *educational and cultural organisations or associations* funded on voluntary basis (Art. 53 (1)).[171] A somewhat different provision is contained in the Montenegrin Constitution, which in Article 70 guarantees the right of persons belonging to national and ethnic groups to establish educational, cultural and religious associations, *with material assistance of the state* (italics added; this indicates the obligation of Montenegro to financially support associations of minorities). Such measure goes beyond the obligations set by the Framework Convention for the Protection of National Minorities, since Article 13 (2) of this Convention stipulates that the exercise of this right "shall not entail any financial obligation by the state party". The Serbian Constitution does not contain any specific provision that would guarantee this rights; it only generally guarantees all citizens the right to express their national culture.

Article 12 of the Act on Protection of Rights and Freedoms of National Minorities stipulates that state-founded museums, archives and institutions charged with the preservation of national monuments would have an obligation to preserve and promote the cultural and historical legacy of national minorities within their territory. Minority representatives would participate in decision-making on the ways of promoting their cultural and historical legacy.

4.13.10. Right to establish and foster unhindered contacts with their co-nationals in other countries – Pursuant to the HR Charter and the Montenegrin Constitution, members of national minorities have *the right to establish and foster unhindered contacts with their co-nationals in other countries*, which is in keeping with Article 17 of the Framework Convention for the Protection of National Minorities.[172] The Montenegrin Constitution also provides that exercise of this right must not be detrimental to the Republic. The Serbian Constitution does not contain a specific provision related to this right.

4.13.11. Protection of minorities against persecution and hatred – A general provision related to the *protection of minorities against persecution and hatred* exists in the HR Charter and the Montenegrin Constitution.

171 Together with this provision, the Federal Constitution had also provided *the possibility* of the state assisting such organisations.

172 Art. 17 (1) of the Framework Convention reads: "The Parties undertake not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage."

Any incitement and encouragement of national, racial, religious and other inequality, as well as incitement to and advocacy of national, religious and other hatred or intolerance is prohibited and punishable (Art. 51, HR Charter; Art. 43, Montenegrin Constitution). Regrettably, the Serbian Constitution does not contain any general provision under which various forms of ethnically motivated persecution, hatred and intolerance would be unconstitutional and punishable.

All three constitutions provide the possibility of restrictions on freedom of the press and of association if they are directed "to incitement of national, racial or religious hatred or intolerance (see 4.9.6).

4.13.12. Political mechanisms for protection of minority rights – Article 45 of the Constitutional Charter provides the institution of Minister for Human and Minority Rights. His/her basic jurisdiction includes ensuring the exercise and monitoring the implementation of human and citizens' rights and right of minorities,[173] as well as coordinating the work on implementation and respect of international treaties for the protection of human and minority rights.

The Constitutional Charter introduced the Court of Serbia and Montenegro. Given that through the expiration of the Federal Constitution the Federal Court and the Federal Constitutional Court were abolished, this body remains as the only judicial instance on the State Union level. The Constitutional Charter provides that the Court of Serbia and Montenegro shall, *inter alia*, be competent to hear constitutional complaints "filed by citizens if no other legal remedies are provided, in the case that an institution of Serbia and Montenegro has interfered with the rights and freedoms that are guaranteed to them by the Constitutional Charter" (Art. 46 (3)). Article 12 of the Implementation of the Constitutional Charter Act provided that the Court of Serbia and Montenegro shall take over the docket of the Federal Constitutional Court for which it is competent according to the Constitutional Charter. Given that this Court is not yet operational,[174] it is not possible to assess the extent to which it would influence the protection of human and minority rights in the country.

The Montenegrin Constitution has established a special institution – the Council for the Protection of Rights of Members of National and Ethnic Groups, tasked with preservation and safeguarding of minority identities and rights. The President of Montenegro chairs the Council, while its composition and competencies determined by the Montenegrin Parliament (Art. 76).[175] The Council also includes

173 Guaranteed by the Constitutional Charter, HR Charter and international law.

174 Justices of the Court of Serbia and Montenegro have not yet been elected, despite the fact that Art. 3 of the Act on Implementation of the Constitutional Charter provides that this should be done within 30 days from the day of promulgation of the Constitutional Charter.

175 Activities of the Council are regulated by the Decision on Jurisdiction and Composition of the Republic Council for Protection of Rights and Freedoms of National and Ethnic Groups, *Sl. list RCG*, No. 32/93.

representatives of the three largest confessions in Montenegro, but not the representatives of all national and ethnic groups. The Council is imagined as an independent body that should take care of the preservation and safeguarding of national, ethnic, religious, cultural and language identities of national and ethnic groups in Montenegro. However, this body has until now met only several times.[176] Montenegro also has the Ministry of National and Ethnic Groups and the Cultural Information Centre for the exercise of the rights of national and religious communities.

4.14. Political Rights

Article 25, ICCPR:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) To have access, on general terms of equality, to public service in his country.

Article 3, Protocol No. 1 to the ECHR:

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

4.14.1. General

The constitutions of the two republics proclaim the sovereignty of the people, and that suffrage is universal and equal (Art. 2 and 42, Serbian Constitution; Arts. 2, 3 and 32, Montenegrin Constitution). The HR Charter also foresees that suffrage should be universal and equal and that elections should be held by secret ballot (Arts. 33 (2)), but does not proclaim people's sovereignty, probably with a view to avoiding the question of whether sovereignty resides in citizens or member states.

176 Although it has been in existence since 1993, in its session it has never debated difficult issues facing minorities in Montenegro, such as the abduction of Bosniaks near Bukovica (municipality of Pljevlja), handover of ninety Bosniaks to the Serbian authorities who had fled to Montenegro because of war, eviction of Roma from Danilovgrad and the so-called "Walpurgis-night" when the settlement was burned to the ground where a Roma community had resided for several years.

The citizen who turns 18 is entitled to vote and to be elected (Art. 33 (2), HR Charter; Art. 42 (1), Serbian Constitution; Art. 32 (1), Montenegrin Constitution).

4.14.2. Participation in the Conduct of Public Affairs

Citizens of the state union are entitled to participate in decisions concerning public affairs, either directly or through their representatives freely elected by secret ballot at general and periodic elections (Art. 33 (1), HR Charter).

The Constitutional Charter of Serbia and Montenegro does not foresee a referendum or a possibility for citizens to submit legislative proposals or launch an initiative for constitutional amendments; in other words, the general provision on direct participation in the decision-making process has remained unspecific.

The fact that the Federal Constitution did not deal with the issue of referenda was probably due to the politically sensitive question of whether at a referendum the electorates of the member states merge into one or are divided into two constituencies, i.e. by member states. This dilemma could have been resolved by federal law, but ever since the establishment of FRY no federal law on referenda has been adopted. The Constitutional Charter does not foresee a referendum either, except on the further fate of the state union. Namely, under the Constitutional Charter the member states can initiate a procedure to secede from the state union upon the expiry of a three year period (Art. 60 (1)). The decision on secession is brought after a referendum (Art. 60 (2)). The Constitutional Charter does not regulate the referendum issue in greater detail, apart from prescribing that a referendum act will be passed by a member state "bearing in mind internationally recognized democratic standards" (Art. 60 (3)). Unlike the previous Federal Constitution and the Constitutions of Serbia and Montenegro, the Constitutional Charter of the state union does not provide for people's initiative. In view of the fact that submitting laws and other general acts is an important form of direct democracy, this initiative should not have been ignored by the Constitutional Charter.

The Constitutions of Serbia and Montenegro in their provisions give concrete principal guarantees of direct democracy and prescribe the people's initiative for adoption of legislation and for change of constitutions. In Serbia, the right to propose a law, other regulation or general act belongs to 15.000 voters (Art. 80, Serbian Constitution), whereas in Montenegro that right belongs to 6.000 voters (Art. 85, Montenegrin Constitution). The proposal to change the Serbian Constitution can be submitted by at least 100.000 voters (Art. 132, Serbian Constitution), whereas the proposal for changing the Constitution of Montenegro can be submitted by at least 10.000 voters (Art. 117, Montenegrin Constitution). The constitutions of the member republics also prescribe referendum as a form of direct democracy. The Constitution of the Republic of Serbia prescribes that scheduling a referendum should be mandatory in two cases – when the decision is being made on changing

the republic's borders (Art. 4) and in the final adoption process of the Act on Amendments to the Constitution, which requires consent of more than one half of all voters (Art. 133 (2)). An optional referendum is possible in two cases – when the National Assembly decides that the citizens should give an opinion about certain matters from the jurisdiction of the Assembly and if the calling for a referendum requires at least 100.000 voters (Art. 81, Serbian Constitution). Article 116 of the Serbian Constitution also provides that in municipalities citizens, apart from deciding through their representatives, should also decide by referendum. Constitutional provisions on referendum and people's initiative are more closely regulated in the Republic of Serbia through the Referendum and People's Initiative Act (*Sl. glasnik RS,* Nos. 48/94 and 11/98). According to the Montenegrin Constitution referendum must be called on decisions on changing the status of the state, changing the form of government and changing of borders (Art. 4). The Constitution also foresees that in local self-government citizens should decide directly or through freely elected representatives (Art. 66 (3)). Montenegro adopted a new Referendum Act (*Sl. list RCG*, No. 9/01) in 2001, at a moment when the referendum was a burning political issue and when the crisis concerning the survival of the joint state escalated. Pursuant to Article 8 of the Referendum Act, all persons registered in the voters' roll used for the elections have the right to participate in the referendum in Montenegro.[177] This has given rise to many polemics, since it deprives Montenegrin citizens who are not domiciled in Montenegro of the right to participate in a potential referendum on the future status of Montenegro. In its report[178] on the Act, however, the ODIHR[179] deemed the provision acceptable since persons who are not domiciled in Montenegro do not have the right to vote in elections for the republic's parliament either; allowing them to vote in a referendum could result in the republican parliament, in which they do not have representatives, confirming a referendum decision. Furthermore, Montenegrin citizens domiciled in Serbia have the right to vote in Serbian elections and referendums. If they had the same right in Montenegro, the effect would be one man – two votes. Noting in its report that some of its earlier recommendations and comments had been incorporated in the

177 At the proposal of the Party of Foreign Exchange Depositors of Montenegro – Herceg Novi, a procedure was started before the Federal Constitutional Court for assessing the constitutionality of Article 8. The Federal Constitutional Court ruled that the part of this provision reading: "under the regulations on elections" is not in accordance with the Federal Constitution, since "citizens can directly give their opinion in various ways – through plebiscite, referendum, the people's initiative, the people's veto, and similar. Each of the mentioned forms of citizens giving their opinion directly implies different manners of their implementation. The equalization of the right to decide by referendum and the electoral right to chose representatives to state and local authorities can mean both the unfounded extension and the unfounded limitation of this right, depending on the issue decided upon by referendum." (*Sl. list SRJ*, No. 17/01).

178 OSCE/ODIHR *Assessment of the Referendum Act on the Republic of Montenegro, FRY* , Warsaw, 6 July 2001.

179 Institution operating within the Organisation for Security and Cooperation in Europe; it was established in 1990, with the siege in Warsaw.

Act, the ODIHR nonetheless pointed up several major defects (e.g. the failure to foresee a qualified majority for referendum decisions, lack of transparency with regard to vote-counting and publication of the results, the vaguely defined authority of observers).

The Speaker of the Montenegrin Parliament requested the ODIHR's comments on the draft act on the referendum on Montenegro's status, which has only 17 articles and is in effect a *lex specialis* with respect to the Referendum Act passed in February 2001. The ODIHR responded with a report in which it expressed concern over the failure of the draft to reflect the recommendations it made in a previous report.[180] An act on the referendum on Montenegro's status has never been passed as a separate law, and the process of resolving the issue of Montenegro's status began with the signing of the Belgrade Agreement and adoption the Constitutional Charter.

4.14.2.1. Responsibility for Human Rights Violations Act – Lustration (vetting) – The National Assembly of the Republic of Serbia on 30 May 2003 adopted the Responsibility for Human Rights Violations Act (hereinafter: the Lustration Act – Serbian *Sl. glasnik RS,* Nos. 58/03, 61/03), in order to overcome the authoritarian past by preventing persons who intentionally violated human rights in the previous undemocratic regime from holding a public office. The Act defines (Art. 1) forms and kinds of violations of human rights as grounds to examine such responsibility, the group of persons whose responsibility is to be examined, the principles and rules of the procedure for the examination, the composition, jurisdiction and procedure of the competent authorities, as well as the sanctions against persons proved to have violated human rights.

The legislator wanted to avoid the problem of the retroactive effect and therefore established 23 March 1976, the day when the ICCPR entered into force in the former SFRY, as the beginning of the implementation of the provisions of the Act. For the purposes of the Lustration Act, the rights foreseen in the Covenant, in the 1974 SFRY Constitution, the 1992 Federal Constitution and the 1990 Constitution of Serbia were included in the concept of human rights. The Act will start to be implemented upon the expiry of three months from the day of its entering into force, i.e. as of 11 September 2003 and will be implemented 10 years from the day of entering into force, i.e. by 2013.

This Act, however, does not prescribe to what authoritarian period it will apply, which makes it difficult to apply. It therefore equally applies both to the past and the future, which is a wrong concept in view of the fact that it was intended for overcoming the authoritarian past, not for punishing human rights violations in the present and future.

180 OSCE/ODIHR *Comments on the Draft Referendum Act on the Status of the Republic of Montene - gro*, FRY, Warsaw, 5 November 2001.

The Act defines one general and three special forms of human rights violations subject to lustration. The general form of human rights violations (Art. 5) means that a person committed an offence or was an accomplice in an offence prosecuted *ex officio*, that the offence was committed in performing public duty, that in the case of the offence in question the statute of limitations applies to prosecution or punishment, and that the offence was committed for one of the two special purposes – to deprive a person of a right pertaining to him/her by law or to make it more difficult for him/her to exercise such a right or to enable a person to acquire a right or benefit pertaining to him/her by law, or to exert influence on a person, organization, company or some other legal person to make a decision or undertake an action whereby citizens are put in an unequal position.

As special forms of human rights violations, the Act foresees the violation of the right to privacy (informers – Art. 6), as well as the violation of the legal equality of citizens (Art. 7), explicitly excluding orders of superiors and legality under internal law as a basis for exemption from responsibility. Although the violation of the right to privacy is well defined, the implementation of Article 6 absolutely depends on the adoption of an act on state security agencies files.

Perhaps the best defined special form is that in Article 9 of the Act – participation in judicial or extrajudicial proceedings in which political beliefs are imposed, when a person in an official capacity participated in the proceedings in which the rights of others were decided on, if the person knew or must have known that the proceedings were conducted exclusively in order to impose political beliefs and standards, which are overtly or covertly presented as legal rights or standards.

This provision is much more applicable than the so-called lustration provision of Article 79 of the Judges Act (*Sl. glasnik*, Nos. 63/01, 42/02, 17/03, 25/03 and 27/03) dealing with political or show trials or with the rigging of citizens' votes, without any detailed explanation.

The Act provides that a person can be exempted from responsibility for three reasons: if the offence subject to lustration was committed by a person of less than 18 years of age, if it was committed under duress, threat or as a result of blackmail or under some other inadmissible pressure or by revealing information to the Security Intelligence Agency during a hearing in detention or prison. While the first case is not problematic, the second two, unfortunately, are.

The Act had to define the nature of duress, threat, blackmail or pressure. Not only did they have to be serious, in the sense that danger for and damage to some good of the subject of lustration were real, but also that the endangered good had to be proportionate to human rights violations committed by the subject of lustration. It is not that each threat and blackmail are the same and that any illegal pressure can be exempted from responsibility. The entire system of exerting pressure on judges by the authorities was based on manipulations, blackmails, intimidation and on offers of various benefits; some judges maintained their independence in spite

of the pressure, while others failed to do so. It is only in each and every concrete case that it can be assessed if some threat or pressure were of such intensity to justify exemption from responsibility, and the legislator must have explicitly stated the criteria on the basis of which it would be assessed whether exemption from responsibility is justified.

Furthermore, it is impossible to exempt from responsibility each person who, while in detention, divulged some information to the police or the State Security completely voluntarily, and thereby violated the right to privacy of another. For instance, a person arrested for larceny can come to an agreement with the police to reveal information about their neighbour, the leader of an opposition party, in order to avoid prosecution. Why would a person like that – a classical informer, be exempted from responsibility?

The lustration procedure is conducted only for candidates for public office under this Act – from the president of the Republic and deputies of the National Assembly to newspaper editors. Parties against which the procedure is conducted are granted a number of procedural rights, above all the right to defence, as well as the analogous and subsidiary implementation of the CPC. Since this is not a court trial, nor does it have to do with civil or criminal responsibility, there is a dilemma as to whether the right to a fair trial, as defined by Article 6 of the ECHR, is relevant to the lustration procedure. This procedure nevertheless deals with a form of legal responsibility which can result in the limitation of a human right – the right to work. This is exactly why the subject of lustration must be granted all procedural rights which are implied in the right to a fair trial, and which apply *mutatis mutandis* to the lustration procedure. The subsidiary implementation of the CPC offers such guarantees.

The procedure is in the hands of the lustration commission, which should have nine members – three judges of the Supreme Court of Serbia, three outstanding legal experts, a deputy state public prosecutor and two members of parliament, who should have a law degree and who were not elected from the same election list. Although in theory this concept is just, the problem lies in the fact that all deputies of the parliamentary democratic parties until December 2003 were elected from a single election list – "DOS–Vojislav Koštunica", so that the second member of the lustration commission would have to be chosen from the ranks of nationalist parties and the parties of the former regime, and none of their deputies accepted to be appointed. Thus, instead of having 9 members, the commission by the end of the year had 8 members and its work remained under doubt. The ninth member can be chosen after elections and the establishment of a new parliament, if there is political will. The commission has three chambers chaired by the judges of the Supreme Court of Serbia. The lustration procedure has three instances – the first instance decision is brought by the chamber of the commission and a complaint against it is lodged with the entire commission, while an appeal against the decision of the

commission can be lodged with the Supreme Court. In the appeal procedure the institute *beneficium novorum* is significantly and justifiably limited, since it is possible to propose only evidence which could not be presented before the commission.

As a sanction for human rights violations, the commission may issue a public statement on the responsibility of a person, and if the person does not resign from office or does not withdraw its candidature, the Supreme Court can ban the person from taking an office for five years from the day of issuing the public statement (Arts. 32 and 33). Thus the Act adopted a mixed system of lustration responsibility, somewhere between "soft" and "hard" lustration. The Supreme Court cannot pronounce a ban on taking office in the case of persons directly elected by citizens or in the case of members of government (Art. 33 (1)). It is thus citizens who should decide if they will chose for a public office a person proven to have violated human rights.

Those are some legal problems with the lustration act, but they could all be overcome if there is any will or need for lustration in Serbia. This need exists *objectively*, since in the society there is a great number of people for whom there is reason to believe that they violated human rights in the past and that they will do the same in the future if they have a chance. However, this need does not exist *subjectively*, since citizens mainly remember the communist totalitarian regime as a golden age in which everyone lived nicely and happily; furthermore, they do not remember the authoritarian Milošević regime as a dictatorship, but rather as a wrong move which they would like to forget as soon as possible. As lustration is not supported either by political leaders or citizens themselves, chances for it to be implemented and to produce any positive effects in Serbia are very slim.

4.14.3. Political Parties

In Serbia and Montenegro the establishment of political parties and their activities are free (see 4.11.1). Up until 1997, coalitions dominated by parties that emerged from the former Communist Party were in power in both Serbia and Montenegro. The reform-oriented wing of the Democratic Party of Socialists was voted into office in Montenegro in 1998 in an election that was positively assessed by domestic and foreign observers. The Serbian parliamentary election in December 2000 was the first fair and free election to be held in Serbia since World War II. Indeed, until the introduction of parliamentary democracy in 1990, genuine elections were not possible owing to the constitutionally declared one-party system and, after that, because of a series of legal and *de facto* obstacles set up by the regime.[181] Thus the Serbian parties then in opposition held that none of the elections held after

181 See *Human Rights in Yugoslavia 1998*, *1999* and *2000*.

1990, including the presidential, parliamentary and local elections in September 2000, in which they were voted into power, were truly free and fair.[182]

The financing of political parties is regulated by republican statutes (Montenegrin Act on Financing of Political Parties, *Sl. list RCG*, No. 44/97; Serbian Act on Financing of Political Parties, *Sl. glasnik RS*, No. 32/97). Both laws foresee annual allocation of a proportion of the respective budgets to parties, and additional financing of their campaigns in years when election years (Arts. 3, 4 and 6, Montenegrin Act; Arts. 4, 9 and 10, Serbian Act). The parties which have deputies or councillors (Art. 3, Montenegrin Act on Financing of Political Parties; Art. 4 (1), Serbian Act on Financing of Political Parties) are entitled to finance their regular work from the budget. The Serbian act foresees a fixed percentage of the budget allocated annually for financing the work of political parties, while the Montenegrin act foresees a minimum percentage of the budget that must be used for these purposes (Art. 4, Montenegrin Act on Financing of Political Parties; Art. 4 (1), Serbian Act on Financing of Political Parties). The Serbian act thus prevents the parliamentary parties from voting an increase of the amount earmarked in the budget to finance their regular work. Both acts foresee that 30% of these resources should be equally shared between the parties, and that the remainder (70%) should be divided in proportion to the number of seats in the parliament (Art. 4 (2), Serbian Act on Financing of Political Parties; Art. 5, Montenegrin Act on Financing of Political Parties). Apart from the resources from the budget, parties can finance their regular work from private sources. Unlike the Montenegrin act, the new Serbian act deals also with the private sources of financial means and limits their amount with a view to controlling their impact on political parties. Private sources include membership fees, donations, income from promotional activities, income from property and legacies (Art. 3 (3)). Their total amount, apart from membership fees, must not exceed the total amount of resources allocated from the budget for the party in question. As for the parties which are not entitled to resources from the budget, the Serbian act foresees that resources from private sources must not exceed the amount of 5% of the total resources allocated from the budget for financing the regular work of parties (Art. 5 (7)). In addition to limiting the overall amount, the act also limits the amount of individual donations. Thus, the amount of donations in a calendar year is limited to ten average incomes of natural persons and one hundred average incomes of legal persons (Art. 5 (4)).[183]

182 Strong criticism of the organization of elections and procedure may be found in the reports of the OSCE observers. See: *Parliamentary Elections September 21, 1997 and Presidential Elections September 21* and *October 5, 1997* and *Assessment of Election Legislation in the Federal Republic of Yugoslavia, 2000*, OSCE Office for Democratic Institutions and Human Rights (hereinafter: OSCE Report 1997).

183 For more detail about the ban on receiving resources from foreign states and other foreign persons, as well as from some domestic authorities, see 4.11.4.2. on the freedom of association.

As for the expenses for electoral campaigns, both acts set restrictions on campaign spending in order to prevent disadvantage to parties with smaller funds at their disposal. The rules of the Montenegrin act lack clarity and precision. The Montenegrin act foresees that resources for the expenses of election campaigning should be allocated from the budget in the year of calling an election. The act provides for the manner of dividing these resources, but not for their amount (Art. 6). On the other hand, parties are allowed to secure resources for these expenses themselves (Art. 8). The Montenegrin act further defines what is meant by election expenses and stipulates that they cannot exceed the amount of 250 average monthly salaries (Art. 9); it also foresees that parties themselves must conclude a special agreement which is to ensure that the limitation of election campaign expenses is observed (Art. 10). The arrangement presented in the Montenegrin act does not seem feasible. The new Serbian Financing of Political Parties Act is considerably more precise. It stipulates that resources for election campaign expenses are allocated from the budget as a fixed percentage of the budget (Art. 9). On the other hand, the amount of resources ensured by parties themselves for funding electoral campaigns is limited and must not exceed 20% of the resources allocated from the budget for these purposes (Art. 11 (2)).

In the opinion of OSCE, the Serbian Act on Financing of Political Parties is an important step towards introducing transparency. OSCE further assesses that the act establishes a good balance between private and public resources, as well as mechanisms for limiting financial influence on political parties. However, it expressed doubts as to whether the present strong influence of legal persons financing political parties will truly be limited in the future.[184]

The Federal Act on Financing of Political Parties (*Sl. list SRJ*, No. 73/00) ceased to be valid on the day of entering into force of the new Serbian Act on Financing of Political Parties (Art. 24), except for the provisions regulating the use of the property of the League of Communists of Yugoslavia, the Socialist Alliance of the Working People of Yugoslavia and the Alliance of the Socialist Youth of Yugoslavia). These assets passed to the federal state but the law foresees that political parties represented in parliaments shall be allowed use of at least half of the real property of the three former organisations (Art. 13, Federal Act).

4.14.4. The Right to Vote and to Stand for Elections

Under the Constitutional Charter, deputies of the Assembly of Serbia and Montenegro are elected from each member state, "in accordance with the European and democratic standards under the laws of the member states" (Art. 20 (2)). Thus

184 OSCE/Economic Transparency Department, *Note to the file, Act on Financing of Political Parties* , Belgrade, August 1, 2003.

election matters were placed entirely in the competence of the member states.[185] The first direct elections for the deputies of the Assembly of Serbia and Montenegro will be held upon the expiry of two years from the adoption of the Constitutional Charter (Art. 20 (2)).[186]

At all Serbian elections, the right to vote in parliamentary and local elections belongs to: 1) Yugoslav citizens residing in the Republic of Serbia; 2) persons who have attained the age of 18 and have legal maturity (Art. 10, Election of Parliamentary Deputies Act, *Sl. glasnik RS*, No. 35/00; Art. 122, Local Self-Government Act, *Sl. glasnik* RS, Nos. 48/99 and 27/01; Art. 7 of the Local Elections Act, *Sl. glasnik RS*, Nos. 33/02, 37/02 and 42/02;[187] Art. 2, Election of the President of the Republic Act, *Sl. glasnik RS*, Nos. 1/90, 79/92, 73/02[188]). The right to be elected to public office is treated differently in Serbia and Montenegro, depending on the office involved. Thus, candidates for Serbian president must be citizens of Serbia with at least one year's residence in the republic prior to the date of the election, while the new Montenegrin law requires the residence of at least 24 months (Art. 3 (1), Election of the President of the Republic Act, *Sl. list RCG*, No. 11/03). All the relevant acts lay down that the candidates for these offices must posses the right to vote.

The Serbian law foresees that the submitter of the proposal – a political party, some other political organization or a group of citizens – must collect 10,000

185 As for the compliance of the federal election legislation with international stand ards, see the *Human Rights in Yugoslavia 2002*.

186 In the first two years upon the adoption of the Constitutional Charter, deputies are el ected indirectly, in proportion to representation in the National Assembly of Serbia or the Assembly of Montenegro (Art. 20 (2), Constitutional Charter). Both member states adopted acts governing indir ect elections (*Sl. list RCG*, No. 8/03; *Sl. glasnik RS*, No. 10/03).

187 Article 128 of the new Local Self-government Act of the Republic of Serbia (*Sl. glasnik RS,* No. 9/02) provides that upon entry into force of this Act the previous Local Self-government Act of Serbia (*Sl. glasnik RS*, No. 48/99) shall cease to be in force, with the exception of the provisions in articles 120–162.

188 In the procedure instituted at the proposal of the Democratic Party of Serbia, the Con stitutional Court of Serbia ruled that this provision was in accordance with the Constitution (*Sl. glasnik RS*, No. 93/03). The Court established that the provision in question did not narrow the ci rcle of subjects exercising their election right, but rather regulated the manner of its implementatio n. At the initiative of the Party of Foreign Exchange Depositors, the Federal Constitutional Court found that the article regulating similar issues of the Act on Election of Deputies and Councillors of Mont enegro (*Sl. list RCG*, Nos. 4/98, 17/98, 14/00, 18/00, 9/01, 41/02 and 46/02) was unconstitutional. Namely, unde r the disputed article, it is only a citizen of Montenegro (not a citizen of FRY/SaM), wh o has been the resident on the territory of the republic at least 24 months before the election da te, who has the right to vote and to be elected. The Federal Constitutional Court assessed that this wa s contrary to the then Federal Constitution, which provided that each Yugoslav citizen had that righ t. On the other hand, the Federal Constitutional Court established that although it could be stipulated that the election right should be exercised based on the place of residence, the requirement th at a citizen must be a resident in the territory of the republic at least 24 months was unconstitut ional, because during that period the citizen's election right, guaranteed to him as a Yugoslav citi zen who turned 18 by the Federal Constitution (*Sl. list SRJ*, No. 73/00) was limited.

signatures of voters from the territory of the Republic in order to declare their candidature for president of the Republic (Art. 3 (2 and 3), Act on Election of the President of the Republic). The Constitutional Court of Serbia rejected the initiative to challenge the constitutionality of this article and the legality of Article 2 of the Regulation on Fees for the Verification of Voters' Signatures, prescribing a 50,000 dinars fee for the verification of signatures. The Constitutional Court assessed that the legislator was authorized by the Constitution to regulate the procedure of the election of the president of the Republic, and within it the manner of declaring one's candidature as a stage preceding the election itself. The Constitutional Court further found that the disputed provisions did not violate the right of citizens to direct elections, universal and equal suffrage and secret ballot (*Sl. glasnik RS*, No. 53/03). In the view of the European Court for Human Rights, the condition that political parties should collect a set number of signatures to participate in elections is acceptable (*Association X, Y and Z v. Germany*, ECmHR, 5 DR 90, (1976); *X v. Austria*, ECmHR 6 DR 110 (1976); *Desmeules v. France,* ECmHR, 67 DR 166 (1990)). The Montenegrin act lays down the requirement that 1% of voters' signatures is necessary to declare one's candidature (Art. 5, Act on Election of the President of the Republic of Montenegro).

The difficulties in crossing the election threshold in the election of the president brought about changes of the electoral acts in Serbia and Montenegro. The new Montenegrin Act on the Election of the President of the Republic no longer foresees a minimum number of voters necessary for elections to be valid. The Serbian Act on Amendments to the Act on Election of the President of the Republic abolished the election threshold only for the second round – if in the first round no candidate won the majority of votes of citizens who voted at the election. However, for elections to be valid 50% of voters registered in the electoral roll (Art. 5z and 5i) need to vote in the first round. The Constitutional Court rejected the proposal of the Democratic Party of Serbia for assessing the constitutionality of these provisions, stating that in view of the fact that the Constitution did not establish the form of the majority needed to elect the president of the Republic, the issue could be governed by law (*Sl. glasnik RS*, No. 93/03). In all that the form of the majority needed to elect the president was a matter of legislative policy. In the opinion of the Constitutional Court the legislator is also authorized to determine that an election is not valid if the needed number of citizens did not vote in the first round. On the other hand, the Constitutional Court found that the disputed Article 5i (3) of the Act on Election of the President, laying down that the speaker of the National Assembly should "decide on calling a new election" within 60 days from the day of holding the invalid election, was not in accordance with the Constitution. The Constitutional Court further assessed that the provisions of the Constitution on the election of the president of the Republic, namely Articles 86 (2) and 87 (5) under which elections must be held within 30 days prior to the expiry of the term of office

of the president of the Republic, i.e. within 60 days if the term of office was terminated before its expiry, and Article 78 (3) under which the Speaker of the Assembly "calls an election" for the president, indicate that calling a presidential election is an obligation and not a discretionary right of the Speaker of the Assembly. In addition, according to the Constitutional Court, the situation in which the same person simultaneously performs the function of the Speaker of the Assembly and the president of the Republic over a longer period of time, is in contravention of the principle of the separation of powers (Art. 9, Serbian Constitution), since it may lead to the "accumulation of the legislative power and a part of the executive power".

Besides provisions regulating active and passive right to vote, election laws in Serbia and Montenegro also prescribe the *electoral right* of citizens. According to the provisions of the election laws, the electoral right is wider than the active and passive right to vote and encompasses also the right of citizens to run and be nominated for public office, to decide about proposed candidates and election lists, to pose questions to the candidates in public, to be timely, truthfully and objectively informed about programmes and activities of the sponsors of election lists and about the candidates on these lists, as well as to exercise other rights laid down by election laws (Art. 9, Serbian Election of Parliamentary Deputies Act; Art. 10, Montenegrin Act on Election of Councillors and Deputies).

Whether or not a person may vote and be elected to public office depends on whether he or she is entered in the electoral rolls. Regular updating of the rolls is a basic prerequisite for individuals to exercise their right to vote and for the regularity of elections in general. Previous elections brought out numerous irregularities and the rolls proved to have been improperly kept. Election laws do not define electoral rolls as public documents kept by duty. Voters are enlisted in the election rolls by their place of residence. The Serbian Election of Parliamentary Deputies Act provides that persons who have "temporarily moved from their domiciles ('refugees')" are entered in the electoral roll in the municipality in which they are registered as refugees (Art. 13). Why the lawmakers used the world "refugees" instead of "displaced persons" whom they obviously had in mind is unclear. Refugees do not have the right to vote while displaced persons, who are citizens of Serbia and Montenegro displaced from Kosovo and Metohija, do.

The Serbian statute foresees no sanctions for improperly kept electoral rolls.[189] In contrast to the Montenegrin Act, they do not make it possible for sponsors of election lists to obtain copies of the entire electoral roll and check its accuracy. Access to this roll is of exceptional importance for monitoring the regularity of

189 The Serbian statute prescribes criminal responsibility for a person who, with the *intent* of preventing another from exercising his right to vote, fails to enter him in the electoral roll or deletes his name from the roll (Art. 105, Serbian Act on Election of Deputies).

elections since rolls are kept by municipal authorities and it is possible for an individual to be entered in more than one municipal roll. The provision in Serbian law according to which citizens can have insight into the electoral roll and request changes is not sufficient to prevent potential abuse (Art. 12 (3), Election of Deputies Act). It is unrealistic to expect that citizens will tour all municipalities and check every municipality roll.[190] The solution that can at least partly prevent one person from voting at several polling stations has been set forth in the Serbian Election of Parliamentary Deputies Act, providing for the first time in Serbia measures to control the voting procedure by means of a special spray and signing the electoral roll (Art. 68 (3 and 4)).

The Montenegrin Act on Electoral Rolls (*Sl. list RCG*, Nos. 14/00) foresees a set of measures to keep the rolls updated. *Inter alia*, it precisely establishes responsibility and sanctions for (not) keeping accurate and updated electoral rolls: keeping of electoral rolls is the responsibility of the holder of executive office in a self-government district (Art. 3 (3)); inspection is the responsibility of the ministry competent for administrative affairs (Art. 19); the act also foresees sanctions for failing to meet these obligations (Art. 22). Electoral rolls processed in self-government districts merge into a single electoral roll kept by the competent state administrative authority (Art. 4 (1)). In Montenegro transparency is ensured; within three days from calling an election the competent authority publishes the electoral roll and informs citizens that they can have access to the rolls (Art. 8 (1)). In addition, this authority must publish tables with data on changes in the electoral roll in its entirety and by election districts as compared to the electoral roll on the basis of which the previous elections were held (Art. 9 (1)); political parties fielding candidates for election have the right to receive a copy of the entire roll, computer-processed, through an appropriate medium, within 48 hours (Art. 15 (1)). Parties were also enabled to have access to the official documentation on individual voters (Art. 17). This right of parties must comply with the protection of the right to privacy, in order to prevent possible abuse. Unlike the 1998 Electoral Rolls Act, the new act no longer allows parties to lodge complaints and appeals, so that the effectiveness of this system of monitoring electoral rolls is questionable.

4.14.5. Electoral Procedure

4.14.5.1. Bodies administering the election process – In addition to the electoral statutes, rules governing the election procedure are to be found also in the decisions of the electoral commissions. These commissions supervise the legality of the election process and the uniform application of the electoral statutes, appointment of the permanent members of the electoral commissions in the election districts (in Montenegro: municipal electoral commissions), the appointment of

190 At the presidential election of 16 November 2003, voters were able to check electoral r olls on the Internet.

members of polling committees (bodies directly administering elections), and hand down instructions for the work of other permanent electoral commissions (if any) and polling committees.[191] The republican commissions are also empowered to consider complaints in Montenegro against decisions, actions or omissions of the municipal electoral commission (Art. 108 (2), Election of Councillors and Deputies Act), whereas in Serbia they can to consider complaints in the first instance against decisions, actions or omissions of polling committees (under Art. 95 (2)) of the Serbian Election of Parliamentary Deputies Act). Pursuant to the provisions of the election laws, bodies administering elections are independent. However, the legal provisions under which the bodies charged with conduct of elections are answerable to the body that appointed them (Art. 28 (2), Serbian Election of Parliamentary Deputies Act; Art. 11 (3) of the Local Elections Act; Art. 17 (2), Montenegrin Election of Parliamentary Deputies Act) are disputable. Since municipal election commission members are appointed by the municipal assemblies, the inclusion of representatives of political parties in some municipal commissions was seen as membership on the basis of the political balance in the respective municipality, and resulted in those commissions taking decisions along political lines.[192]

The electoral commissions are appointed by the respective parliaments (Art. 38 (1), Serbian Election of Parliamentary Deputies Act; Art. 29, Montenegrin Election of Parliamentary Deputies Act). Members of the polling committee charged with the immediate conduct of elections at the polling stations are nominated by the respective electoral commissions. Members of the electoral commissions are nominated for the period of four years, whereas the members of polling committees are nominated for every election. Besides the nominated members (the so-called permanent members) the electoral commissions and polling committees also include representatives of sponsors of election lists (political parties, coalitions or groups of citizens). The permanent members of the commission, who as a rule are drawn from the judiciary, are expected to be politically neutral. However, in view of the dependence of the judiciary on the executive branch, they may in practice advocate the interests of the parties in power, which was the case up to the 2000 Serbian parliamentary election. The non-permanent members who, besides representatives of the parliamentary majority, include representatives of other political parties, become involved in the work of the commissions only after the election lists have been made public in the electoral districts.

4.14.5.2. Control of ballot printing and safekeeping of electoral documentation – Pursuant to the statutes in Serbia and Montenegro, the central electoral

191 Just prior to the 24 September 2000 elections, the Federal Electoral Commission issued an instruction requiring voters in the presidential election to show their ballots to a member of the polling committee. The rule constituted a violation of secrecy and was aimed at int imidating voters.

192 OSCE/ODIHR, Election Observation Mission, *Report on the Parliamentary Election in the Republic of Montenegro* (*FRY*), Warsaw, 22 April 2001.

commissions decide on the manner, place and control of ballot printing. However, they have failed to regulate the process in detail or to foresee appropriate contrd mechanisms (OSCE Report 1997, p. 11) since they do not stipulate the obligation to safeguard election materials before they are delivered to the local commissions, or the procedure whereby this is done (e.g. sealing the premises and the like). In order to preclude counterfeiting of ballots for the federal election in 2000, the ballots were printed in one designated facility and on watermarked paper (Art. 63 (4) Act on Election of Deputies to the Chamber of Citizens of the Federal Assembly, *Sl. list SRJ*, No. 32/00).

In its report on the early election in Montenegro, the ODIHR noted the absence of provisions regulating mutilation of ballots by voters.

4.14.5.3. Determination of the election results – The competent electoral commission determines the election results. The electoral commission determines the overall number of votes received by each election list (elections on all levels are conducted according to the proportional representation system) and in proportion with the number of votes received establishes the number of mandates belonging to each elections list, on the basis of D'Hondt system. The distribution of mandates is shared only by the election lists that have received at least 5% of votes from the overall number of voters who have voted in the electoral district (Art. 81 of the Serbian Election of Parliamentary Deputies Act),[193] or 3% of the overall number of voters who have voted in the electoral district (Art. 94 of the Montenegrin Act on Election of Deputies and Councillors; Article 40 (4), Serbian Local Elections Act).

Election laws contain various solutions with regard to the distribution of seats that have been won by individual election lists in the parliamentary elections. Different solutions with regard to the distribution of seats result in the different ways of exercising the passive right to vote on various election levels. In Serbia, the sponsors of the election lists can distribute the seats won to the candidates of their own choosing (Art. 84 (1), of the Serbian Election of Parliamentary Deputies Act). Under the Local Elections Act, one third of mandates are distributed according to the order on the list, whereas the remaining mandates are distributed in accordance with the decision of the bearer of the list (Art. 14 (4 and 5)). A similar solution is foreseen in the Montenegrin Act where one half of the seats won by the list shall be distributed to the first candidates from the list, whereas the rest of the seats shall be distributed according to the decision of the bearers (Art. 96 (1), Montenegrin Election of Deputies and Councillors Act). In its report on the parliamentary election

193 A proposal to amend the Election of Parliamentary Deputies Act, providing a lower thr eshold, was submitted by deputies Meho Omerović, Aleksandar Vatović and Rodoljub Šabić, was on the agenda of the autumn session of the National Assembly of Serbia but not considered. The Assemb ly was in the meantime dissolved.

in Montenegro,[194] OSCE expressed concern with regard to the distribution of seats. Under the law, one half of the seats won by a party are distributed to the first candidates on the list and the remainder is assigned by the bearer of the list. This is against recognised standards of transparency and may confuse voters.

All election laws in Serbia and Montenegro that regulate the election of deputies on various levels prescribe that the term of office of a deputy shall cease before due time if, among other things, his/her membership in the party on whose list he/she had been elected should terminate (Serbian Act also says in the coalition – Art. 88 (1.1)) (Art. 45, item 1, Local Elections Act; Article 101 (7), Act on Election of Deputies and Councillors of Montenegro). The fallout from this solution was that the deputies were primarily accountable to their parties, whereas the freedom of mandate and political accountability of the deputies to the voters was reduced. In addition, in case the party or coalition should split, the proposed solution had led to fierce political and constitutional disputes. Regarding the dispute that arose due to the complaint lodged by 45 deputies of the Democratic Party of Serbia in the Serbian National Assembly against the decision of the National Assembly Administrative Committee that had temporarily suspended their mandates following the exclusion of their party from the ruling coalition "DOS–Dr. Vojislav Kostunica", the Constitutional Court ruled:

> [That] the execution of the contested actions and acts could result in irreparable harmful consequences as follows: by incapacitating the legally elected deputies to perform their duties by way of changing the composition of the Serbian National Assembly in relation to the one established in the elections held on 23 December 2000, leading to the infringement of the freely expressed will of the citizens. The change in the composition of the National Assembly that would arise as a consequence of the implementation of the contested actions and acts could impact on the constitutionality and legality of the acts passed by the Serbian National Assembly in keeping with its constitutional authority (*Sl. list SRJ*, No. 57/02).

Finally, the Constitutional Court of the Republic of Serbia, acting at its own initiative, proclaimed that those provisions were unconstitutional, as well as Article 88, para. 9 of the Election of Parliamentary Deputies Act, under which the term of office of a deputy shall also cease if the political party or another organization on whose election list he/she was elected (*Sl. glasnik RS*, No. 57/03) is deleted from the register. In the opinion of the Constitutional Court, the right to stand for elections is an individual right exercised by citizens under the Constitution itself (Art. 42, Serbian Constitution) and cannot be made conditional on membership in a political party, "and therefore the termination of such membership cannot serve

194 OSCE/ODIHR, *Report on Parliamentary Election in the Republic of Montenegro* , (*FRY*), Warsaw, 22 April 2001; www.osce.org/odihr/documents/reports/election_reports/yu/fry_mont_fin2001pe.p df.

as a basis for losing this right (a deputy's mandate). Furthermore, the Constitutional Court found that there was a direct relationship between deputies and voters, without the mediation of political parties, assessing that a deputy, in keeping with Article 76 of the Serbian Constitution, under which a deputy represents the citizens of an election district, and with Article 2 of the Serbian Constitution, guaranteeing the sovereignty of citizens, has "the constitutionally guaranteed freedom in representing those who elected him/her and cannot be bound by legally binding orders of political parties or coalitions, non-compliance with which could result in the termination of a mandate." The Constitutional Court stated that the provisions referred to were not in accordance with the provisions of the Serbian Constitution which guarantee the freedom of political action and the equality of citizens. The Constitutional Court concluded that "political parties cannot be granted powers by law resulting in change of the composition of the National Assembly nor can, under the Constitution, the political or legal life of the party on whose list a deputy was elected directly influence the composition of the National Assembly after elections". Given that under the Election of Parliamentary Deputies Act deputies are elected from the lists of political parties, and mandates are distributed to election lists, whose bearer then freely distributes them to the candidates from the list (see Arts. 4 and 84, Election of Parliamentary Deputies Act), the question remains whether voters really vote for individuals or parties. This decision of the Constitutional Court gave rise to considerable controversy (since its adoption some non-parliamentary parties have become parliamentary) and criticism that it encourages horse trading.[195]

4.14.5.4. Grounds for annulment – Election laws of the member states prescribe various grounds for annulment of elections at particular polling stations. If there is reason to conclude that the elections at a particular polling station were null and void, the polling committee must be dissolved, a new one appointed and the balloting repeated. The Serbian Act prescribes that the polling committee must be dissolved and balloting repeated at a polling station where the breach has occurred of the secrecy of voting, of the legal provision of voting in person, or if there has been a violation of the prohibition to display political party symbols or other promotion material, etc. (Art. 55, Serbian Election of Parliamentary Deputies Act). On the other hand, when the irregularities are less serious, in considering complaints the electoral commission may decide whether or not the voting will be cancelled (see Art. 72, Montenegrin Election of Parliamentary Deputies Act).

4.14.5.5. Legal protection – According to the European Court of Human Rights, electoral and political rights are not "civil rights" in the sense of the right to a fair trial in Article 6 of the European Convention (*Priorello v. Italy*, ECmHR, 43 DR 195 (1985)), and guarantees of a fair trial are not applied to the procedures

195 See N. Lj. Stefanović, "Odbrana i poslednji dani" (Defence and Last Days), *Vreme*, 16 October 2003.

following the revision of legality of the conduct of elections (*X v. France*, ECmHR, 82-B DR 56 (1995); *Pierre-Bloch v. France*, ECtHR, (1996)).

Election laws in Serbia and Montenegro provide for a basic legal remedy that ensures legal protection in the electoral process is the complaint that each voter or participant in the election can lodge with the competent election commission. The Montenegrin Act on Election of Deputies and Councillors prescribes that the complaint shall be lodged "*on the grounds of violation of the right to vote during the elections*" (Art. 107 (1)), while Article 95 of the Serbian Election of Parliamentary Deputies Act, provides for the complaint to be lodged to the Republican Electoral Commission "*on the ground of violation of the electoral right during the elections or on the grounds of irregularities in the procedure of nomination or election*". The amendments suggested link the legal protection to the period in which the elections are being held and solely apply to the protection of the right to vote in this process. They do not include the protection of the right to vote outside the election process, like the protection of the passive right to vote in case of the early termination of mandates.

None, however, lay down the rules according to which electoral commissions are to deal with complaints. This results in a lack of uniformity with regard to establishing the facts, use of evidence and, in particular, observance of the adversarial principle. This is in contravention to the rule of law and creates legal insecurity. Only the new Montenegrin law (Art. 111) foresees the subsidiary application of the Administrative Procedure Act. This Act itself prescribes that its provisions are applicable in all administrative matters while specific procedures requiring departures are conducted pursuant to the general principles of the Act (Arts. 1 and 3).

Under the Montenegrin law, decisions on complaints are delivered in keeping with the Administrative Procedure Act (*Sl. list SRJ*, No. 55/99), meaning that all interested parties are notified of them. The federal and Serbian electoral statutes contain no similar provision, owing to which interested parties were not notified of decisions and were not able to participate in the complaints procedure.

The absence of any legal obligation to apply the Administrative Procedure Act results in arbitrary decisions in both the electoral procedure and in evidence evaluation. Namely, the Act prescribes that all the relevant facts must be established correctly and in full, and be supported by the evidence (Arts. 8 and 149). In practice, however, decisions were taken on the basis of unsubstantiated allegations by interested parties.[196]

The electoral statutes provide also for the possibility of appeal against the decisions of the competent electoral commissions by which a complaint has been rejected or disallowed: to municipal courts in the case of local elections (Art. 50,

196 See *Report of the Committee of Experts*, Serbian Association of Jurists, for an analysis of judicial proceedings regarding the November 1996 local elections in Serbia.

Local Elections Act), to the Serbian Supreme Court in the case of republican parliamentary and presidential elections (Art. 97, Serbian Election of Parliamentary Deputies Act), to the Montenegrin Constitutional Court with respect to elections at all levels (Art. 110, Montenegrin Act on Election of Deputies and Councillors). Appeals to the highest court instances of the regular judicial system and to the constitutional courts are lodged through competent electoral commissions. Serbian laws prescribe that procedures before courts are urgent – decisions are taken within 48 hours since the receipt of an appeal. (Art. 97 (5), Serbian Election of Parliamentary Deputies Act and Art. 50 (5), Local Elections Acts). The Montenegrin act does not set a deadline, nor does it impose an urgent procedure. The Serbian Election of Parliamentary Deputies Act prescribes that the Supreme Court of Serbia shall decide on the appeal by way of applying provisions of the law regulating administrative proceedings (Art. 9 (4)).

4.15. Special Protection of the Family and the Child

Article 23, ICCPR:

1. The family is the natural and fundamental grouping of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognised.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24, ICCPR:

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 12, ECHR:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 5, Protocol No. 7 to the ECHR:

> Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

4.15.1. Protection of the Family

The HR Charter guarantees special protection of family, mother and child (Art. 39 (1)). Very similar provisions are to be found also in the Serbian (Art. 28 (1)) and Montenegrin (Arts. 59 (1) and 60 (1)) Constitutions. The protection provided for by the constitutions is more closely regulated by the statutes of the two republics – the Serbian Marriage and Family Relations Act (*Sl. glasnik SRS*, Nos. 22/80, 24/84 and 11/88; *Sl. glasnik RS,* Nos. 22/93, 25/93, 35/94, 46/95; 29/01) and the Montenegrin Family Act (*Sl. list RCG*, No. 7/89).

Under the Serbian Marriage and Family Relations Act, the society through its developmental policies and special measures in the fields of education, culture, social welfare and medical care ensures conditions for the founding of families and for harmony in matrimonial and family life (Art. 19). These principles are further elaborated in a series of provisions. Legal procedures relating to marriage and family relations, common law marriages, and property relations in a family are also regulated.

The HR Charter envisages protection of the family as part of the right to privacy as the Article 8 of the ECHR does. Special protection of family is now part of the private sphere of every individual (Art. 24, HR Charter).

The relevant legislation in Serbia and Montenegro contains no legal definition of the term family. Most family law provisions, however, treat the nuclear family (parents and children), while a smaller number dealing with matters such as alimony, child support, and kinship as an obstacle to marriage, regulate relations among a somewhat wide circle of relatives. The interests of children and wider community are the only ones protected in the regulations on the relations among parents and children (Art 7 (1), Serbian Marriage and Family Relations Act). There is no mention of interests of parents. Jurisprudence of the ECtHR is different. On the proceedings on family life in *B v. United Kingdom* (10 EHRR 87 (1987)), the Court held that parents need to be included in the process of reaching a decision up to the point which secured protection of their interests.

Provisions pertinent to penal protection of the family have been the subject-matter of changes and amendments to republican Criminal Codes during 2002. Thus, the CC of Serbia and Montenegro now lay down an offence of family violence (Art. 118a, Serbian CC, *Sl. glasnik RS,* No. 10/02; Art. 100a, Montenegrin CC, *Sl. list RCG*, Art. 30/02) defined in the following way:

> A person who, by use of force or by serious threat of assault at life or body, violates or endangers the physical or mental integrity of a family member, shall be penalised by fine or sentenced to up to three years of imprisonment.

Aggravated forms of this offence exist if weapons or dangerous tools have been used or if grave bodily harm or serious health damage has occurred, as well as if the act was committed against a minor, or if it has resulted in death of a family member (paras. 2, 3 and 4). Penalties for aggravated forms of this offence span from six months to ten years of imprisonment, except in case of death of a family member, when the minimum penalty is ten years.[197]

Pursuant to the amended Serbian CC, mental cruelty, threat of violence, light bodily harm, grave bodily harm and similar acts committed against a family member are treated as a criminal offence of violence in the family, which is prosecuted *ex officio*. Thereby, violence in the family is regarded as a crime like any other and the prosecutors have a duty to prosecute the perpetrator of violence in each case where the police file an application.

Under SaM law, family members have an obligation to support each other. This is both a right and a duty of family members and other relatives, and an expression of their family solidarity (Art. 10, Serbian Act; Art. 9, Montenegrin Act). Withholding of child support, maintenance or alimony is sanctioned by the Criminal Codes of the republics, which also envisage penalties for failure to fulfil family obligations, e.g. abandonment and neglect of family members unable to care for themselves (Art. 120, Serbian CC; Art. 101, Montenegrin CC).

4.15.2. Marriage

The HR Charter foresee right to marriage and equality of spouses, as well as equality of children born in and out of a wedlock (Art. 25 (1 and 2)). Under the Serbian Constitution, marriage and family relations are regulated by statute (Art. 29 (2)), while the Montenegrin Constitution states that marriage may be entered into only with the free consent of the man and woman (Art. 59). The republican laws mentioned above go into more details.

197 Criminal offence of domestic violence was proposed by the Serbian Victimology Society as a legislative solution that would, together with incriminating violence in the family, envisage another form of protection of preventive nature, through restraining orders. The provision was not adopted. This measure would consist of ordering the perpetrator to stop the violence and to restrain from approaching the victim. Petition to the court would consist of ordering the perpetrator not to approach the victim within a set period of time and not to reside in the same apartment as the victim, regardless of the ownership of real property. This would be important for the protection of victims, especially women (most vulnerable when seeking protection from the law). Besides this one, experts from the Victimology Society have proposed a new safety measure the perpetrator could be subjected to jointly with the sentence of incarceration or probation, such as mandatory counselling and treatment of the perpetrator in order to help him resolve his problems in a constructive way rather than by violence.

Article 25 (1) foresees a marriage based on a freely given consent of future spouses without specifying their sex. However, the statutes of the member states do not provide a possiblity for two individuals of a same sex to enter into a marriage. The European Court of Human Rights protects the right to privacy of individuals of the same sex, but not their right to family life (X, Y, Z *v. United Kingdom*, ECtHR, 24 EHRR 143 (1997); *Soberback v. Sweden*, ECmHR, EHRLR 342 (1998)).

In the eyes of the SaM law, spouses are equal. The obstacles to marriage are listed in the relevant laws, some of which ensure that marriage is entered into with the free consent of the intending spouses (a marriage is considered null in the case of coercion, deceit, or incompetence), and others prohibit marriage between persons connected by ties of consanguinity (to the fourth degree) or affinity (to the second degree). Finally, only men and women of marriageable age may marry, which is in accordance with the ICCPR (Art. 23 (2)). As a rule, persons over the age of 18 may enter into marriage though persons over the age of 16 may be permitted to do so with a court dispensation. When a person over the age of 16 marries, he or she attains full business competence and does not loose it if even if the marriage is divorced before majority is attained.

Divorce is allowed and may be by mutual consent of the spouses or by one party suing on the grounds of irretrievable breakdown of the marriage, irreconcilable differences or other grounds such as desertion, mental illness and the like (Art. 83, Serbian Act; Art. 55, Montenegrin Act). However, the law allows only divorce by consent during the pregnancy of the woman and until the child becomes a year old (Art. 84 (2), Serbian Act; Art. 57, Montenegrin Act). The court may deny a divorce petition if it finds this in the interests of the well being of the couple's minor children (Art. 84, Serbian Act; Art. 56, Montenegrin Act).

Assets acquired during a marriage are communal property and are managed and administered jointly by the spouses (Art. 324, Serbian Act; Art. 284, Montenegrin Act). Property owned by the spouses before they married remains their personal property (Art. 70, Serbian Act; Art. 279 Montenegrin Act).

Changes and amendments to the republican Criminal Codes in 2002 introduced certain novelties related to the protection of women in marriage. Changes refer to the expansion of the concept of rape as a criminal offence, encompassing and sanctioning rape in marriage (Art. 103 (1), Serbian CC; Art. 86, Montenegrin CC). For aggravated forms of this crime (grave bodily harm of the victim, act committed by a group of persons, or in a particularly cruel or degrading manner, or if the offence was committed against a minor, or if offence resulted in death of the victim) harsher punishments are prescribed. Harsher punishments are also envisaged for other offences from the group of crimes against the dignity of person and morality, which protect women in matrimony (Arts. 104, 105, 106, 107, Serbian CC; Arts. 87, 89, Montenegrin CC). However, in the Montenegrin Criminal Code, for crimes of rape, unnatural debauchery and forced intercourse, committed against a spouse,

criminal prosecution is done on the basis of private action (Art. 88a, Montenegrin CC), whereby judicial bodies have distanced themselves from punishing rape in marriage. The Office of the UN High Commissioner for Human Rights in Podgorica had a series of objections to the quality of amendments and changes to the Criminal Code. The Office believes that protection from sexual harassment is unjustifiably missing and that it is necessary to separate violence in the family directed against women from other forms of domestic violence, particular objection being that these offences have not been included among crimes against life and body, which would stress them as peril to society.[198]

4.15.3. Special Protection of the Child

4.15.3.1. General – The SaM has ratified the Convention on the Rights of the Child from 1990 (Act on Ratification of the UN Convention on the Rights of the Child, *Sl. list SFRJ* (*Međunarodni ugovori*), No. 15/90 and No. 4/96 (withdrawing reservations given at the signing); *Sl. list SRJ*, No. 2/97).[199] Then FRY adopted, in July 2002, two optional protocols to the Convention on the Rights of the Child. These are: the Optional Protocol on the Sale of Children, the Child Prostitution and Child Pornography and the Protocol on Participation of Children in Armed Conflicts (*Sl. list SRJ, (Međunarodni ugovori),* No. 7/02).

The is no definition of a child in SaM legislation. The HR Charter sets that majority is attained at age of 18 (Art. 36), while the constitutions of the two republics link the attainment of majority with attainment of the right to vote. Artide 15 (1) of the Serbian Act states that majority is attained at the age of 18, while the Montenegrin Act says nothing on the subject. Under Article 82 of the Federal CC, the statutory age of responsibility for the purposes of criminal law is 14. These few examples show that the minimum age for attaining certain rights and obligations is dealt with differently.

Ratification of two optional protocols to the Convention on the Rights of the Child is an important step towards the improvement of the legal position of children, especially bearing in mind the disturbing rise in violation of children's rights in Serbia and Montenegro during the course of last year.[200] Violence in the Family and Child Abuse and the practice of violating children's rights in the wars on the territory of former SFRY.

198 Commentary on the Draft Amendments to the Criminal Code of the Republic of Montenegro, O ffice of the UN High Commissioner for Human Rights in Podgorica, 10 May 2002.

199 Implementing the obligation undertaken by the ratification of the Convention, the FRY authorities have in 1994 submitted to the Committee for the Rights of the Child a *Report on the Implementation of the Convention on the Rights of the Child in FRY for the Period 1990–1993* . Committee on the Rights of the Child has posed additional 32 questions to the FRY Government, to which the Government has responded in writing, refusing to address them orally according to the usu al procedure. The following the Federal report was due in 1998, but at the time of writing o f the present Report it has not yet been submitted.

200 See *Human Rights in Yugoslavia 2001* , II.2.15.1.

Protocol on the Sale of Children, Child Prostitution and Child Pornography requires the state parties to undertake measures for the protection of children, given the increasing international trafficking of children, sex tourism and the ever-greater availability of child pornography on the Internet.

Obligations of states laid down by the Protocol include, *inter alia*, the need to encompass the offences of prohibited sale of children, child prostitution and child pornography in their respective criminal and penal codes (Arts. 3 (1), 4 (1, 2, 3)). Article 2 contains the definitions of these crimes, and the Article 3 (1a) explains the actions of perpetration of these offences. Attempt to perpetrate these offences is also punishable, and the state parties should apply adequate sanctions for these offences taking into account their serious nature (Art. 3 (3)). In accordance with the special protection of children guaranteed by the Convention on the Rights of the Child, the Protocol also prescribes special measures for protection of children victims of these offences in all stages of criminal proceedings, security and discretion for children victims and ensuring the best interest of the child (Art. 8).

Member states started making their criminal legislation compatible with the Protocol. Up to 2003, child prostitution was not constituting a separate criminal offence in the Federal CC, but was regarded as an aggravated form of the criminal offence of aiding the prostitution (Art. 251 (1)). Under the item of showing pornographic material, Article 252 of the Federal CC/Basic CC incriminates sale, showing or public display of pornographic material to persons under 14 years of age, but does not define the case when the subject of the offence is child pornography, nor does it particularly incriminate such an act. However, amendments to the Serbian CC (*Sl. glasnik RS*, No. 39/03) included using minors for pornography as a criminal offence and the penalty is one to five years imprisonment. In the case of a younger minor (a minor who is under 14 year of age) the penalty is harsher – minimum of 3 years of imprisonment. As regards the sale of children, domestic legislation is still inconsistent with the Protocol. Article 155 of the Federal CC/Basic CC prohibits placing people into slavery or servitude (see chapter on Prohibition of Slavery and Forced Labour) but does not mention children as subject of special protection when they are victims of this offence. Including trafficking in human beings as a criminal offence in the Serbian CC (*Sl. glasnik RS*, No. 39/03) and providing harsher punishment in the case of having a minor as an object of criminal offence (Art. 111b (3)). If it is a case of a yonger minor, the perpetrator will be punished even if the offesne has not been commenced by using coersion.

The Optional Protocol on Participation of Children in Armed Conflicts guarantees the protection of children in international and non-international armed conflicts, prohibits compulsory recruitment of persons with child status and binds states parties to raise the minimal age limit for voluntary recruitment of persons into their armed forces (Arts. 1, 2 and 3).[201]

201 Since Article 38 of the Convention on the Rights of the Child sets the minimal age limit for participation in the armed conflicts at 15 years of age, the Protocol demands that state s parties

While the state parties are expected to undertake all necessary measures to prevent such practice of compulsory recruitment of children and direct use of children in armed conflicts (Arts. 1 and 2), in respect of the voluntary recruitment of persons under 18 years of age, the difference is made whether these are armed forces of the country or armed groups that are not an integral part of the country's armed forces. In the first case, each state party should deposit a binding statement after the ratification of the Protocol in which it should set the minimal age limit for voluntary recruitment as well as give guarantees[202] that such recruitment shall not be compulsory (Art. 3 (2)). In the second case, concerning non-state armed groups, states are requested to undertake all measures to prevent recruitment or use of children in hostilities, under any circumstances.

The Yugoslav Army Act is in accordance with the Protocol in the part that relates to compulsory recruitment, prescribing that the person, recruit, shall be sent to his military service after 21 years of age (Art. 301), or at the explicit request of the recruit himself once he is 18 years old (Art. 302).

4.15.3.2. "Measures of protection ... required by the status of minors" – Under Article 24 (1) of the ICCPR, "every child shall have without any discrimination ... the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." Though the ICCPR contains a general prohibition of discrimination (Arts. 2 and 26; see 4.1), this provision reinforces the obligation of the state to ensure no inadmissible discrimination where protection of the child is concerned. Accordingly, the HR Charter (Art. 3), besides prohibiting discrimination in general, stipulates (Art. 25 (2)) that illegitimate children have the same rights and duties as legitimate children (Art. 61 (22)). Very similar provisions are to be found also in the republican constitutions (Arts. 13 and 29 (4), Serbian Constitution; Arts. 15, 17 (1) and 60 (2), Montenegrin Constitution), and are further elaborated in the family law of the republics (Art. 5, Montenegrin Act; Art. 7, Serbian Act).

Parents have the right and duty to take care of their children, support them in keeping with their financial and material ability, and provide guidance in the adoption of family and other values (Arts. 113–117, Serbian Act; Arts. 58–61, Montenegrin Act).

As a general rule, parents exercise their parental rights jointly and in agreement. This does not imply, however, that all the rights and duties must be exercised

should raise the age limit given in this article of the Convention related to voluntary recruitment, leaving to the states to set this limit themselves.

202 In Article 3 (3) of the Protocol minimal guarantees are given regarding voluntary recruitment that the states should fulfil: that such recruitment shall indeed be voluntary, that such recruitment shall be conducted with explicit consent of parents or legal guardians of the recruited person, that these persons have been fully informed about obligations arising from such military service, that these persons have provided reliable proof of their age before they are accepted into state military service.

jointly, and parents are allowed to decide which will be exercised by one or the other spouse. In the event of their disagreement, the final decision rests with the child welfare agency. Where issues of major importance for the development of the child are concerned, decisions are made by both parents, even when they are separated or divorced (Arts. 123 and 124, Serbian Act; Arts. 66–74, Montenegrin Act).

In matrimonial disputes, the court *ex officio* decides on the custody and upbringing of minors, and need not take into consideration agreements reached by the parents. Personal contacts between children and parents may be limited or temporarily suspended only if necessary to ensure the best interests of minors (Arts. 125–131, Serbian Act; Arts. 66–74, Montenegrin Act).

The basic forms of protection of children without parental care are adoption and placement with a foster family (Arts. 148 and 149, Serbian Act). Adoption is allowed when required for the well being of the child (Art. 152, Serbian Act), and children are placed only with foster families with a proven ability to provide proper parental care (Art. 202, Serbian Act; Art. 217, Montenegrin Act).

A child may own assets acquired through inheritance, gifts, or similar. Under the SaM law, a child acquires civil capacity at the age of 15.

4.15.3.3. Protection of minors in criminal law and procedure – The Federal CC/Basic CC contains a separate chapter prescribing special rules that are applied to juvenile delinquents in conjunction with the relevant Criminal Codes member states. Other provisions of the criminal codes are applicable only if they are not in conflict with the special rules (Art. 71, Federal CC/Basic CC).

Criminal penalties may not be pronounced against a child who was under the age of 14 at the time the criminal offence was committed. Children older than 14 but younger than 16 (younger juveniles) are subject only to correctional measures, as is the case also with offenders between the ages of 16 and 18 (older juveniles) who, however, may as an exception be sentenced to terms of imprisonment in the case of extremely serious crimes. The purpose of these measures is to protect and aid juvenile delinquents and ensure their development and upbringing (Arts. 72–75, Federal CC/Basic CC).

Correctional measures envisaged by the republican criminal codes are: reinforced supervision by parents or guardians, placement of minor in a disciplinary institution, reinforced supervision by the custodial council, reinforced supervision in another family or placement in the correctional facility or young offenders' institution.

In the first four cases the child remains under the control of parents or third persons. Namely, placement in a disciplinary institution envisages that the minor would spend a certain number of hours in the institution. Placement in a correctional facility or a reformatory entails putting the child under public supervision. This can

last from at least 6 months to maximum five years. The institution is required to provide education, contact with parents, occasional leaves, and it is subject to special judicial control. See Articles 17–27 of the Serbian CC and Articles 11–26 of the Montenegrin CC. In May 2002, the FRY has adopted the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (*Sl. list SRJ (Međunarodni ugovori)*, No. 1/02). This CoE Convention binds the states to provide central custodial bodies with the view of facilitating the applications of individual citizens of CoE member states to the competent bodies in each state party to this Convention, enables easier execution of decisions on custody in other state parties if the decision should be implemented on their territory, as well as enables the enforcement of decisions on custody of a child (Art. 4).

Criminal procedure in the case of juveniles is covered by a separate chapter of the CPC (Arts. 452–492), and other provisions of the CPC are applicable only if they are not in conflict with those set out in this chapter. Assigning detention to minors is an exceptional measure (Arts. 486–487). Juvenile magistrate can decide that a minor shall be placed in detention to prevent the escape, committing a criminal offence, destruction of evidence or danger of influencing witnesses or accomplices. Detention can be set by the juvenile magistrate or juvenile court panels. In the preparatory procedure detention can last up to one month. However, juvenile court panel can extend the detention for a maximum of another two months for justified reasons. After the preparatory procedure, detention can last for one year maximum. Each month the juvenile court panel is obliged to review the grounds for detention. As regards the conditions in detention, the minor is separated from the adult prisoners on remand, but the juvenile magistrate can rule that the minor could be held in custody with adult prisoners on remand in the case of prolonged isolation and if there is a possibility to place the minor with an adult that would not have a harmful influence on the minor (Art. 487 (2)). However, this provision is not in keeping with the ICCPR, which does not allow exceptions with regard to isolation of detained minors from adults in detention facilities (Art. 10, ICCPR).

Since Federal CC/Basic CC does not allow imposition of criminal penalties against a child below the age of 14, the CPC envisages termination of criminal proceedings against a child who was not 14 at the time the crime was committed, of which the child welfare agency must be notified (Art. 435, CPC). The CPC stipulates that a child may not be tried *in absentia*. Agencies that are parties to proceedings have an obligation to consider the mental development, sensitivity and personal characteristics of the child in the event of his presence at hearings and, in particular, during his questioning, so as to avert possible ill effects on his well being (Art. 454, CPC). If the proceedings are for a crime carrying a prison sentence of over five years, the child must have a defence attorney from the very beginning and, in other cases, if the judge deems it necessary (Art. 456, CPC).

The public prosecutor is duty bound to notify the child welfare agency whenever proceedings are instituted against a child (Art. 459, CPC). Information on such proceedings may not be disclosed to the public without the permission of the judge and, when permission is granted, the name of the child and other information that could be used to identify him may not be disclosed (Art. 461, CPC). Proceedings against a child are always conducted *in camera* (Art. 482, CPC).

Proceedings against children are conducted by judges or panels of juvenile courts. The law makes it possible for one court to be designated to hear in the first instance criminal cases involving children from several judicial districts. The lay judges on panels hearing juvenile cases are selected from among educators, teachers and others who have experience in work with children (Art. 482, CPC).

4.15.3.4. Birth and name of the child – To ensure that every child is registered immediately after birth, the law prescribes oral or written notification of the Registry Office in the place of the child's birth. The birth of a child must be reported within 15 days. If the parents are unknown, the birth is recorded by the Registry Office of the district in which the child was found and on the basis of a decision of the competent child welfare agency (Arts. 17 and 25, Serbian Public Registries Act; Arts. 5, 7 and 9, Montenegrin Public Registries Act).

Having a name (first and last names) is the right of every individual. The name of a child is chosen by both parents and is entered into the Register of Births within two months of birth. In the event that the parents do not agree on a name within the set time period, the child is named by the child welfare agency. A child receives the last name of one or both parents. In Serbia, children of the same parents may not bear different last names. If one of the parents is deceased, unknown or unable to exercise his or her parental rights, the child is named by the other parent. If both parents are deceased, unknown or unable to exercise their parental rights, the child is named by the child welfare agency. Article 389 of the Serbian Marriage and Family Relations Act[203] and 7 of the Montenegrin Act on Personal Names (*Sl. list RCG*, Nos. 20/93, 27/94), respectively, prohibit giving a child a name that is disparaging, morally offensive or against the customs and beliefs of the community. Under Article 2 of the Montenegrin Act on Personal Names, members of national and ethnic groups may have their names entered in their own languages.

4.16. Right to Citizenship

Article 15 of the Universal Declaration of Human Rights:

Everyone has the right to a nationality.

203 There is no special law covering personal name in Serbia, but the provisions on personal names are contained in the Part IX of the Serbian Act on Marriage and Family Relations.

No one shall be arbitrarily deprived of his nor denied the right to change his nationality.

Article 24 (3), ICCPR:

Every child has the right to acquire a nationality.

4.16.1. General

The Universal Declaration of Human Rights states the right of every individual to have a nationality and prohibits arbitrarily depriving a person of nationality or of the right to change it (Art. 15). Though the ICCPR does not refer specifically to this right, its Article 24, which treats the status of children, guarantees in paragraph 3 the right of every child to acquire a nationality.[204] The goal is clearly to keep down the number of stateless persons. The provision only obliges states to enable newborn children to acquire a nationality, not necessarily to grant their citizenship to every child. How and what conditions must be met to acquire nationality is regulated by national legislation, which, however, must not discriminate against newborn children on whatever grounds.

In contrast to the previous Federal Constitution, according to which republican citizenship of an individual was derived from the citizenship of the then FRY (where every "Yugoslav citizen is at the same time ... the citizen of a constituent republic") and in accordance with the nature of the new state union of Serbia and Montenegro, pursuant to Article 7 (1) of the Constitutional Charter, "A citizen of a member state shall also be a citizen of Serbia and Montenegro". Such provision of the Charter probably indicates that in the future the matters of nationality will be governed by member states, meaning that the citizenship of a member state shall be considered as primary.

Neither the Constitutional Charter of the state union of Serbia and Montenegro nor the HR Charter guarantee the right to citizenship, an attitude which is commonplace and generally accepted. The HR Charter guarantees the right to citizenship only to the child born in the territory of the state union and having no other citizenship (Art. 35 (1)).

Unlike the Charter and the Montenegrin Constitution, the Serbian Constitution contains provisions pursuant to which citizens of Serbia who also have the citizenship of another state can be deprived of Serbian citizenship "only if they refuse to fulfil the constitutional duties of citizens" (Art. 47 (4)). Previously, the possibility to deprive a person of Serbian citizenship could have resulted in that person having Yugoslav but not state citizenship. Different understanding and interpretation of the origin of Serbian and Montenegrin citizenship envisaged by the HR Charter would exclude such possibility in practice, but could nevertheless result

204 See 4.15.

in a person forfeiting the citizenship of the State Union when deprived of the citizenship of a member state.

The HR Charter prohibits deprivation[205] of citizenship, expelling or extradition of a citizen, except in keeping with international obligations assumed by the state union (Art. 35 (2)).

The Socialist Federal Republic of Yugoslavia (SFRY), the break-up of which caused citizenship problems for great numbers of its citizens, had during its existence four federal statutes regulating citizenship: the Citizenship Act of the Democratic Federal Yugoslavia (1945), the Citizenship Act of the Federal People's Republic of Yugoslavia (1946), the Yugoslav Citizenship Act (1964) and the SFRY Citizenship Act of 1976 (*Sl. list SFRJ*, No. 58/76). The 1976 law was in effect when the country broke up. All the states that subsequently emerged in the territory of the former Yugoslavia have adopted their own citizenship legislation.

Less than five years after its enactment, the Yugoslav[206] Citizenship Act (*Sl. list SRJ*, No. 33/96) was amended in March 2001 (*Sl. list SRJ*, No. 9/01).

In early March 2001, the Act Repealing the Decree passed by the Presidium of the FPRY National Assembly by which the Karađorđević royal family were deprived of their Yugoslav nationality and their property confiscated (*Sl. list SRJ,* No. 9/01*)*. This legal act is important for the citizenship regime in the FRY/SaM, but maybe even more important for the issues of building and preserving a legal system based on principles of legal security and respect of human rights.[207]

4.16.2. Acquisition of Yugoslav Citizenship[208]

Pursuant to Article 25 of the Implementation of the Constitutional Charter, all citizens who had acquired the Yugoslav citizenship prior to the entry into force of the Constitutional Charter "shall retain the right to such citizenship and the right to use the existing public documents pending the adoption of the law that will deal with such matters " (Art. 25).

This Act does not explicitly determine which body of the state union should undertake the affairs regarding matters of citizenship that had been dealt with by

205 Unlike the Serbian Constitution, which uses the term "divest" of citizenship, the HR Ch arter uses the term *deprivation* of citizenship.

206 On the level of the state union of Serbia and Montenegro, appropriate amendments have not yet been made in the laws governing citizenship, where even the name of the citizenship stil l remains as it was – *Yugoslav*. The Constitutional Charter itself, as well as the Act on its implementation, in some cases do not offer enough grounds to assume what the future legal situation wo uld be. The current legal terminology will be used, except for the term – citizenship of Serbia and M ontenegro.

207 This Act repealed the Decree of the Presidency of the Presidium of the National Assemb ly of FPRY (*Sl. list FNRJ,* No. 64/47). The new law restores Yugoslav citizenship to persons divested of it by a political rather than a legal act, while the restitution of their assets will be gov erned by a separate statute (Art. 2).

208 See *supra* 206.

the Federal Ministry of Interior and in some areas the republican Ministry of Interior.[209] Until the enactment of the new law, it should be assumed that ministries of the interior of member states shall be responsible for matters of nationality.

Yugoslav/Serbia and Montenegro citizenship is acquired by origin, birth, naturalisation (acceptance) and international treaty (Art. 2).

Children of Yugoslav/SaM citizens irrespective of where they are born, and children with one Yugoslav/SaM parent who are born in Yugoslav/SaM territory of acquire citizenship by origin, i.e. *ex lege,* as do also children born abroad, one of whose parents are Yugoslav/SaM citizens and the other unknown or a stateless person (Art. 7).

A child born abroad, one of whose parents is Yugoslav/SaM citizen and the other a foreign national, acquires Yugoslav/SaM citizenship if one of the following requirements is met (Art. 8):

1) if, before the child attains the age of 18, the Yugoslav/SaM parent registers it as a Yugoslav/SaM citizen with a Yugoslav/SaM diplomatic mission (the child's consent is required if it is over 14; a child between the ages of 18 and 23 may apply itself);

2) if the child would be stateless unless granted Yugoslav/SaM citizenship.

Besides this basic criterion of origin, citizenship can also be acquired by birth. Thus children born or found in the territory of Yugoslavia/SaM acquire citizenship if their parents are either unknown or stateless persons.

The amendments adopted in 2001 also changed one of the conditions for naturalisation (Art. 12). The earlier provision – that "it may be concluded from his behaviour that he will be a loyal citizen of Yugoslavia [FRY/SaM]" – has been rephrased and now reads: "that it may be concluded from his behaviour that he will respect the legal order of Yugoslavia [FRY/SaM]" (Art. 12 (1.5)). Although the competent body still has discretionary rights with regard to naturalisation, they have been narrowed down by this more specific instruction. This removes the possibility of politically motivated decisions through arbitrary interpretation of the term "loyal citizen of Yugoslavia [FRY/SaM]."

Yugoslav/SaM citizenship can be terminated by way of loss or renunciation of nationality or by international agreement (Arts. 19–25).

4.16.3. Dealing With Citizenship Problems Following the Break-up of Former Yugoslavia

The position of refugees, already hard hit by the wars and the economic crisis in the FRY, was further aggravated by the discriminatory provisions of the 1996

209 Since one of the republican citizenships was also acquired together with the FRY citi zenship (Art. 5), the republican Ministry of Interior also gave its opinion on whether all requir ements are fulfilled for acceptance into citizenship (Art. 48 (3)).

Yugoslav Citizenship Act (*Sl. list SRJ*, Nos. 33/96, 9/01). Articles 47 and 48 of the Act enumerate different grounds upon which people from the former Yugoslav republics (except Serbia and Montenegro) could acquire Yugoslav citizenship, depending on whether they took up residence in the FRY before or after the promulgation of the new Constitution on 27 April 1992. Besides, these provisions gave wide discretionary powers to the decision-making bodies with regard to citizenship of refugees who have taken up residence in the FRY after 27 April 1992.[210]

Subsequent amendment of this law made it easier for refugees to resolve various problems in which citizenship played a part.[211]

Under the 1996 law, citizens of the former Yugoslavia who also had the citizenship of Serbia or Montenegro on 27 April 1992 were considered citizens of FR Yugoslavia, as were also their children born after this date (Art. 46).

Acquiring citizenship was made easier for two more categories (Art. 47 (1)):

1. Citizens of the former Yugoslavia who were citizens of a former republic other than Serbia and Montenegro, and *citizens of other states that emerged in the territory of the Socialist Federal Republic of Yugoslavia* (italics added), on condition that they were domiciled in the territory of FRY on 27 April 1992. The provision also covers children born to these persons after the promulgation of the Federal Constitution;

2. Citizens of the former Yugoslavia who were citizens of a former republic other than Serbia and Montenegro and who accepted transfer to the Yugoslav armed forces as professional officers and non-commissioned officers or as civilians in the employ of the Yugoslav Army, and their spouses and descendants.

Amendments in 2001[212] have allowed the acquisition of dual citizenship[213] for a certain group of people who are acquiring or being accepted into the citizenship of Serbia and Montenegro (Arts. 47 and 48). They are no longer asked to prove that they do not possess any other citizenship, which used to cause additional insecurity. On the other hand, the intention of the legislator was to allow the acquisition of dual citizenship in order not to deprive the citizens of their ties with the country of origin, as well as in order to facilitate the resolution of the issues of migration, residence, family and property rights of such persons.[214]

Legislative amendments have repealed the previously existing statute of limitation of one and three years since the coming into force of the 1996 Act, within

210 See *Human Rights in Yugoslavia 2000,* I.4.1.2.3.
211 See *Human Rights in Yugoslavia 2001*, I.4.9.3.
212 See more in the *Human Rights in Yugoslavia 2002*, I.4.16.3.
213 The 1996 Yugoslav Citizenship Act also allowed dual citizenship in some cases. See Vi da Čok, *Pravo na državljanstvo (Right to Nationality),* Belgrade Centre for Human Rights, Beograd, 1999, p. 102.
214 See interview with Brankica Grupković, Assistant Federal Minister of Interior, "Iz beglica ima pravo na državljanstvo" (Refugees Have the Right to Citizenship), *Danas,* 30 August 2002, p. VIII.

which the request had to be filed for inscription into the register of Yugoslav Citizens (Art. 4). This has facilitated the position of refugees who are usually in precarious financial conditions, since they have been released from the obligation to initiate the proceedings regarding their citizenship within strict deadlines. Namely, by acquiring Yugoslav citizenship, these persons would automatically lose their right to the status of refugees, whereby they would be deprived of many rights enabling them to more easily resolve certain material problems.[215]

The applicant for acceptance into citizenship of Serbia and Montenegro is released from the obligation to specifically state circumstances and reasons indicating persecution on the grounds of nationality, religion or political affiliation or on the grounds of his/her advocacy for respect of human rights and freedoms, and the state body acting on the submitted application has lost the earlier authority on the basis of which it had been the sole judge on whether reasons stated in the application are satisfactory (Art. 48 (1 and 3)). Such changes of the law have also facilitated the position of refugees.

The watershed date remains unchanged. While persons who have obtained residence in the then FRY before 27 April 1992 shall acquire citizenship, those persons who have obtained residence after this date, or have not yet obtained it, can be *accepted* into citizenship and are therefore still in a less favourable position, because their applications are decided as matters of discretion, although the jurisdiction of the competent bodies has been significantly reduced in this respect.

As the number of persons holding dual citizenship increases, the issue will inevitably arise of their legal status in the other countries of which they are citizens. Since it may be safely assumed that the majority will be from Croatia and Bosnia-Herzegovina, it should be noted that the Bosnian Citizenship Act makes dual citizenship conditional on the prior conclusion of bilateral agreements. Agreement on dual citizenship between the FRY and B&H was signed[216] and should be ratified in the parliaments of state parties. The text of the agreement prescribes the conditions for acquisition of the other state party's citizenship of the other state, the person is above 18 years of age, that he/she has at least three years of registered domicile in the territory of a state whose citizenship he/she shall be acquiring, or one year in case of marriage, that he/she has the means to support himself/herself, that he/she has not been convicted of criminal offences carrying a sentence of more than three years imprisonment, as well as that it can be inferred from his/her demeanour that he/she will respect the legal system of the country whose citizenship he/she is acquiring. The most problematic provision in the agreement seems to be the one leaving to national legislations to regulate the issue of active and passive right to

215 See *Pravi odgovor*, No. 2 March 2001, p. 5.
216 News *B92*, www.b92.net, 29 October.

vote for dual citizenship holders. Namely, many persons among the potential dual citizens have registered their domicile both in B&H and the FRY.

Law on Croatian citizenship allows Croatian citizens to hold or acquire citizenship of another country (Art. 2), and the draft of a similar agreement between Croatia and the FRY is under way.[217]

4.17. Freedom of Movement

Article 12, ICCPR:

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

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

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

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

Protocol No. 4 to the ECHR:

Article 2

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

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

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

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

217 See Grupković, *op. cit*.

Article 3

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

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

Article 4

Collective expulsion of aliens is prohibited.

Article 1, Protocol No. 7 to the ECHR:

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

(a) to submit reasons against his expulsion,

(b) to have his case reviewed, and

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

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

4.17.1. General

Freedom of movement is guaranteed by the Constitutional Charter, as well as by constitutions of member states.

Article 13 of the Constitutional Charter proclaims free movement of persons, goods, services and capital in SaM (para. 1), and prohibits the setting of any obstacles to their free flow between the states of Serbia and Montenegro (para. 2).

Freedom of movement is regulated in more detail in the HR Charter (Art. 37). The most important change with respect to the former Federal Constitution is that now, in the relevant part of the HR Charter, the right to freedom of movement and settlement, as well as the right to leave and return to the state union is guaranteed to *everyone* who is legally present in the territory of SaM. Before, this freedom was guaranteed by one article only to citizens, while all rights and liberties of aliens were guaranteed by one general provision (Art. 66 (1)). Their movement is regulated by the Movement and Residence of Aliens Act (*Sl. list SFRJ,* Nos. 56/80, 53/85, 30/89, 26/90, 53/91; *Sl. list SRJ,* Nos. 16/93, 31/93, 41/93, 53/93, 24/94, 28/96). This Act is in some parts restrictive and in certain cases leaves matters related to movement and residence of aliens to the Ministry of Interior, with broad guidelines for decision making.

Similarly to the former federal constitution, the separation of provisions that guarantee the freedoms of national and foreign citizens is reflected in the constitutions of member states. In addition, the Serbian Constitution guarantees in Article 17 the freedom of movement in a way similar to the HR Charter, whereas the Montenegrin Constitution is less precise: although its Article 28 (1) guarantees the freedom of movement and residence, but does not speak of the freedom to leave the territory of Montenegro and to return to it.

The HR Charter leaves the more elaborate regulation of entry and residence of aliens in SaM to relevant laws. It further provides that foreign citizens can be expelled only by a decision of a competent body and in a manner prescribed by law (Art 7 (3)). Expulsion of aliens represents one of the measures envisaged by the basic Serbian CC (Art. 61 (1.7)). Pursuant to this law, if an alien is condemned for a criminal offence the court can also pronounce a security measure of expulsion for the period of one to ten years or in perpetuity. While deliberating on such measure, the court shall consider the motives for which the criminal offence was committed, the manner in which it was committed, as well as other circumstances indicating why it is undesirable for the alien to further remain in FRY/SaM. Although the decision is left to the court, the impression is that the possibility of pronouncing the measure of expulsion for an indefinite period of time seems too harsh, and the fact that the court has the possibility while debating the case to take into account other circumstances indicating why the alien is undesirable in FRY/SaM allows for abuses in such proceedings.

It is important to stress that the HR Charter does not allow the expulsion of an alien to a country where he/she would be at risk of persecution "because of his/her race, religion, affiliation to a certain social group or political opinion, or where his/her rights guaranteed under this Charter might be violated seriously" (Art. 37 (4)).

4.17.2. Right to Asylum

The HR Charter additionally guarantees aliens the right to asylum in Serbia and Montenegro (Art. 38) if he/she has reasonable fears of persecution for reasons similar to those enumerated in the provision prohibiting the expulsion of aliens. Such provisions generally guarantee the right to asylum to vulnerable aliens in Serbia and Montenegro. No international document guarantees a full right to asylum and the obligation of the state to grant asylum, but only provide that a person can request and enjoy asylum in accordance with the law of the state from which the asylum is being sought. The Universal Declaration of Human Rights provides that "everyone has the right to seek and enjoy in other countries asylum from persecution," as well as that this right cannot be invoked this right "in case of prosecutions genuinely arising non-from non political crimes or from acts contrary to the purpo-

ses and principles of the United Nations" (Art. 14). The Convention on the Status of Refugees[218] also deals with the issue of requesting and obtaining asylum with the aim to harmonise this process in all states.[219] The ICCPR does not explicitly guarantee the right to asylum, whereas the ECHR, unlike some other regional human rights protection, does not directly protect the right to asylum. Nevertheless, improper action by authorities during decision making on granting asylum can lead to violation of certain rights and freedoms guaranteed by the ECHR, and it is even considered that the protection provided by this convention goes beyond the one ensured by the Convention on the Status of Refugees.

The HR Charter prescribes that the procedure for obtaining asylum shall be regulated by law (Art. 38 (2)). This law has not yet been adopted, which could aggravate the situation of persons potentially requesting asylum in SaM.

4.17.3. Restrictions

Restrictions of the freedom of movement contained in the HR Charter, as well as in constitutions of member states are formulated in accordance with international standards. They prescribe that restrictions may be imposed only by law and if necessary to attain a legitimate goal. Reasons for restrictions stated by the constitutional acts (Art. 37 (2), HR Charter; Art. 17 (2), Serbian Constitution and Art. 28 (2), Montenegrin Constitution) are less numerous and more narrowly defined than those in the ICCPR and ECHR.

The Act on Travel Documents of Yugoslav Citizens (*Sl. list SRJ,* Nos. 33/96, 49/96, 12/98, 44/99, 15/00, 7/01, 71/01, 23/02) envisages the basis on which the Ministry of Interior, as competent authority for issuing travel documents or visas (Art. 15) shall deny the request for issuing such documents (Art. 46).[220]

In April 2002, this Act was amended (*Sl. list SRJ*, No. 23/02), and the reasons for denial of request for issuing document have been redefined and are now in keeping with the restrictions of freedom of movement prescribed by the HR Charter.[221] Namely, the competent body shall deny the request for the duration of criminal proceedings against the person in question, at the request of the competent court; then the request of a person sentenced to an unconditional prison sentence longer than three months, until sentence has been served; then persons whose movement has been denied pursuant to existing regulations for the purpose of

218 UN General Assembly Resolution 429 (V), adopted on 28 July 1951, entered into force on 22 April 1954.

219 Serbia and Montenegro re-acceded to the Geneva Convention on 12 March 2001; Yugoslav ia had already signed the Convention in 1951 and ratified it in 1959 (*Sl. list FNRJ* (*Dodatak*), No. 7/60).

220 See *Human Rights in Yugoslavia 2001* , I.4.17.2. For a long time among the reasons for refusal o were also those which were are not in accordance with the restrictions of the freedom of movement allowed by the Constitution (Art. 30 (2)). They were declared unconstitutional by the Federal Constitutional Court in 2000 and 2001.

221 See more in *Human Rights in Yugoslavia 2001,* I.4.17.2.

prevention of spreading contagious diseases or epidemics, as well as in case of a state of war, a state of imminent threat of war of a the state of emergency (Art. 46 (1)).

4.18. Economic, Social and Cultural Rights

The HR Charter and the constitutions of the two member states lay down the principles on the social rights of citizens and on the special position of specific groups (children, women, mothers, the elderly); these are more closely regulated by the statutes and ancillary legislation of the republics, and are exercised through public services. After the enactment of the Constitutional Charter the area of economic, social and cultural rights is to be regulated by the member states, while the basis of human rights and freedoms is set out in the Charter. The Act on the Implementation of the Constitutional Charter provides that federal laws and other normative acts which belong to a legislative area which is no longer within the jurisdiction of the State Union are to remain in force as legal acts of the State Union of Serbia and Montenegro except in those parts which are in collision with provisions of the Constitutional Charter. See more, I.1.

The 1991 Public Services Act (*Sl. glasnik RS,* Nos. 42/91, 71/94) paved the way for private initiative in the spheres of social and cultural rights but did not make it possible for the private sector to apply for financing from public funds and the state budgets (Art. 10), reserving this exclusively for state public-service institutions. Hence, even though it has been almost 10 years since the law was passed, private institutions are not integrated in the sub-systems of medical care, social welfare, child care, education and others, either in terms of organisation or of financing.

4.18.1. Right to Work

The right to work is explicitly guaranteed by the constitutions of Serbia (Art. 35) and Montenegro (Art. 52) and also by the HR Charter (Art. 40). Both constitutions as well as the HR Charter guarantee the free choice of occupation and employment, and prohibit forced labour (Art. 40, HR Charter; Art. 35, Serbian Constitution; Art. 52, Montenegrin Constitution). Only the Serbian Constitution prescribes that employment and public office are equally accessible to all (Art. 54 (1)).

The Serbian Constitution guarantees to an extent the safety of jobs by laying down that the employees' contract may be terminated against their will only under the conditions and in the manner stipulated by law and collective contracts (Art. 35 (2), Serbian Constitution). The procedure and grounds for such termination of employment are prescribed by the former federal Act on Basis of Labour Relations

(*Sl. list SRJ*, Nos. 29/96, 51/99) as well as by the new Labour Act (*Sl. glasnik RS*, Nos. 70/01, 74/01), although these two laws have not been harmonised on many issues including the one mentioned here.[222]

The new Labour Act, passed in the late 2001, by broad and vague formulation of grounds for dismissal in the Article 101, gives the employer a larger possibility to terminate the labour contract, stating that "the employer is allowed to cancel the employee's contract if there are justified reasons for this, related to the capacities of the employee, his behavior and the needs of the employer" (for instance, due to failure to achieve results in work, disregard of work discipline, etc – Art. 101). The Common Collective Agreement contains additional grounds on which the employer is allowed to cancel the employee's contract (Art. 44). On the other hand, this Act envisages that the procedure in the case of dismissal is urgent, and that prior to dismissal the employer is obliged to request the opinion about the employee from the trade union of which the employee is a member, as well as that legal protection in case of illegal dismissal can be requested both by the employee in question and the trade union that he has authorised to act on his behalf. New Montenegrin Labour Act (*Sl. list RCG*, No. 43/03) of July 2003 foresees the same conditions dismissal (Art. 111).

The Serbian Labour Act and New Montenegrin Labour Act made the rights of employees redundant by technological, economic or organisational innovations are also regulated by law. Under the Serbian Labour Act, the contracts of these employees may be terminated only if the employer is able to provide them with other work or retraining for other jobs (Art. 101 (3)). When an employee has been made redundant, the employer may not hire another person for the same job for a period of three months and, should the need arise for such an employee within that period, the employee who was dismissed takes precedence (Art. 101 (5 and 6)). The employer who has more that 50 permanent employees working full-time and is planning to cancel their contracts on these grounds for more than 10% of the overall number of employees within one calendar year, is obliged to adopt a programme on how to resolve the issues of redundant workers (Art. 114 (1)). Montenegrin Labour Act foresees similar employer obligation, except in the case of intention to dismiss less than five workers when he does not obliged to adopt the programme (Art. 115 (1 and 2)). Employees made redundant are entitled to severance pay based on the length of time they were employed (Art. 117, Serbian Labour Act). Severance pay in Montenegro is meant only for workers who are not entitled to any right envisaged by the programme on how to resolve the issues of redundant workers (Art. 116), as well as in the case when employer is dismissing less than five workers. The amount of severance pay is more regulated in more details than in Serbian Act and is at least six times average monthly pay in Montenegro (Art. 117 (1)).

222 The Act on Basis of Labour Relations still deals with the basis of labour relations in those parts which are compatible with the Serbian Labour Act, as it is now applied as a law of a memb er state.

Rights and obligations stemming from the employment of persons working in state bodies are regulated by specific acts; therefore provisions generally regulating labour relations apply to them only in cases that are not explicitly regulated by these laws.[223]

Right to work includes also the right to information about possibilities and conditions of employment, professional orientation, preparation for employment and financial compensation during expert training and in case of termination of employment. The above-mentioned rights are exercised through the labour market and without fee.

4.18.2. Right to Fair and Favourable Conditions of Work

The Charter and both constitutions of the member states guarantee remuneration in accordance to the work performed (Art. 40 (3), HR Charter; Art. 36, Serbian Constitution; Art. 53 (1), Montenegrin Constitution).

The Serbian Labour Act prescribes that appropriate compensation shall be determined in keeping with the law, general acts or labour contract, as well as that the employee shall be guaranteed equal pay for equal work or for work of same value. Montenegrin Act foresees that the compensation should be in accordance with its provisions and provisions of a collective contact, which provides better protection from arbitrary compensation than Serbian Act (Art. 65 (1)).

To ensure the material and social security of the employed, the Serbian law envisages a minimum wage (until passing of the Labour Act this was the right to guaranteed wage), which is fixed jointly by the government and unions and employer's representatives and in accordance with statute (Art. 84 (2), Serbian Labour Act). If the three parties fail to reach an agreement on the minimum wage within 10 days from the day of starting the agreement, it is fixed by the government (Art. 84 (3)). Montenegrin Act still uses the term "guaranteed" compensation. It is set on the basis of a minimum wage, which is set according to the common collective agreement (Art. 68 (2)). In Serbia the agreement was reached between the Government and the labour unions on the minimum wage (*Sl. glasnik RS*, No. 3/03).

The right of employees to limited work hours, paid annual vacations and other leave is guaranteed by the constitutions. The constitutions of member states also prescribe the right to daily and weekly rest periods (Art. 38 (1), Serbian Constitution; Art. 53 (2), Montenegrin Constitution).

Under the law, employers are obliged to introduce shorter hours for persons working at particularly hard or hazardous jobs, in proportion to the potential ill

223 In Serbia the provisions of the Act on Labour Relations in State Bodies apply to persons employed in state bodies (*Sl. glasnik RS,* Nos. 48/91, 66/91, 44/98, 49/99, 34/01, 39/02). In early July 2002, during the strike of the employees in the judiciary, an urgent procedure was employed to adopt the Act on Changes and Amendments to the Act on Labour Relations in State Bodies (*Sl. glasnik RS,* No. 39/02).

effects on the employees' health or capacity. An employee may work longer hours but for the employee this can be an obligation only in cases of force majeur, sudden increase of workload and need to finish unplanned work within a given deadline. By law, the employee has the right to rest during daily work, as well as to daily, weekly and annual leave and paid or unpaid leave in keeping with the law. These rights cannot be denied to the employee. Also, within the protection of motherhood, maternity leave is envisaged for employed women, as well as leave for the purposes of child care in the duration of 365 days, with the possibility that the father of the child can exercise the same rights (Art. 87, Montenegrin Labour Act). Serbian Labour Act specifies that the father of a child can enjoy these rights, if the mother abandons the child, dies or is for other justified reasons prevented from exercising these rights, i.e. for prison sentence, severe illness, etc. (Art. 69 (5 and 6), Serbian Labour Act).

The constitutions of member states also guarantee safety at work and prescribe special protection for women, young people and disabled persons (Art. 38 (2 and 3), Serbian Constitution; Art. 53 (3 and 4), Montenegrin Constitution).

To be assigned to a job that carries an increased risk of injury or occupational or other diseases, an employee must fulfill certain required standards with regard to physical and mental health and age. A potential employee must undergo a medical examination before assignment to a high-risk job, and after that at prescribed periods (Arts. 30–35, Safety at Work Act, *Sl. glasnik RS*, Nos. 42/91, 53/93, 67/93, 48/94, 42/98). To safeguard the health of the work force, the law also establishes shorter hours for persons working at hazardous jobs.

Failure to observe security measures during work can result in the closing down of a company (Art. 100 (1.1), Act on Enterprises) and, in some cases, in criminal prosecution (Art. 90, Serbian CC; Art. 74, Montenegrin CC).

If an employee believes that one of his/her labour rights has been violated, completely or in part, he/she can complain to the Labour Inspectorate (Art. 157, Serbian Labour Act), or take action before a competent court (Art. 122) or, together with his/her employer, take any contentious issues to arbitration (Art. 121).

4.18.3. Right to Social Security

Social security is comprised of the rights to social insurance and to social welfare. The HR Charter provides rights to social security and to social insurance, and prescribes the residency of a person in the State Union as the basis for the enjoyment of these rights. The Serbian Constitution states that, through compulsory insurance and according to law, employed persons ensure for themselves medical care and other rights in the event of illness, pregnancy, birth, reduction or loss of ability to work, unemployment, old age, and for their family members the right to medical care, family pensions and other rights deriving from social security (Art. 40). All these rights are more closely regulated by a number of statutes. In Monte-

negro the right to social insurance is secured in the form of compulsory insurance of all employees (Art. 55, Montenegrin Constitution).

In 2001 the Pension Insurance Act was amended several times both on the federal level (*Sl. list SRJ*, Nos. 30/96, 58/98, 70/01, 3/02) and in Serbia (*Sl. glasnik RS*, Nos. 52/96, 48/98, 29/01). The Act on Social Protection and Provision of Social Welfare was amended as well (*Sl. glasnik RS*, No. 29/01). In 2003 a new Act on Pension and Social Insurance (*Sl. glasnik RS*, No. 34/03) was passed in Serbia.

Member States Labour Acts provide compulsory insurance which includes all those employed, persons rendering individual services and farmers. Moreover, pursuant to the Act on the Bases of Pension and Disability Insurance (*Sl. list SRJ*, Nos. 30/96, 58/98, 70/01, 3/02 – which is still in force),[224] rights from pension and disability insurance are explicitly guaranteed also to employees who are declared as redundant, while they are entitled to financial compensation pursuant to rules on labour relations (Art. 12).

The possibility exists under the law of voluntary insurance for persons who are not covered by the compulsory insurance schemes, in the manner prescribed by a special law (Art. 16, Act on Bases of Pension and Disability Insurance, *Sl. list SRJ*, No. 70/01; Art. 16, Act on Pension and Disability Insurance). At the same time, by voluntary insurance, the ensured persons can secure a wider scope or other form of rights for them and their families, outside those prescribed by this Act.

An insured person is eligible for an old age pension if he meets two requirements prescribed by the Act: a certain age and length of employment (Art. 22). These are 63 years of age for men (58 for women) and at least 20 years of employment, or 65 years of age for men (60 for women) and at least 15 years of employment, or 40 years of employment for men (35 for women) and at least 53 years of age (Art. 22). These conditions have been confirmed by the new Act on Pension and Social Insurance.

A disabled person has the right to a disability pension and other rights on the basis of his remaining ability to work, the right to retraining or acquiring additional qualifications, the right to be assigned to an appropriate full-time job, and the right to monetary benefits. The cause of the disability has no significance in the determination of the disability itself but does have an effect on eligibility for certain rights and their scope.

An employed person whose health has deteriorated to an extent that prevents him from working (ensured who has suffered from loss or deterioration of working ability) is eligible for a disability pension on condition that his age (53 for men and 48 for women) precludes him from retraining or acquiring additional qualifications (Art. 45 (1), Act on Pension and Disability Insurance). If the disability was caused

224 It is now applied as a law of a member state. See I.1.

by a work-related accident or occupational disease, the person has the right to a pension on the condition that the disability was inflicted before the prescribed age for retirement and that he was employed for at least five years before the disability occurred.

In order to provide at least minimum means of living for those who have only a few years of employment and/or received very low wages when they worked, the Act on Pension and Disability Insurance (Arts. 25 and 26) prescribes the lowest old age and disability pensions. The base for this pension is the average net monthly wage in Serbia in the preceding year.

When a person covered by the compulsory insurance scheme or recipient of an old age or disability pension or person who has at list five years of employment or meets the requirements for a disability pension dies, his family acquires the right to a family pension (Arts. 27–36, Act on Pension and Disability Insurance).

Unemployment insurance is governed by statutes of member states on employment and rights of unemployed persons. Both constitutions of member states guarantee the right of temporarily unemployed persons to receive unemployment benefits (Art. 36 (2), Serbian Constitution; Art. 55 (2), Montenegrin Constitution).

When a person loses his/her job, they become eligible for a monetary benefit on condition that he was insured for at least nine consecutive months or 12 non-consecutive months over the 18 months preceding the loss of his job (Art. 13, Serbian Act on Employment and Rights of Unemployed Persons, *Sl. glasnik RS*, Nos. 22/92, 73/92, 82/92, 56/93, 67/93, 34/94, 52/96, 46/98, 29/01; Art. 28, Montenegrin Employment Act, *Sl. list SRCG*, Nos. 29/90, 27/91, 28/91, *Sl. list RCG* Nos. 48/91, 8/92, 17/92, 3/94, 27/94, 16/95, 22/95). However, not every loss of job means that a person is entitled to an unemployment benefit, and the matter is differently regulated by the republican Acts, with the Serbian (Art. 12) prescribing when a person is eligible and the Montenegrin (Art. 31) when he is not. Generally speaking, a person who loses his job through his own fault or resigns, is not entitled to an unemployment benefit. Unemployed persons receiving benefits also have medical, pension and disability coverage (Art. 27, Montenegrin Employment Act; Art. 8 (6), Serbian Medical Insurance Act).

In contrast to social insurance, funds that come from the contributions employed persons pay from their incomes, social benefits mean the expenditure from public funds established from public income of the state.

The Montenegrin Constitution lays down that the state provides social welfare for people unable to work and/or without means of living, while the Serbian guarantees social welfare only those who are unable to work and have no means of living (Art. 55, Montenegrin Constitution; Art. 58, Federal Constitution; Art. 39 (2), Serbian Constitution). The area of social welfare is regulated in Serbia by the Act on Social Security and Provision of Social Welfare and in Montenegro by the Act

of Social and Child Protection. In 2001 Serbian Act on Social Security and Provision of Social Welfare was amended (*Sl. glasnik RS*, No. 29/01).

The basic right in this area is to welfare benefits, which in Serbia belongs to individuals or families whose income is below the subsistence minimum. The amount paid is determined in a percentage depending on the size of the family, and the base, which for social welfare is the average net wage in the municipalities or towns in the preceding quarter where the base cannot be higher than the average wage per employee in the Republic during the same period (Art. 11, Serbian Act on Social Security and Provision of Social Welfare, *Sl. glasnik RS*, Nos. 36/91, 79/91, 33/93, 53/93, 67/93, 46/94, 48/94, 52/96, 29/01). The amount of welfare benefits is harmonised with the flow of average monthly salaries per employee in the municipality or town, in the same quarter in relation to the preceding one. The subject matter is similarly regulated by the corresponding Montenegrin Act on Social and Child Protection (*Sl. list RCG*, Nos. 45/93, 27/94, 16/95, 44/01).

Other rights in the system of social security and welfare envisaged by the statutes of both republics include the rights to the care and nursing of a third person, assistance in job-training, and placement in a social welfare institution or foster family (Arts. 22–38, Montenegrin Act; Arts. 23–47, Serbian Act). The decisions on all these rights are made by the competent social welfare agencies.

4.18.4. Protection of the Family

Under the HR Charter, the family, mothers and children enjoy special protection of the state. The constitutions of the member states also guarantee protection of the family, mothers and children, and comprehensively regulate this area (Art. 28, Serbian Constitution; Art. 60 Montenegrin Constitution). Both prescribe that parents have an obligation to care for their children, ensure their upbringing and education, and the obligation of children to care for parents who are in need and require assistance (Art. 61, Federal Constitution; Arts. 27 and 29, Serbian Constitution; Arts. 58 and 59, Montenegrin Constitution).

Employed women enjoy special protection under the labour relations statutes, on the grounds of their physical and psychological characteristics as well as pregnancy and motherhood. Both constitutions of member states guarantee special protection of working women, young people and disabled persons (Arts. 27 and 29, Serbian Constitution; Arts. 58 and 59, Montenegrin Constitution). The majority of these rights are regulated by the Federal Act on Bases of Labour Relations. Identical provisions are contained in the corresponding Serbian Act, which adds some further regulations, while the Montenegrin Act has very little to say with respect to the special protection of women and young people.

According to the Labour Act of member states, women cannot hold jobs involving extremely hard physical labour, or work underground or underwater, or jobs that could have a harmful effect on their health or constitute a risk to their life

(Art. 67, Serbian Labour Act; Art. 75, Montengrin Labour Act). The Serbian Labour Act nevertheless envisages the possibility that a working woman can give a written consent to exclude the implementation of the mentioned provision (Art. 67 (2)). Furthermore, a pregnant woman cannot work at a job that could threaten her pregnancy or the development of her unborn child, and there are restrictions on her working overtime or at night (Art. 35 (2), Serbian Labour Act; Art. 80 (1), Montenegrin Labour Act). Pregnant women and women with children below the age of three may not work overtime or at night. Exceptionally, a woman with a child over the age of two may work at night but only if she specifically requests this in writing. Single parents with a child up to the age of seven or a severely handicapped child may work overtime or at night only if they make a written request to this effect (Art. 36, Act on the Bases of Labour Relations, Art. 68 (3), Serbian Labour Act), and women holding jobs in industrial or construction enterprises provided they do not hold executive positions or deal with health, social and other protection, may work at night only as an exception (Art. 40, Act on Bases of Labour Relations).

Maternity leave is a basic right of working women. A pregnant woman may start her leave 45 days before her due date or at the latest 28 days before the due date (Art. 37 (3), Act on Bases of Labour Relations). The duration of maternity leave is until the child's first birthday (Art. 37 (2)). According to the member states Labour Acts stipulate that maternity leave for a third child lasts until 365 days from the due day (Art. 67, Serbian Labour Act; Art. 82 (1), Montenegrin Labour Act). If the child is stillborn or dies before the mother's maternity leave expires, she has the right to extend the leave until she recovers from childbirth and the loss of the child. The minimum period stipulated by law is 45 days, during which time the woman enjoys all the rights accorded to women on maternity leave (Art. 30, Act on Bases of Labour Relations).

During maternity leave, leave for the purposes of child care and leave for the purposes of special child care, employed woman has the right to compensation for her salary in the amount of salary she would have earned in her workplace, up to a maximum of five average wages in the republic, provided she had been permanently employed for at least 6 consecutive months and immediately prior to exercising this right. In the contrary, she shall have the right to compensation of wages in a certain percentage from this base, depending on the duration of employment immediately prior to exercising this right (Arts. 10–12, Act on Financial Support for Families with Children; Art. 73, Montenegrin Act on Social and Child Protection).[225] Besides the maternity benefit, the Montenegrin statute also envisages a

225 On April 2002, the Act on Financial Support for Families with Children was adopted (*Sl. glasnik RS,* No. 16/02) and by entering into force it has replaced some obsolete provisions of the Act on Social Child Care (*Sl. glasnik RS*, Nos. 49/92, 29/93, 53/93, 67/93, 28/94, 47/94, 48/94, 25/96, 29/01). This has introduced some changes in this field, relevant for the type, scope, shar acter and conditions of exercising the stated rights.

benefit of 50 percent of the lowest wage in the republic for unemployed new mothers who are registered as job seekers with the Labour Office or are full-time university students. This benefit is paid for a period of 12 months following the birth of the child (Arts. 81 and 82).

If the condition of a child requires special care or if it suffers from a severe disability, the mother has the right to additional leave (Art. 37 (4), Act on the Bases of Labour Relations). In Serbia, one of the parents can choose between leave and working only half-time, for 5 years maximum, in which case she/he is paid for the time she works and receives compensation for the rest in accordance with social insurance regulations. Montenegrin Labour Act provides that after maternity leave if the child needs additional care, one of the parents, adopted parents or guardian can work half time until child's age of three (Art. 84). If the child suffers from sicknesses enumerated in paragraph 1 of the Article 85 there is no duration limit. Working time of these individuals will be considered as a full time work (Art. 85 (2)). Under the statutes of the member states, one parent (only the mother in the case of Montenegro) may take leave from work until the child's third birthday, with their labour rights and duties remaining dormant during this period. Only Montenegrin Act envisages continuing medical and pension insurance for parents who take this kind of leave (Art. 75, Serbian Labour Act; Art. 90, Montenegrin Labour Act).

The law guarantees to an extent a woman's job during pregnancy, maternity leave and additional leave, during which periods she may not be made redundant but may be dismissed on other grounds (Art. 38 (3), Act on Bases of Labour Relations). Serbian Labour Act introduces wider protection of employees on the basis of exercising the above-mentioned rights, by obliging the employer not to terminate the employment contract unless explicitly stated conditions have been met (Art. 76). Montenegrin Act does not allow dismissal of a pregnant woman due to pregnancy or maternity leave, as well as with employees who are using rights from Articles 84 and 85, single parent with a child younger than 7 years of age or with a child with severe disability (Art. 79).

The above rights are guaranteed primarily to women but, in the event of a woman's death, if she is otherwise prevented from exercising them, or if she abandons the child, they devolve to the father if he is employed (Art. 38 (1), Act on the Bases of Labour Relations).

Other rights, most importantly child benefits, are provided for by the statutes of the republics. In Serbia, the child benefit is ensured for the first four children, and the exercising of this right depends on the aggregate monthly income per family member. These benefits are paid until the child attains the age of 19, on condition that it is acquiring an education (Arts. 21–29, Child Welfare Act). The legal provisions in Montenegro are very similar except that child benefits do not depend on the family's financial circumstances. The amount of the benefit depends on the

child's age, what school it is attending and psychological and physical condition (Arts. 42–50, Montenegrin Act on Social and Child Protection).

The Charter and both constitutions also guarantee special protection for children, including at work. The Montenegrin Constitution additionally prohibits abuse of children, and their assignment to jobs that could impair their health and development (Art. 61). Labour legislation sets the lowest age for admission to employment at 15 (Art. 13, Serbian Labour Act; Art. 10 (2), Montenegrin Labour Act), and employees under the age of 18 enjoy special protection. Like women, minors may not hold jobs involving hard physical labour, work underground and underwater, and other jobs that could imperil or adversely affect their health, nor may they work at night. Shorter hours may be envisaged for minors by either collective contracts or company rules. Minors employed by construction, industrial and transport companies may not work at night (Art. 41). The same provisions are contained in the Serbian Labour Act, which additionally envisages that it is prohibited to reassign working hours for persons under 18 years of age (Art. 45). The Montengrin Labour Act includes similar provision for the protection of employee younger than 18 years of age.

4.18.5. Right to Health Care

The HR Charter and both constitutions guarantee to everyone the right to health care and stipulate that children, pregnant women and the elderly who are not covered by insurance schemes are entitled to free medical care (Art. 45, HR Charter; Art. 30, Serbian Constitution; Art. 57, Montenegrin Constitution). Besides these constitutional rights to health care, employed persons and their families are also entitled to health care under the compulsory insurance scheme.

Health care is in the purview of the member states, whose relevant statutes are very much alike. In Serbia, the area is regulated by the Medical Insurance and Health Protection Acts, and in Montenegro by the Act on Health Protection and Medical Insurance.

Insurance is compulsory under laws of the member states, which also envisage the possibility of voluntary insurance for those who want broader medical coverage or those not covered by the compulsory scheme. The law designates which categories are to be covered by the compulsory insurance scheme and whose contributions for this purpose are deducted from their wages. The scheme also covers their family members.

Health care for uninsured persons without means of living is paid for from the republican budgets. The matter is somewhat differently regulated by the statutes of the two republics. In Serbia, these are children up to 15, or up to the end of their regular education, which may be up to the age of 26 at the most, pregnant women and mothers, persons over the age of 65, handicapped and disabled persons, persons on social welfare, and persons suffering from specified serious illnesses (Arts. 7 and

8, Serbian Health Protection Act, *Sl. glasnik RS*, Nos. 17/92, 26/92, 50/92, 52/93, 53/93, 67/93, 48/94, 25/96, 18/02). Funds for the prevention and combating of epidemics, and preventing and eliminating the consequences to public health of natural disasters and similar also come from the Serbian state budget.

The Montenegrin Act on Health Care and Health Insurance envisages as a minimum compulsory forms of health care provided for all citizens, especially for certain categories of individuals. Persons unable to work or earn a living who do not have means of support, when their health care is not ensured on some other grounds enjoy the same rights. These compulsory forms of health care include prevention, diagnostics, and treatment of specified serious illnesses, medical care for women who are pregnant and during childbirth, and persons over the age of 65 (Arts. 22 and 32, Montenegrin Act on Health Protection and Medical Insurance, *Sl. list SRCG*, Nos. 39/90, 21/91; *Sl. list RCG* Nos. 48/91, 17/92, 30/92, 58/92, 6/94, 27/94, 30/94, 16/95, 20/95, 22/95, 23/96).

The basic rights under the compulsory insurance scheme are to medical care, compensation of earnings while a person is unable to work, travel expenses related to medical care, and reimbursement of funeral costs.

Health care includes preventive and control measures, treatment, medicines, rehabilitation and the like, and is more closely regulated by the regulations of the Medical Insurance Office, which covers the costs specified in its regulations while other costs are borne by the insured. The Act also provides for the possibility of insured persons participating in the costs, which means that they in fact pay extra. Participation in the costs of obligatory forms of health care is ruled out in Montenegro (Art. 1, Montenegrin Act on Health Protection and Medical Insurance) and is restricted in Serbia by the law stating that it may not be as high as to deter persons from seeking medical care (Art. 29, Serbian Act on Medical Insurance, *Sl. glasnik RS*, Nos. 18/92, 26/93, 53/93, 67/93, 48/94, 25/96, 46/98, 54/99, 29/01, 18/02).

The right to medical treatment abroad is very limited. In Serbia it is guaranteed only to children below the age of 15 who suffer from an illness or condition that cannot be treated in the country. Montenegrin law sets no age limit for treatment abroad (Art. 31, Montenegrin Act on Health Protection and Medical Insurance; Art. 27, Medical Insurance Act).

The right to compensation for earnings belongs only to insured persons and does not extend to their family members. Compensation is paid if a person is temporarily unable to work because of an illness or injury, if they are nursing a sick family member, or are accompanying a family member who has been referred to a medical institution in another place, if they are unable to work due to necessity to maintain pregnancy, or in other similar cases. Compensation for wages is only paid for days for which wages or compensation of wages would be due pursuant to labour regulations.

Compulsory health insurance covers cost of transport for the purposes of treatment or medical examination in another town or place, as well as funeral costs.

As a rule, the rights ensuing from insurance are decided upon by the Medical Insurance Office and its local offices. Decisions may be appealed, with the second-instance decision being final. Administrative litigation against a final decision is not allowed but remedy may be sought before the competent court within 30 days from the day of serving the decision (Art. 68, Serbian Medical Insurance Act).

Article 3 of the Act states that the republican Medical Insurance Offices may introduce voluntary insurance schemes for persons not covered by the compulsory scheme or those who want broader coverage. Private insurance companies have appeared over the past few years (e.g. Belgrade's Anlave Clinic) but it is not known how many persons are insured through them, who in fact owns these companies, or what guarantees they provide for the functioning and reliability their systems.

A voucher system for payment of medical services in the private sector by persons covered by the compulsory scheme has not yet been introduced. These persons can realise their rights only in the public sector and pay the full costs of treatment in private hospitals and clinics.

The Serbian government's Planned Network of Medical Institutions Decree (*Sl. glasnik RS*, Nos. 13/97, 58/97, 31/98, 1/99, 37/99) determines the type, number, structure and location of state medical institutions and the number of hospital beds. The basic criterion for establishing medical centres, clinics, pharmacies, medical stations and similar is the size of the population of a district. The law does not envisage mobile medical teams to make care more accessible to people in distant villages and sparsely populated areas. To the contrary, the whole concept is centred on cities and tailored to the needs of densely populated areas.

In 2001, a group of experts of the Centre for Policy Studies came out with a study entitled "Guidelines for Reform of the Health Care System in the Republic of Serbia." The study identifies the key areas of reform, suggests possible solutions and defines the process of the implementation and evaluation of reform decisions. The main goals of reform would be to ensure fairness in the use and financing of the health care system, its overall effectiveness and financial and institutional sustainability, and continual upgrading of its work and the services it provides. Some of the principles on which the reform would be based are:

- Privatisation based on an evaluation of the state's and society's interests and which areas of the system could be given over to the private sector;
- An active approach to private medical practice and its inclusion in the health care system and its financing;
- Continued development of the compulsory medical insurance scheme; decentralisation of the existing Medical Insurance Fund and more auto-

nomy for its regional offices; introduction of other forms of insurance, including voluntary and private;

- Increasing the participation costs of insured persons to between 10 and 15 percent of the total cost of medical care;
- Increasing the number of hospital beds to five per 1,000 inhabitants;
- Organising primary health care in medical centres (municipal level), with people having the right to choose their doctors; integration of private medical practice in the system of primary health care and contracting of medical care for individuals/families on the same terms as in the public sector; allowing private practices to rent space in municipal medical centres and to use their laboratories, X-ray facilities, administrative and clerical personnel, etc.;
- That the Medical Insurance Fund continue financing only primary dental care and emergencies, while other dental services would be given over to the private sector.

4.18.6. Housing

There is no mention of the right to housing in either the HR Charter or the constitutions of the member states.

The housing situation in Montenegro and Serbia is specific and requires explanation. Namely, in the 1991–1993 period, occupants of socially owned housing were able to purchase their apartments at very low prices, with the average price per square meter being less than 50 euros. Due to the hyperinflation in 1992 and 1993, the price fell dramatically so that whole apartments were bought for under 50 euros. Before that, socially and state-owned apartments made up 24 percent of all housing in Serbia and Montenegro, and were located mainly in major cities (over half of Belgrade's housing, for example, was socially or state-owned), whereas close to 99 percent of all housing is at present privately owned.

A distinction should be made between socially owned apartments in the former Yugoslavia and the subsidised public housing provided in western European countries for needy members of society. In Yugoslavia, socially or state-owned apartments were allocated to people from all social groups though state and party officials, business executives, ranking military officers, and experts had better chances of being allocated an apartment and more say with regard to its quality, location and size. As inflation eroded the value of the national currency, they purchased their apartments at giveaway prices. This policy eliminated the most important source of financing for public housing and incentives for construction (subsidised loans, mortgages and the like) even though these possibilities are envisaged by the 1992 Housing Act.

The Housing Act (*Sl. glasnik RS*, Nos. 50/92, 76/92, 84/92, 33/93, 53/93, 67/93, 46/94, 47/94, 48/94, 44/95, 49/95, 16/97, 46/98, 26/01) regulates: 1) purchase

of the remaining socially-owned apartments; 2) renting of socially-owned apartments; 3) the status of legal occupants of housing which is the private property of others. In all other areas, the market has taken over and housing is merely a commodity. Only in Article 2 of the Act does it say that the "state takes measures to create favourable conditions for housing construction and ensures conditions for meeting the housing needs of underprivileged persons, in accordance with law." All the other elements designed to protect and assist vulnerable social groups and which exist in different forms in all European countries, are no longer a matter of interest or concern for state agencies in Serbia and Montenegro. The problem is further exacerbated by the fact that "underprivileged persons" in fact means people on welfare, that is, those below the line of absolute poverty. Hence the number of people who can hope for state assistance with respect to their housing needs is indeed negligible.

The state did, however, retain some of its rights under the previous Housing Act and certain elements of the housing policy of former Yugoslavia: allocation of new occupancy rights over apartments which were shortly afterwards purchased at low prices, and selective granting of easy-terms bank loans to high officials, which confirms the extent to which the *nomenklatura* was privileged and the law violated.[226]

The maintenance of the existing and construction of new housing is an acute problem. These matters are regulated by the Housing Act. The Housing Maintenance Act (*Sl. glasnik RS*, Nos. 44/95, 46/98, 1/01) specifies in detail which work must be undertaken to maintain apartments and buildings, and obliges apartment owners to participate in the costs of capital repairs and maintenance in proportion to the size of their apartments. Non-compliance with the law and the absence of legal provisions making it obligatory for those whose neglect of their own apartments causes damage to other apartments in the building to pay compensation to their neighbours have contributed to the poorer quality of housing and to the reduction in the value of real property.

Minimum housing standards are not fixed in either Serbia or Montenegro. Thus housing can be anything from shacks without running water, toilets and sometimes not even electricity, to luxuriously appointed mansions with swimming pools and tennis courts. This creates insurmountable problems in statistically determining the number of substandard dwellings.[227]

226 Documents that came to light after the political changes in October 2000 brought out the extent to which the Housing Act had been violated by government agencies and the parties making up the then-ruling coalition. Although the 1992 Act did away with the system of allocation of housing (except in the case of persons on welfare), senior government, party and other officials were allocated large and luxurious apartments, which they then purchased at prices far below the market rate.

227 The Housing Act defines a dwelling as "A dwelling within the meaning of the present Act is one or more rooms *intended and suitable for habitation* which, as a rule, makes up a single unit with

Retired persons are the only vulnerable category of the population for which Special Regulations on Housing Requirements have been adopted (*Sl. glasnik RS*, Nos. 38/97, 46/97). These matters are administered by the Serbian Pension and Disability Insurance Fund.

Municipal funds for building housing for indigent families are scant. No systematic record exists of the number of such apartments or their quality, nor are there fixed criteria for their allocation and use. In a recent ruling, the Constitutional Court designated the City Assembly as the body empowered to lay down uniform criteria for the allocation of these "solidarity" apartments, and companies, through their by-laws, to set the criteria under which the apartments are rented (*Sl. glasnik RS*, No. 1/01).

4.18.7. Physically and Mentally Disabled Persons

The Serbian Constitution guarantees to disabled persons training for jobs they are capable of performing and ensures conditions for their employment. Persons who are unable to work and have no means of living receive social welfare (Art. 40). For more details on social welfare for disabled persons, see 4.18.3.

4.18.8. Nutrition

No constitutions or laws in Serbia and Montenegro treat the right to proper nutrition. As a result, there are no food subsidies designed to improve the diets of the poorest and most vulnerable groups. The prices of some basic foods are "protected" to keep them at a relatively low level. Relief aid in food from foreign and domestic humanitarian organisations was distributed to refuges, the poor, the unemployed and other vulnerable groups through the Red Cross, and by churches and other humanitarian organisations.

4.18.9. Poverty

In June 2002, the Serbian Government adopted the Interim Poverty Reduction Strategy defining forms of poverty, stating information on the number of poor citizens and families as well as the particularly vulnerable categories of population. At the same time, this document determines the threshold of poverty in a more narrow sense, which is the inadequacy of income for meeting basic living needs. According to the data published in the *Interim*, almost one third of Serbian citizens live in the conditions of poverty with average income below USD 30 per person per month, whereas 18% live below the absolute poverty line with income lower than USD 20.[228] Baring in mind the multidimensional character of the poverty

a separate entrance" (Art. 3). The definition in official statistics is: "a built un it consisting of one or more rooms with ancillary rooms (kitchen, pantry, entranceway, bathroom and similar , or *without ancillary rooms* and with one or more entrances" (italics added).

228 *Initial Framework of the Poverty Reduction Strategy* , Serbian Government, June 2002, p. 2.

phenomenon, during the process of drafting and implementing the Poverty Reduction Strategy its wider definition shall be used, besides the definition in the strict sense, which also includes the possibility to meet other existential needs (accessibility of public and utilities services).[229]

4.18.10. Education

The HR Charter and the Montenegrin Constitution stipulate that primary education is free of charge and compulsory (Art. 43, HR Charter; Art. 62, Montenegrin Constitution). The Article 32 of the Serbian Constitution states that "tuition is not paid for regular education financed from public funds". From this provision it ensues that primary, secondary and high regular education are free, which means that this provision of the Serbian Constitution comes very close to the requirement in Article 13 (2) of the ICESCR, which prescribes that states have the obligation to gradually provide higher levels of education than the primary that would be free of charge. Compulsory education lasts eight years and is organised in the primary school.

The right to education, defined in the current constitutional provisions as the right to schooling, is guaranteed to all under equal conditions.

Until the new legislation was passed in Serbia (Act on the Bases of the System of Education, *Sl. glasnik RS,* Nos. 62/03 and 64/03) and in Montenegro (Act on Elementary Education, *Sl. list RCG*, No. 64/02) parents had no possibility to choose another educational institution for their children's schooling apart from the one founded by the public authority, although this right is explicitly prescribed by the ICESCR (Art. 13 (3 and 4)). Now private persons can also found elementary schools, but because the new legislation has been enacted so recently, no private elementary schools have yet been founded. The Serbian Act on the Bases of the System of Education introduces fundamental changes into the system of oversight over schools, as well as a system of permanent education and improvement of teachers, by instituting educational councils and centres. The duration of elementary, compulsory education has been extended to nine years. The Act establishes a diverse catalogue of rights of children (pupils), such as the right to education of certain quality, respect of person, development of person, protection from discrimination and violence, timely and complete information on issues relevant to his/her education, rights and duties, right to petition and to appeal to a grade, freedom of association into various groups, clubs and similar organizations, right to organize a students' parliament and to participate in the work of the school organs. The Act also instituted a system of graduation exams, which are taken after the completion of secondary schools, and which replace admittance exams into universities and other institutions of higher education. Striving to maintain and improve the quality

229 *Id.*, p. 1.

of teachers, the Act prescribed the issuing of teaching licenses, requiring permanent supplementary education and improvement of the teachers themselves in order for the license to be extended, which means that teachers have to keep up with new achievements in their fields and learn new teaching methods if they wish to keep their license.

In April 2002 the Act on Changes and Amendments to the Act on Elementary Schools was passed (*Sl. glasnik RS*, No. 22/02) and in May 2002 the Act on Changes and Amendments to the Act on Secondary Schools was adopted (*Sl. glasnik RS,* No. 23/02).

The legislator has opted for conducting gradual reforms in education and these two acts are only the first step in this process. They do not change the concept of education and adopted changes are only a step towards decentralising the educational system, depoliticising the school and democratisation of teaching.

Changes and amendments mainly refer to the status, organisation, plan and programme of religious education and education in the other optional subject designated by the Minister of Education, determining the professional, administrative and inspection supervision, as well as the area of responsibility of school boards and parents' councils.

One of the important novelties relates to the decentralisation of school management, by transferring these authorities from republican level to the levels of local self-administration. School boards, we the school management bodies, have a tripartite composition according to these changes, being composed of school representatives, parents and local self-administration (Art. 118 (2), Act on Elementary Schools and Art. 89 (2), Act on Secondary Schools, *Sl. glasnik* Nos. 50/92, 53/93, 67/93, 48/94, 24/96, 23/02). The intention of the legislator was to create a partnership and harmonised opinions of those groups that naturally have an interest in participating in education. However, the question remains to what extent are the local authorities free from political reasoning while deciding on persons they nominate for membership in school boards, as well as to what extent are those representatives prepared to sincerely use the given authority (and the responsibility that accompanies it) in the best interest of the school as an educational institution. One of the authorities of the school board is to nominate school principals based on prior opinion of the teachers' council. Current practice in nomination of school principals (after the changes to the act have come into force) shows that in a significant number of cases the opinion of the teachers' council has been disregarded.[230]

230 When there is a reference the right to education we usually think about children as beneficiaries of education or about parents who have the right to bring up their children in accordance with their religious and philosophical beliefs (Art. 2, Protocol No. 1 to the ECHR). Teachers are most often and easily forgotten in the process. Although they are not the only ones concerned by the life and organisation of the school, the issue of electing school principals is primarily of their concern and

Another important novelty is related to introducing the provision that ensures protection of groups and individuals from discrimination and protection from physical punishment and verbal abuse of students. Article 7 of the Act on Elementary Schools and Article 8 of the Act on Secondary Schools envisage the following:

> All activities threatening or degrading groups and individuals on the grounds of race, national, language, religious affiliation, sex or political conviction, as well as instigating such activities is strictly prohibited in the school.
>
> Physical punishment and verbal abuse of students' personalities is prohibited in the school.

In this way the republican laws underline the provisions of the Convention on the Rights of the Child related to non-discrimination, protection from abuse and school discipline in terms of the way it can be exercised (Arts. 2, 19 (1) and 28 (2), Convention on the Rights of the Child; for prohibition of physical punishment see *Campbell and Cosans v. United Kingdom*, ECtHR, App. No. 7511/76, 7743/76 (1982)).[231] These prohibitions are supported by appropriate protection mechanisms and their breach constitutes the grounds for dismissal of teachers or associates from the teaching process (Art. 73 (1), Act on Elementary Schools and Art. 80 (1), Act on Secondary Schools). This is also the grounds for dismissal of school principals who do not take appropriate action in cases of improper conduct of teachers (Art. 88 (3), Act on Secondary Schools), and sanctions have also been prescribed for the school, which is obliged to pay a fine for the offence if it fails to take action against such conduct (Art. 109 (11 and 12), Act on Elementary Schools and Act. 140 (1 and 2) Act on Secondary Schools).

Serbian Government determines the number and location of schools in the republic and the Ministry of Education, at the proposal of municipalities, determines the area from which children are enrolled in a particular school. The novelty in these laws relates to the separation of the management from professional and pedagogical supervision in schools. By introducing the institution of education advisor a step further can be made in improving the overall education and upbringing process, thus influencing the quality of education. Financing salaries, compensations and other income of educational staff, as well as the funds for joint consumption, are centralised and done through the Ministry of Education. Also, by changes and amendments to the act it has been explicitly stated that the school can generate its own income from donations, sponsorships, contracts and other legal affairs. Muni-

interest. This is particularly important since the Act on Changes and Amendments to the Act on Secondary Schools envisages that Parents' Council would be dealing with issues related to the school life (Art. 90a). Election of the school principal is of more relevant to the life of school as a collective; therefore this authority should be fully given to the Teachers' Council. Such solution the school would become truly democratised and depoliticised institution.

231 About the case of physical punishment of minors see also the case *Tyrer v. United Kingdom* (ECtHR, App. No. 5856/72 (1978)).

cipality or the town provide resources for further professional development of teachers and associates, investment and regular maintenance, equipment, material costs and depreciation in keeping with the law, transport of students living farther than 4 km from the location of the school, if there is no alternative school at their location. For students with developmental disabilities transport is provided regardless of the distance between their house and school. Changes and amendments to the Act on Elementary Schools have introduced a provision pursuant to which "the municipality or town on whose territory the parent of the student has residence keeps records of children categorised and enrolled in an appropriate school, covers the cost of transport, food and accommodation of students if on the territory of that particular municipality there are no appropriate schools" (Art. 85 (9)). The problem, however, remains how this obligation would be fulfilled by poorer municipalities, which cannot allocate the necessary funds from their budgets. Current obligation of municipalities, although regulated by law, has remained unfulfilled in poor municipalities (usually rural communities), where the problem of long distances from home to school is the most acute. The Act does not envisage organising specialised school buses, not even in municipalities with low population density and dispersed settlements. For these settlements, as well as for settlements with very small number of children in primary school age, the legislator envisages establishing the so-called branch schools, with combined classes. The Act contains the category "combined class" for lower elementary school grades (grades 1–4), in which two grades have been put together (in this case the class has 20 pupils) or three and four classes (of 15 pupils each). The quality of work in combined classes, located in old and poorly equipped buildings (frequently without toilet facilities and running water, library, kitchen, proper classrooms and similar rooms), is rather low and has a demotivating effect on pupils.

Professional advancement, obtaining certificates and development of teachers, associates and child minders are more closely regulated than in the previous acts and represent another step in the reform of educational system towards modernisation and increased quality of education.

The Act does not envisage penal provisions for municipal authorities, nor for the Ministry of Education, should they fail to ensure that students are able to attend school under conditions stipulated by this Act, but it does envisage sanctions for parents. A parent who deliberately fails to enrol his or her child into elementary school or the child is absent from school without justification, shall be fined with an amount from 1.000 to 10.000 dinars or 30 days in prison (Art. 141, Act on Elementary Schools).

Towards end of July 2001, Serbian Government has enacted a Decree Introducing Religious Instruction and an Alternative Subject in Elementary and Secondary Schools (*Sl. glasnik RS*, No. 46/01). Since new subjects in schools can only

be introduced by acts and not decrees, the adopted changes to these acts regulate the introducing of these subjects into schools (See more I.4.8.).

4.18.10.1. The University Act – The HR Charter and the two constitutions do not mention explicitly the autonomy of the university, but they proclaim the freedom of scientific and artistic creation (Art. 44, HR Charter; Art. 33 (1), Serbian Constitution). Guaranteed freedom of science can mean the freedom of university as the institutional bearer of the scientific thought. In the Montenegrin Constitution, with similar provisions, the autonomy of the university is explicitly guaranteed (Art. 50, Montenegrin Constitution).

The New University Act was passed in April 2002 (University Act, *Sl. glasnik* No. 21/02). According to the words of the Minister of Education, Gašo Knežević, "this act is of transitional and temporary nature" (Beta, 18 April). The Act defines the teaching curricula, length of studies and redefines management bodies in the university and mandate of students' parliament, and also contains provisions on reviewing the election of teachers and associates done pursuant to the former University Act.[232] Compared to the previous law this Act represents a significant step towards genuine autonomy of the university.

Pursuant to Article 2 of this Act, the university is an autonomous scientific or artistic educational institution, which is very important given the absence of such norm in the Serbian Constitution.

The Act guarantees the freedom of scientific and artistic educational work and creation (Art. 4 (2)), whereas political, religious and party organisation is prohibited at the university.

A university can be funded by the Republic, legal and natural persons (Art. 10).

Article 16 encourages international educational cooperation, since the faculty or university can organise studies from their respective fields in cooperation with foreign university, faculty or international organisation.

An important part of the university autonomy principle is exercised through the provision pursuant to which a faculty enacts its own teaching plans and curricula and programmes for innovation of knowledge with consent of the university.

The new University Act regulates in detail the existence of the students' parliament – an organisation in charge of rights and interests of students at the university and faculty (Art. 64). Elections for this parliament are held once a year, by direct and secret ballot. This body elects ant dismisses its representatives in management bodies of the university and faculty. The importance of the students' parliament is also reflected through the possibility of submitting proposals related to the improvement of the education process as well as in the possibility of filing

232 More about the former law, see *Human Rights in Yugoslavia 1998*, IV.4.

complaints against the way in which teaching is organised and conducted. These complaints are deliberated by the faculty or university council.

Student representatives have the right to be attend sessions of the faculty or university council.

Pursuant to the new Act, a large portion of management in faculties and university has been left to the academic community.[233]

One of the new bodies is the Republic Council for the Development of University Education, consisting of deans and provosts of universities in the republic and ten members nominated by the Government; this body renders strategic decisions. The area of responsibility of this Council includes development and capacities of university education, material situation of universities, proposals of necessary preconditions for the opening of university and faculties (Arts. 115, 116, 117, 118).

The University Act is also the first act containing elements of lustration (Art. 141).

It has been judged as a necessary and temporary solution in the public. The University Act from 1998 (*Sl. glasnik RS,* No. 20/98) has placed the academic community entirely under the control of the state. The implementation of this act has resulted in the dismissal of over 200 teachers and associates, leading to inefficiency of the teaching process, automatic promotions for which only the dean's signature was required, as well as the international exclusion of Serbian universities. The role of university was reduced to mere production of human resources intended to serve the state.[234]

In the discussions regarding the new Act that would regulate academic life, the issues of moral responsibility for the acts committed was raised. This should be seen as the source of Article 141 of the University Act. The question still remains to what extent could this provision be considered as lustration, because it has been softened, mitigated and given a time limit. The proposal to review the procedures of election of teachers during the previous law can be submitted by the dean of a faculty and the respective department, but only within two months of the date of coming into force of the present Act. Therefore, this review is not conducted automatically, but only at request, while the decision on review is taken by majority of votes of the overall number of council members. Given that during the time of the 1998 Act majority of teachers and associates have silently watched their colleagues being expelled, it is questionable whether they would now have the initiative and strength to accept the possibility of reviewing decisions taken in that period.

233 For example, faculty deans are elected among permanent professors, by the faculty Council composed an elected mainly from the ranks of faculty teaching staff, whereas a small numb er of members are representatives of the students' parliament and the founder.

234 See more *Human Rights in Yugoslavia 1998*, IV.4.

The Article 141 contains the provision allowing teachers and associates whose contracts had been terminated against their will during the period of the 1998 Act, to re-establish their employment at the faculty, upon personal request. Although this provision could be interpreted as a form of positive discrimination, in its essence it is only partial, but not sufficient attempt to rectify the injustice done to one part of the academic community.

II
HUMAN RIGHTS IN PRACTICE

1. Introduction

1.1. Research materials – This report is based on three groups of sources. The first is made up of the media in Serbia and Montenegro, the second of reports of local non-governmental organisations (NGOs), and the third of reports of international NGOs and foreign government agencies. All information is dated and sourced to the reporting media or organisations.

1.2. National media as sources of data – A total of 17 daily newspapers are published in Serbia and Montenegro, with a total circulation of between 650,000 and 700,000. Nine (seven in Serbia and two in Montenegro) are regarded as politically relevant and available on the entire territory of the State Union of Serbia and Montenegro (SaM).

For this report, the Belgrade Centre for Human Rights (BCHR) monitored five Belgrade dailies – *Politika*, *Danas*, *Glas javnosti*, *Večernje novosti* and *Blic* – as well as *Vijesti* and *Dan,* which are published in the Montenegrin capital, Podgorica. The weeklies covered were *Vreme, NIN* and *Blic news,* published in Belgrade, and the Podgorica-based *Monitor*.

The BCHR also monitored several news agencies – the state agency Tanjug, two local private agencies – Beta and Fonet, and several foreign agencies.

Media reports indicate a falling number of human rights violations in Serbia and Montenegro in 2003 compared with the preceding year. This conclusion is also borne out by the fact that late in April 2003 the UN Commission on Human Rights ended the mandate of its special representative for Serbia and Montenegro. The decision has taken Serbia and Montenegro out of the group of "countries suspected of being the scene of mass human rights violations" (*Politika*, 29 April, p. 2). This is also evidenced by the 30% decline in the number of texts covering human rights monitored in the media – a total of 7,889 in 2003, compared with 11,285 in 2002.

Once again, in 2003 the focus was on the work of the Hague-based International Criminal Tribunal for War Crimes in the Former Yugoslavia (ICTY) (26.61

% of all texts). The percentage slipped somewhat (from 30 % in 2002), most likely as a result of a wearing off of the novelty of the court and reader fatigue caused by what most people see as lengthy and monotonous trials.

Ranked second were political rights (23.52% of all texts in 2003, as against 23.4% in 2002). The high percentage was a consequence of the presidential and parliamentary elections held in 2003 in Serbia, the presidential vote in Montenegro, and numerous political scandals in Serbia.

Coverage of the plight of non-Albanians living in Kosovo and Metohija grew from 8% of the total in 2002 to 10.21% in 2003, primarily because of several serious crimes committed against Serbs.

The shares of texts devoted to minority rights, freedom of speech, the right to a fair trial and social and economic rights continued to drop in 2003.

Diminished coverage of minority rights (4.7% of the total in 2002 and 3.95% in 2003) can be attributed both to an improved status of minorities and a growing will to view violations of minority rights on a personal basis – as violations of the rights of individuals. The declines in the coverage of freedom of speech topics (4.03% in 2003, against 5.18% in 2002) and the right to a fair trial (2.93% and 3.76%, respectively) were a result of the modest improvements recorded in those areas, while reduced coverage of social and economic rights (3.76% in 2003 and 5.63% in 2003) points to a gradual adaptation to the economic transition and the appearance of politically-motivated strikes, which are covered in the section on political rights.

There was, however, a considerable increase in 2003 in the share of reports about discrimination, prohibition of torture, slavery and forced labour. In the case of discrimination (1% of all texts in 2002 and 2.3% in 2003) and torture (up from 1.92% to 3.07%), there was no rise in their actual incidence in 2003, but the coverage reflects a growing awareness in society that such things do exist and are not permissible. This is also evidenced by a doubling in 2003 over 2002 in the number of trials of policemen for involvement in torture and the increase in the incidence of criminal complaints and trials involving discrimination.

The biggest increase recorded in 2003 was in the number of texts focusing on the prohibition of slavery and forced labour (from 1.52% in 2002 to 7.23% in 2003). This is a result of intensive activities by both law enforcement agencies and NGOs in connection with trafficking in human beings and tangible results achieved by the police in its prevention.

Besides selected printed media, B92 news were used (www.b92.net).

Table 1. Total number of human rights-related texts in the printed media in Serbia and Montenegro in 2003

NEWSPAPER	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII	Total
Politika	64	103	104	126	69	77	57	70	60	71	59	102	962
Blic	88	73	79	107	60	44	50	69	51	55	57	64	797
Danas	124	135	133	184	119	129	134	108	108	122	99	137	1.532
V. novosti	89	79	107	157	83	98	103	109	92	93	110	106	1.226
G. javnosti	83	89	113	130	95	105	97	78	67	72	70	104	1.103
Vijesti	68	74	75	95	83	99	81	78	64	56	72	88	933
Dan	72	73	85	87	67	50	72	69	52	51	46	66	790
Vreme	13	8	17	16	11	15	18	9	6	4	5	14	136
NIN	16	16	17	18	19	15	20	11	7	11	10	18	178
Blic news	6	6	9	18	6	6	8	4	4	11	4	4	86
Monitor	8	9	16	13	14	21	12	12	12	9	14	6	146
UKUPNO	631	665	755	951	626	659	652	617	523	555	546	709	7.889

1.3. Reports of local non-governmental organisations – The following major reports and Press Releases were used in this report:

A) Humanitarian Law Centre (HLC), reports, Press Releases, 2003;

B) Centre for the Development of Non-Profit Sector (CRNPS), reports, Press Releases, 2003;

C) Torture, YUKOM, 2003;

D) Centre for Free Elections and Democracy (CeSID), reports, Press Releases, 2003;

E) Centre for Human Rights in Leskovac, Press Releases, 2003.

F) Prisons in Serbia 2002–2003, Helsinki Committee for Human Rights in Serbia (HC), 2003;

1.4. Reports by international organisations. – This report uses materials issued by the United Nations and its agencies (UNOHCHR), including a joint UNICEF, UNOHCHR and OSCE/ODIHR report on trafficking in human beings in south-eastern Europe. It also cites reports by a monitoring mission of the CoE, and the OSCE mission in Serbia and Montenegro. Finally, it is also based on reports and Press Releases by international NGOs such as the Human Rights Watch (HRW), Amnesty Intentional (AI) and the European Roma Rights Centre (ERRC).

2. Individual Rights

2.1. Prohibition of Discrimination

2.1.1. Discrimination based on ethnic origin – In 2003, the state did not encourage discrimination, but effectively tolerated it through inefficient prosecution of perpetrators. Somewhat fewer cases of discrimination were reported in 2003 than in the preceding years; as always, the majority of the victims were Roma.

The results of a study conducted for the purposes of this report indicate that Serbs and Montenegrins continue to maintain a considerable ethnic distance[235] from other ethnicities in Serbia and Montenegro. Viewed in percentages, in Serbia this distance was the highest towards ethnic Albanians (32%), followed by Bosniaks (23%), ethnic Croats (19%) and ethnic Hungarians (12%). In Montenegro, the figures were 32% for ethnic Albanians, 27% for Roma, 23% for Bosniaks and 21% for ethnic Croats. Just 18% of the population think national minorities are in a less favourable position than the majority people.[236]

2.1.1.1. The Roma – Early in August, the Office of the UN High Commissioner for Human Rights (UNOHCRH) in Serbia and Montenegro said in a report covering a period up to April 2003 that the rights of Roma were being violated on a regular basis in the country (Beta, 7 August).

Although intolerance and attacks against Roma were also recorded in 2003, their incidence was lower than in the preceding years. Incidents were reported in Belgrade, Zaječar, Novi Sad, Leskovac and Prokuplje (*Blic*, 25 October, p. 11; *Glas javnosti*, 4 and 26 September, pp. 9, 32; Tanjug, 31 October; Beta, 11 September; Toplička inicijativa, Press Release, 21 November; *Danas*, 22 November, p. 22).

Voicing outrage over the attacks, Roma organisations warned that violence against the Roma population was widespread (Beta; CRNPS, 3 September). The HLC, the Centre for Minority Rights (CMR) and the European Roma Rights Centre (ERRC) filed a number of criminal complaints in 2003 in connection with the said cases, but there were no reports that any investigations or prosecutions had taken place.

A number of night-clubs continued to turn away would-be Roma customers in 2003, prompting a complaint to the UN Committee for the Elimination of Racial Discrimination.[237]

235 Acceptance of or opposition to the status of minorities as co-citizens, neighbours and superior to the majority people.
236 More in III.3.1. and III.3.13.
237 See more *infra* and *Human Rights in Yugoslavia, 2001, 2002,* II.2.1.1.1.

Late in July 2003, the HLC and the CMR established by a test that Roma were being denied access to Akapulko, a floating bar on the Danube in Belgrade (*Danas*, 28 July, p. 24). Together with the ERRC, early in October the two organisations filed with the Fourth Municipal Court in Belgrade a criminal complaint against unidentified employees of the establishment for the criminal offence of violating the equality of citizens (Article 60 of the Criminal Code of Serbia). A claim for non-pecuniary damages, including a demand that this practice be discontinued and a public apology issued, was also filed against the owners of Akapulko (HLC, Press Release, 10 October; *Danas*, 11–12 October, p. 5).

In the preceding years, the HLC established on a number of occasions the existence of discrimination against Roma, who were being barred from cafes, swimming pools and discotheques. A number of legal actions were initiated.[238] After national courts took no action in the case of Trezor, a disco, in April 2003 the HLC together with the ERRC, filed a complaint with the Committee of the Elimination of Racial Discrimination, claiming that Serbia and Montenegro had violated the International Convention on the Elimination of All Forms of Racial Discrimination.

According to an HLC Press Release, in one case state officials exhibited neglectful conduct towards Roma: in the case of A. J., a ten-year-old Roma boy living in Veliko Gradište who had been sexually abused in 2002, the local Social Work Centre effectively broke off efforts to prosecute those responsible by revoking the power of attorney issued to the HLC, claiming that the boy was an "unstable child whose inclusion in the trial would aggravate the existing situation". The HLC has said that the entire case was characterised by irresponsible conduct by state officials. It took a full two months of the investigation to be started, which allowed the suspects, Vladimir Petrašković (26) and Miodrag Radović (33), to flee from the country (HLC, Press Release, 26 June; *Glas javnosti*, 10 January, p. 15; *Danas*, 10 January, 12 February and 25 April, pp. 1, 3 and 4; *Blic*, 22 January, 20 and 21 March, pp. 10, 11 and 11; Beta, 26 June).

Local media and reports issued by national and international NGOs point to a considerable decrease in the incidence of discrimination against Roma by the police; there appears to be growing awareness among law enforcement officials that all people are equal and that they could face prosecution for violating that equality.

Prosecutions in cases of this kind are still few and far between, but there have nevertheless been some. Late in May, the District Court in Belgrade sent Darko Tribunović, a "skinhead", to jail for six months for insulting Radmila Marinković, a Roma woman, on a racial basis and attacking her, inflicting light injuries.[239]

238 See *Human Rights in Yugoslavia 2002*, II.2.1.1.1.
239 *Id.*

The first ever judgment explicitly describing racial discrimination as a violation of human rights became legally binding in 2003: the so-called *Krsmanovača* case, in which it was for the first time established in July 2002 that there was discrimination against Roma as regards access to public facilities and the conduct of those responsible defined as a violation of human rights.[240] Late in October 2003, the District court in Šabac upheld a judgment of the local Municipal Court ordering the Krsmanovača Sports and Recreational Centre to issue a public apology to Merihana Rusteno, Jordan Vasić and Zoran Vasić, all Roma, for violating their rights. *Jugen TTT*, the owner of the swimming pool, was ordered to publish the apology in the daily *Politika* for barring the three on 8 July 2000 from the pool solely because they were Roma. The court also ordered Krsmanovača to stop discriminating against citizens of Roma nationality (HLC, Press Release, 28 October 2003). Until the conclusion of this Report apology has not been published.

2.1.1.2. Other – In 2003, the media monitored by the BCHR reported fewer cases of discrimination than in the preceding years; most cases involved attacks on ethnic Albanians. But there were also some assaults on other minorities: on 18 February, police in Novi Sad physically and ethnically abused Rehad Iljazi, a member of the southern Kosovo Gora national community. Police said on the occasion that Iljazi and his brother had "behaved improperly in the police station ... disrespecting cautions about the rules of conduct on official premises" (*Danas*, 18 and 21 February, p. 5; HLC, Press Release, 21 February).

Some positive reactions by police were also reported: early in September, Podgorica police arrested and filed misdemeanour charges against three groups of youths suspected of throwing rocks on several buses carrying ethnic Albanian tourists from Kosovo, slightly injuring one person and causing considerable damage (*Vijesti*, 2 September, p. 10).

2.1.2. Other forms of discrimination – Women continued to hold an inferior status in society in Serbia and Montenegro in 2003. According to a study on the position of women with children conducted in 2002 by the Group for the Advancement of Women's Political Rights, the Centre for Researching Alternatives and the G–17 Institute, women in Serbia are paid about 20% less than men holding identical jobs. The women of Serbia and Montenegro have Europe's highest workload, 70 hours a week on the average (*Blic*, 9 January, p. 7).

A study conducted in Serbia by the OSCE late in 2002 indicates that women own only 17 % of all privately-owned flats, 8.7 % of all houses and 7.8 % of all private cars (*Politika*, 20 January, p. 9).

Before the December 2003 elections, just 27 (or 10.8%) of the deputies in Serbia's 250-seat parliament were women. Almost 25% of all local government

240 See *Human Rights in Yugoslavia 2002*, II.2.1.1.

councils in Serbia have not a single woman member, and another 25% just one (*Politika*, 20 January, p. 9).

In some cases women were also subjected to adverse treatment in the media. Women's organisations in Serbia[241] filed in November 2003 a criminal complaint against Belgrade-based *TV Pink* and local comedian Milan Gutović, provoking a heated public debate. The complaint claimed that in his show Gutović was "inciting a language of hatred, deepening the gender gap, treating women as sex objects and discriminating against humanity and negating it" (*Politika*, 21 November, p. 10).

That same month, women's organisations in Montenegro protested against an article in the *Index* which linked women's desire for involvement in law or politics to a deficiency in female hormones and a desire to copy men. The writer of article was motivated by a now infamous sex trafficking case involving a Moldovan citizen victim of forced prostitution (*Dan*, 26 November, p. 10).

2.2. Right to Life

The gradual decline in the incidence of violations of the right to life, begun in October 2000, continued in 2003.

Zoran Đinđić, the Prime Minister of Serbia, was assassinated in Belgrade on 12 March 2003. The authorities reacted by imposing a state of emergency and launching a massive hunt for the killers code-named "Sablja" (Sabre). The prime suspect is Milorad "Legija" Luković, a former commander of a special police unit (the JSO), together with 22 other members of the so-called Zemun Criminal Clan.[242]

The perpetrators of several politically-motivated murders committed in the preceding years were apprehended in 2003, but many killings remain unsolved.

According to the media covered by the BCHR in 2003, in the ongoing cases involving serious violations of human rights and humanitarian law during the conflict in the former Yugoslavia, there were three acquittals, one case continues and one investigation has been started; this leads to the conclusion that there still exists little will to come face to face with these crimes and to punish those responsible.[243]

The investigation into one of the three mass graves found in 2001, that in Petrovo Selo, has been completed. Early in November 2003, police handed its results over to the Special Prosecutor for War Crimes, but no charges had been filed when work on the compilation of this Report ended.

Several of the medical malpractice cases recorded in 2003 led to prosecutions.

241 Association for Women's Initiative, Women in Action and Centre for Girls.
242 More on the assassination in IV.1.
243 More infra 2.2.1.

2.2.1. The epilogue of politically-motivated murders committed in the past years – Trials ends in 2003 and several were begun in connection with just a few of the politically-motivated murders committed during the past decade. More convictions of police and army personnel in cases involving violations of the right to life were recorded in 2003 than in the preceding years.

In January 2003, the trial ended in Belgrade of persons charged with the 3 October 1999 murder of four senior officials of the Serbian Renewal Movement (SPO).[244] The perpetrators, JSO officers Nenad Ilić and Nenad Bujošević, received 15-year prison terms. Radomir Marković, the former head of the Serbian State Security Service (SDB), was sent to prison for seven years for "aiding and abetting after the commission of a criminal offence". SDB staffer Milan Radonjić was acquitted due to lack of evidence (*Danas*, 31 January, pp. 1, 3). The judgment was overturned by the Supreme Court of Serbia in October (*Blic*, 7 October, p. 11).

During the "Sablja" campaign late in March, the Serbian police found in an unmarked hillside grave the body of the former Serbian President, Ivan Stambolić, who vanished in Belgrade in August 2000.[245] Five murder suspects were arrested (*Danas*, 29 March, p. 1; *Glas javnosti*, 31 March, p. 4). According to data released by the police, Stambolić was murdered on 25 August 2000 by JSO personnel at the instruction of the then SDB head, Radomir Marković (*Večernje novosti*, 28 March, p. 2). Stambolić's remains were laid to rest in Belgrade in April (*Danas*, 9 April, p. 1).

Late in September 2003, a total of 10 persons were formally charged with the murder of Stambolić and the attempted murder of SPO leader Vuk Drašković on 15 June 2000 in Budva (*Danas*, 24 September, p. 1). They are the former Yugoslav President, Slobodan Milošević, charged with incitement to commit a murder and attempted murder, Colonel-General Radomir Marković, aiding and abetting in a murder and attempted murder, and Marković's former deputy Milorad Bracanović for failing to report a criminal offence. Other indictees include the former Yugoslav Army (VJ) Chief-of-Staff, Gen. Nebojša Pavković, for aiding and abetting an attempted murder, and Milorad "Legija" Luković for taking part in a criminal conspiracy, a murder and attempted murder. Five JSO personnel – Branko Berček, Dušan Maričić, Leonid Milivojević, Nenad Bujošević and Nenad Ilić – are accused of murdering Stambolić and attempting to murder Drašković (*Danas*, 25 and 29 September, pp. 5, 3).

Early in August, charges were filed against a group headed by Željko "Maka" Maksimović suspected of assassinating police general Boško Buha in June 2002.[246]

244 More on this in *Human Rights in Yugoslavia 1999*, II.2.2.2, *Human Rights in Yugoslavia 2002*, II.2.2.1.

245 More in *Human Rights in Yugoslavia 2000*, II.2.2.1, *Human Rights in Yugoslavia 2001*, II.2.2.2. and *Human Rights in Yugoslavia 2002*, II.2.2.1.

246 See *Human Rights in Yugoslavia 2002*, II.2.2.1.

(*Politika*, 5 August, p. 11). The group went on trial before the Special Court for Organised Crime in Belgrade in September 2003 (*Večernje novosti*, 17 September, p. 14); the trial had not been completed by the end of the period covered by this Report.

Early in April, the Serbian police said they were close to apprehending the persons responsible for the 11 June 2002 murder of a journalist from Jagodina, Milan Pantić.[247] Police arrested Jovan Stojanović, the former director of the local brewery (Jagodinska pivara), and the former local police head, Živojin Trifunović. The two are suspected of ordering the mafia-style hit, but no charges have been filed so far (*Večernje novosti*, 5 and 16 April and 11 June, p. 7, 7, 7).

The March 1999 murder of Belgrade journalist Slavko Ćuruvija is still shrouded in mystery, although the Special Prosecutor and Bureau in Charge of Fighting Organised Crime said in mid-December 2003 that an eyewitness had identified one of the gunmen (Beta, 9 December).[248] Journalists' associations and NGOs expressed outrage at a statement made on the eve of the 28 December parliamentary elections in Serbia by Tomislav Nikolić, a prominent member of the Serbian Radical Party, which had been in power in 1999; Nikolić said on TV that he was not sorry that Ćuruvija had been slain (*Danas*, 26 December, p. 3).[249]

2.2.2. Prosecutions of violations of humanitarian law – An investigation was begun and detention ordered for a number of persons suspected of taking part in the execution of 260 civilians at the Ovčara farm near Vukovar on 20 and 21 November 1991. Early in September, the Supreme Court of Serbia extended detention by three months; early in December the Special Prosecutor for War Crimes brought charges against eight of the suspects for the criminal offence of war crimes against prisoners of war. All the indictees are in detention (*Danas*, 6 September, p. 1; *Politika*, 5 December, p. 12).

2.2.2.1. Prosecutions of police and army personnel for violations of humanitarian law – Late in October 2003, the Supreme Military Prosecutor, Nikola Petković, said most of the 30 ongoing prosecutions of VJ personnel violating the principles of humanitarian law had been turned over to civilian courts,[250] and that legally-binding judgments had been issued in two cases in 2003 (Beta, 21 October). In the first case (the murders of two Kosovo Albanian civilians in Kuštin, near Prizren, in 1999), the Supreme Military Court sent Lt. Colonel Zlatan Mančić to prison for 14 years, Captain Rade Radojević for 10 years, and privates Danilo Tešić

247 *Id*.

248 See *Human Rights in Yugoslavia 1999, 2000, 2001, 2002* , II.2.2.2, II.2.2.3, II.2.2.2, II.2.2.1.

249 See BCHR Press Release of 24 December: *Povreda prava na život i ljudsko dostojanstvo,* www.bgcentar.org.yu.

250 The Constitutional Charter does not provide for the existence of military courts, all of whose cases should have been passed on to civilian courts in 2003; however, this has not happened so far. See I.4.6.2.

for seven and Mišel Seregi for five years (*Večernje novosti*, 13 June, p. 17; see more OSCE, Report on War Crimes,[251] p. 11).

In October, the same court sentenced VJ Major Dragiša Petrović and VJ reserve members Nenad Stamenković and Tomica Jović to ten, seven and seven years' imprisonment, respectively, for war crimes against civilians – the murders of the Krasnićis, a married couple, in the village Gornja Sušica, in the spring of 1999. The judgment replaced an earlier one issued by the Military Court in Niš under which the three had been sentenced to 5, 4 and 4 years, respectively (*Politika*, 20 October, p. 10).

On 20 March, Saša Cvjetan and Dejan Demirović, members of a special police unit, went on trial before the District Court in Belgrade on charges of committing war crimes against civilians – the murders of 19 Kosovo Albanians in Podujevo in 1999.[252] The trial, begun before the District Court in Prokuplje, was moved by the Supreme Court of Serbia to Belgrade in November 2002 because of what the Supreme Court had described as a "series of irregularities" (see more OSCE Report on War Crimes, pp. 46, 55–65).

Demirović, who had been at large, was arrested in Canada. Although the Serbian courts sought extradition, he was released from detention late in May for lack of evidence (*Danas*, 21 March and 21 May, pp. III, 1, and *Večernje novosti*, 15 April and 31 May, pp. 15, 14). For the first time ever, Kosovo Albanians – relatives of the people Cvjetan and Demirović are accused of murdering – appeared before Serbian courts as witnesses (*Danas*, 10 July, p. 1; see more OSCE Report on War Crimes, p. 53).

On 5 December 2003, Goran Stoparić, a member of the reserve force of "Škorpioni" (Scorpions), a special anti-terrorist unit, changed testimony given in Prokuplje. Stoparić said that shortly before the killings, 19 ethnic Albanian civilians had been under the escort of Cvjetan, Demirović and four other policemen, and that moments later gunfire was heard and the said members of the unit had walked out of the courtyard in which the civilians had been killed, changing magazines on their assault rifles.

The HRW urged the Serbian authorities to provide protection for the witness, stressing the importance of such an act for future war crimes trials. The next hearing is set for 5 February 2004. Ruling on his request, the court ordered a psychiatric examination of the accused (News *B92*, www.b92.net, 5, 11, 12 and 13 December).

2.2.2.2. Trials for kidnappings of Bosniaks in Sandžak in 1992 and 1993 – Late in September 2003, the District Court in Belgrade sentenced Milan Lukić, Oliver Krsmanović, Dragutin Dragićević and Đorđe Šević to a total of 75 years'

251 OSCE, War Crimes Before Domestic Courts (hereinafter: OSCE Report on War Crimes), Oct ober 2003.

252 More in *Human Rights in Yugoslavia 2002*, II.2.2.2.

imprisonment for war crimes against civilians (Art. 142, Federal CC/Basic CC) for kidnapping, torturing and murdering seventeen citizens of the then Yugoslavia (Serbia and Montenegro) of Moslem nationality in 1992.[253] Dragičević, Lukić and Krsmanović got 20 years each, and Šević 15. Lukić and Krsmanović were tried *in absentia* (*Danas*, 30 September, p. 1; see more OSCE Report on War Crimes).

The crime was committed in the territory of Bosnia and Herzegovina just across the Serbian border, then under the control of the Bosnian Serbs. According to eyewitness accounts, on 22 October 1992 a group of armed men stopped a bus in the village of Mioce, ordered passengers of Moslem nationality off and then transported them in lorries to nearby Višegrad, where they were first tortured and then killed (*Danas*, 11 January, p. 1; *Politika*, 18 January, p. 1).

OSCE monitors concluded that the court in general respected international standards on fair trial and national criminal procedure guarantees (OSCE Report on War Crimes, p. 35).[254]

Representatives of the Human Rights Watch who monitored the so-called *Sjeverin* trial said that given the relatively clearly-formulated position of the prosecutor as regards the evidence, [the trial] could represent progress in war crimes prosecutions before Serbian courts". Also rated positively were the efforts by the presiding judge to secure during the trial full clarification of the status of the perpetrators – whether they were members of paramilitary units or the Bosnian Serb Army, as well as the measures implemented by the court, prosecutor and police to protect witnesses, in spite of the limitations featured by Serbian law in that respect But the HRW also pointed in its report to problems linked with the protection of witnesses, co-operation with neighbouring states and non-availability of information that could influence the course of the trial (HRW, *Balkans Justice Bulletin: the First Phase of the Sjeverin trial*, 15 March).

OSCE criticised the manner in which the records were kept, witness protection and hearing, as well as the lack of respect of dignity of victims' relatives. OSCE also considers that the qualification "armed group" from the indictment is too broad term and therefore does not imply who the perpetrators of this crimes are (OSCE Report on War Crimes, pp. 35–40).

In February 2003, appeals were lodged against the September 2002 judgment handed down to Nebojša Ranisavljević, who was sentenced to 15 years' imprisonment for the abduction and subsequent murders of 19 passengers, mainly Bosniaks, from a train at the station in Štrpci on the Belgrade-Bar line in February 1993.[255] Both sides appealed against the judgment, the defence claiming that there was lack of evidence for a conviction, the prosecution against the leniency of the punishment

253 Most of the victims are from the village of Sjeverin, after which the case is known.
254 OSCE Report on War Crimes, p. 35.
255 More in *Human Rights in Yugoslavia 2002*, II.2.2.3.

(*Vijesti*, 15 January, p. 6 and *Vijesti*, 7 and 26 February, pp. 7, 7). By the end of 2003, the Supreme Court of Serbia had not ruled on the appeals.

2.2.3. Mass graves – Just one of the investigations into mass graves containing a total of 836 bodies discovered in Serbia in 2001 and 2002 (in Petrovo Selo, near lake Perućac and in Batajnica, near Belgrade) has been completed (Beta, 4 December).[256] Late in July 2003, another 43 bodies were found in the grave in Batajnica (*Vijesti*, 24 July, p. 2).

The bodies were exhumed at three sites. The documents found on them provided sufficient evidence for initial identification; DNA analyses were performed on 350 bodies (UNOHCHR Report with Recommendations on the Investigations into Mass Graves in Serbia, October 2003). However, almost two years later, the investigation has been completed only in the case of the grave in Petrovo Selo, near Kladovo (see below). This leads to a conclusion that there is a shortage of political will in Serbia to prosecute those responsible for these serious violations of human rights.

Late in October 2003, the UNOHCHR published a report on the mass graves in Serbia in which it drew attention to the slow investigation and the failure to prosecute those responsible for the crimes. According to the UNOHCHR, the example of Batajnica is simply "proof of a wider systematic reluctance of the authorities to approach the difficult but serious question of impunity in Serbia." The UNOHCHR called for the establishment of a special commission made up of independent experts to implement an efficacious investigation in cases of this kind (UNOHCHR Report, October 2003; *Večernje novosti*, 23 October, p. 8).

The view of the UNOHCHR is that the mass graves offer *prima facie* evidence of grave and systematic violations of human rights. It is difficult to believe that transports of over 750 bodies from Kosovo to mass graves in Batajnica could have been performed without co-ordinated logistics and without the knowledge, permission or approval of the military and police authorities. Testimony given before the tribunal at the Hague offer proof of this (UNOHCHR Report, October 2003).

The only investigation completed in 2003 was that involving bodies found at a training range used by a special anti-terrorist unit of the Serbian police in Petrovo Selo, near Kladovo. Early in November, the case was handed over to the Special Prosecutor for War Crimes in Belgrade. The bodies of 77 Kosovo Albanian civilians were found in two graves in Petrovo Selo in 2001; the identities of 33 have been established. Forensic evidence indicates that 60 of them were killed with firearms and five with blunt objects, three have burns, while the cause of death could not be established on the other bodies.

256 *Id.*, II.2.2.4.

Among the victims are three Bitiqui brothers, all U.S. citizens. The Municipal Court in Kladovo issued a detention order for Vlastimir Đorđević, the former head of the Serbian police Public Security Department, on suspicion of organising the transfer of the Bitiqui brothers from the prison in Prokuplje to Petrovo Selo. Đorđević, who is at large and the subject of an arrest warrant, has also been indicted for war crimes committed in Kosovo by the tribunal at the Hague (*Politika*, 7 November, p. 11).

All the bodies identified so far have, according to Gvozden Gagić, the head of the Bureau for Kidnapped and Missing Persons of the Co-ordinating Centre for Kosovo and Metohija, been handed over to their families or UNMIK. Another 620 are still being identified (*Blic*, 4 February, p. 10; *Glas javnosti*, 9 May, p. 2; *Blic*, 16 May, p. 10; *Vijesti*, 13 June, p. 2; Beta, 16 October and 4 December).

Exhumation and identification of the remains of persons who went missing during the clashes also continued in Kosovo in 2003. This subject, together with other examples of violations of the right to life in the province, will be reviewed in a section devoted to Kosovo.[257]

2.2.4. Endangerment of general security – Dragoljub Milanović, the head of the Serbian state TV during the Milošević era who was sentenced by a court in June 2002 to 10 years' imprisonment for endangering general security, late in January 2003 filed an appeal for the sentence to be postponed. After the District Court in Belgrade rejected the appeal, Milanović fled from Belgrade and police issued an international arrest warrant (*Glas javnosti*, 21 January, 12 and 15 February, pp. 9, 9, 9 and *Vreme*, 30 January, p. 5). Early in April, Milanović was arrested by local police in Montenegro, where he had been hiding in a seaside villa (*Danas*, 3 April, p. 1; *Večernje novosti*, 5 April, p. 7).

On 15 April, a car driving the Serbian Minister for the Agriculture, Dragan Veselinov, killed one pedestrian and injured two others in central Belgrade. Police filed a criminal complaint against Veselinov's driver. Veselinov himself denied any responsibility for the accident and said he was the target of a "political persecution campaign", but public pressure forced his resignation in May (*Večernje novosti*, 16 April, p. 15; *Blic*, 19 April, p. 11; *Glas javnosti*, 23 April, p. 11; *Politika*, 30 May, p. 1). No criminal proceedings in the case have been reported so far.

Early in July, a live RPG launcher round used during training exploded in a VJ barracks near Kraljevo. One soldier was killed and 12 others wounded. Four officers were sacked in connection with the case by the Defence Minister of Serbia and Montenegro, Boris Tadić (*Politika*, 19 and 20 July, pp. 9, 1). No prosecutions have been reported so far.

257 See IV.3.

2.2.5. Endangerment of the right to life on other grounds – In 2003, many health-care professionals were accused of malpractice resulting in the death of patients or serious health risks. Prosecutions are under way of ten doctors employed by the Clinical Centre in Belgrade (*Blic*, 16 July, p. 8), four Belgrade-based dentists (*Blic*, 26 July, p. 8), a physician based in Bor (*Glas javnosti*, 2 June, p. 9) and a dentist based in Cetinje (*Dan*, 31 July, p. 7).

Early in December, two Podgorica doctors were sent to prison for a serious act against human health – negligent treatment of a dental abscess causing the death of a patient (*Monitor*, 5 December, p. 44).

2.3. Prohibition of Torture, Inhumane or Degrading Treatment or Punishment

Serbian media reported more frequently on torture in 2003 than in the preceding years. Police personnel continue to head the list of alleged perpetrators of physical abuse. Policemen resorted to torture mainly in order to obtain evidence during investigations, in fact to extort confessions; several cases were also recorded of maltreatment of people because of their ethnic or racial origin. Although less widespread than before, several cases were reported in 2003 of Roma citizens being insulted and confessions extorted from them on account of a prejudice according to which the Roma are inclined towards delinquency (HLC, Press Release, 8 April).[258]

Local and international organisations pointed to numerous indications of police brutality during the state of emergency, which lasted from 12 March until 22 April. The topic is discussed in more detail in the section about the state of emergency.[259]

In 2003, the UN Committee Against Torture (CAT) received 4 complaints alleging breaches of the Convention Against Torture by Serbia and Montenegro. Important progress has also been achieved in co-operation with the Committee: on 19 June, the Montenegrin Government decided on the basis of the Committee's ruling in the case of *Hajrizi et al v. Yugoslavia* dating from November 2002 (CAT/C/29/D/161/2000) to pay out damages amounting to a total of 985,000 Euros to 74 Roma, victims of the so-called Danilovgrad pogrom in 1995 (HLC, Press Release, 25 June; *Dan*, 18 April, p. 11; *Vijesti*, 23 April, 20 and 21 June, pp. 11, 8, 7; Beta, 11 June).[260]

The ruling concerns an incident which took place on 14 and 15 April 1995, when several hundred locals, with the support of the municipal authorities and the

258 More in 2.1.1.1.
259 See IV.1.
260 The complaint was lodged on behalf of 65 men, women and children by the HLC, the ERRC and the Podgorica law office of Dragan Prelević.

police, completely demolished Božova Glavica, a Roma shanty town in Danilovgrad, central Montenegro.[261] The Committee pronounced the FRY/SaM responsible for breaches of several provisions of the Convention and asked the authorities to mount an investigation, criminally prosecute those responsible and compensate the victims (HLC, Press Release, 25 June).

In connection with the *Ristić v. Yugoslavia* (CAT/C/26/D/113/1998) case, the District Prosecutor in Šabac on 4 November asked the investigating judge of the District Court in that western Serbian town for the body of Milan Ristić to be exhumed and a new post-mortem carried out to establish with precision what injuries Ristić had sustained before his death on 13 February 1995. The prosecutor said that the CAT had on 11 May 2001 stated that it accepted the claims made in a complaint Ristić's parents Radivoje and Vesna submitted through the HLC in 1998. The CAT ruled that in the case of the death of Milan Ristić, the FRY had breached its obligations under the Convention Against Torture because it had failed to implement a rapid, comprehensive and impartial investigation (HLC, Press Release, 13 November).[262]

Together with the steps taken to implement decisions of the CAT, in 2003 courts also ruled in several actions for torture brought in preceding years.[263] Although a little more frequent than before, in 2003 speedy and efficient investigations into claims of torture were still few and far between, and prosecutions were even rarer.

NGOs filed a number of requests for establishing responsibility, criminal complaints and suits for damages. Prosecutors ignored most of the complaints,[264] and initiated proceedings in just a handful of cases.

The police continue the practice of denying all responsibility and defending all of its personnel accused of torture. In some cases, criminal complaints were even lodged against victims of brutality who police claimed had been obstructing public officials in the performance of duty (Art. 213, Serbian CC, Art. 23 (1), Act on Public Law and Order) or disturbing the peace (Art. 12, Act on Public Law and Order). Victims intimidated in that manner usually shrank from pointing the finger at those responsible (HLC, Press Release, 29 July). In only a few cases were policemen suspended from duty for overstepping their authority.

The Lawyers Committee for Human Rights (YUKOM) has said that in its view the poor efficiency of the judiciary and the Ministry of the Interior (MUP) created among police personnel the impression of an implicit approval of their

261 See more in *Human Rights in Yugoslavia 2002*, II.2.3.
262 *Id.*
263 *Id*.
264 See YUKOM, Report on Torture, August 2003.

violent conduct. YUKOM also said it was receiving an increasing number of complaints about more subtle forms of torture which leave no visible traces.

No efficient mechanism was created in 2003 for controlling the police and preventing brutality. Although the Service of a General Inspector of the Serbian MUP was established in mid–2003, no responses have been forthcoming to complaints lodged by human rights organisations, and nothing at all has been said about the steps that should be taken to look into allegations of torture and to punish those responsible (HLC, Press Release, 29 July; YUCOM, *Report on Torture*, August).

Late in April, the Serbian police introduced the Instruction on Police Ethics, which is based on the European Code of Police Ethics and an obligatory part of the curriculum at police educational institutions from the start of the next school year (*Blic*, 29 April, p. 4).

2.3.1. Cases of Torture in Serbia in 2003

Serbian media reported in 2003 on cases of police brutality in Kruševac (HLC, Press Release, 7 March), Čačak (*Večernje novosti*, 4 June, p. 17; HLC, Press Release, 18 July), Belgrade (*Večernje novosti*, 9 June, p. 15; *Danas*, 10 June, p. 15; Beta, 15 June; *Danas*, 27 June, p. 3; YUKOM, *Report on Torture,* August 2003; *Vreme*, 3 July, p. 21; *Glas javnosti*, 30 July, p. 5; *Glas javnosti*, 29 November, p. 9), Batočina (*Večernje novosti*, 28 and 29 July, p. 15, HLC, Press Release, 17 November), Novi Kneževac (HLC, Press Release, 2 July), Vlasotince (*Danas*, 29 September, p. 12), Niš (*Politika*, 18 September, p. 11), Zrenjanin (*Večernje novosti*, 4 September, p. 14), Raška (Tanjug, 8 September; HLC, Press Release, 8 September), Novi Pazar (Beta, 16 September), Stara Pazova (*Večernje novosti*, 7 October p. 23) and Veliko Gradište (*Glas javnosti*, 7 October, p. 9).

Also reported were cases of torture by private citizens: in Bujanovac (Otpor, Press Release, 22 January), Belgrade (*Blic*, 25 January, p. 11) and Niš (*Glas javnosti*, 18 and 24 June, p. 9), and one case of brutality inflicted by army personnel (HLC, Press Release, 4 November).

The police generally denied all responsibility of its personnel for alleged brutality. Only in exceptional cases were investigations carried out, leading to even fewer suspensions from duty.

The Serbian police said that in the first six months of the year they had resorted to the use of force on a total of 660 occasions, just five of them being deemed unjustified. Four persons died as a result of the use of force. Some 124 of the total of 1,492 complaints lodged against the police in that period were assessed as being justified. During the said period, police personnel committed a total of 189 criminal offences, leading to 25 arrests, 6 lay-offs and 59 suspensions from duty (*Danas*, 17 and 21 July, pp. 5 and *Večernje novosti*, 30 August, p. 7). The Serbian Minister of the Interior, Dušan Mihajlović, said in mid-October that between February 2001 and the end of September 2003 a total of 109 policemen had been

arrested for various offences, that 700 had been suspended from duty and that 155 had been sacked (*Politika*, 19 October, p. 6).

The general impression remains, however, that the police continue in their official statements to protect their personnel, often using the criminal records of the victims as an additional justification for the use of force. One such case was that of Radenko Ostojić Ocokoljić (*Glas javnosti*, 30 July, p. 5; Press Release of the Belgrade Municipal MUP Information Service, 23 July; HLC, Press Release, 29 July).

2.3.1.1. Criminal and disciplinary proceedings – In 2003, the media covered by the BCHR reported on three criminal proceedings involving acts of torture by police. In mid-February, an action was initiated in Vranje against two policemen who had allegedly used force against Nenad Tasić, who was in their custody (*Danas*, 14 February, p. 5), in mid-June against policemen in Surdulica who on 25 December 2000 beat up Mirjana Savić (*Danas*, 14 August, p. 14), while early in October the trial began in a Belgrade court of Aleksandar Đorđević, the former head of the SDB's Sixth Department, as well as his deputy, for extortion and inflicting light injuries to Vlada Šućur, a retired police officer[265] (*Politika*, 9 October, p. 11).

Three criminal trials ended in convictions – in early September, the District Court in Šabac overturned a suspended sentence passed in late 2002 to policeman Stanislav Lazić to two months' imprisonment; Lazić was on trial for brutality against an activist of Otpor (*Politika*, 9 September, p. 11). In October, the Municipal Court in the same town sent to prison for three months policeman Zoran Todorović, who had in June 2002 beaten up Radenka Vidaković in an effort to extort a confession for a criminal offence (*Politika*, 12 October, p. 6). The third sentence against two policemen (eight and two months, respectively, with two years' probation) was passed in Bačka Palanka in October 2003 for extorting confessions from two persons of Roma nationality (Beta, 5 December).

Criminal complaints involving police brutality were lodged in Kuršumlija (Beta, 9 August), Vlasotince (*Blic*, 11 August, p. 10) and Lebane (*Danas*, 18 August, p. 22). In four cases, disciplinary actions resulted in suspensions or lay-offs (*Blic*, 11 August, p. 10; Beta, 11 November and 3 December).

In 2003, four courts ordered the Republic of Serbia to pay damages to police brutality,[266] in the Aleksov (HLC, Press Release, 10 March), Miloš C. (*Danas*, 20 July, p. 18), Rugovac[267] (*Monitor*, 12 September, p. 7) and Krstić cases (*NIN*, 10 April, p. 6).

265 The defendants demanded during the night between 12 and 13 May 2000 that Šućur admit that he had tried to assassinate the then President, Slobodan Milošević.

266 More on cases of damages awarded for forced mobilisations in IV.4.

267 See more in *Human Rights in Yugoslavia 1998*, III.3.3.

Appropriate actions were also brought during the year by Zoran Matić in Šabac (*Glas javnosti*, 24 April, p. 8) and Zoran Todorović and Danijela Bogojević in Kruševac (Beta, 16 June; HLC, Press Release, 7 March and 16 June).

2.3.1.2. The Situation in Serbian prisons – In Helsinki Committee for Human Rights in Serbia (HC) Report on prison situation in Serbia (hereinafter: Prison Report) quality of life in these institutions was graded negatively. Statutory minimum of space per prisoner is not respected in one third of prisons. Poor condition of sanitary facilities reduces personal hygiene of prisoners. Health service is poorly organised and equipped. Furthermore, none of the prison institutions organises educational programmes of prisoners.

External security of is positively graded, unlike internal security. There is a problem of classification of prisoners. Constant hostility between guards and prisoners, corruption, prisoners fights, thefts, possession of arms, mobile phone, etc additionally worsen the situation. Resocialisation of prisoners is negatively graded (HC, Prison Report).

HC did not manage to get to the data on prisoners' appeals, coercion practices, disciplinary punishments and violations of official duties.

On 17 June, the HLC asked the Serbian Minister of Justice, Vladan Batić, to look into allegations of serious breaches of human rights in the District Prison in Novi Sad. Ten prisoners and detainees had written to the HLC claiming that inmates were constantly being subjected to grave physical and mental abuse, leading one of them to commit suicide (HLC, Press Release, 17 June).

Prisoners who had written to the HLC and met its representatives said some senior prison officers often came to work drunk and harassed inmates. After such beatings, they said, the victims failed to receive the necessary medical assistance. The prisoners and detainees said their position deteriorated further in the period after the imposition of the state of emergency. One inmate of Roma nationality claimed ethnically-based insults and abuse was widespread.

Almost all the applicants said they had contemplated self-mutilation or even suicide to avoid further torture (HLC, Press Release, 17 June).

No information had become available by the end of the year if the Justice Ministry had taken any steps to look into the allegations.

2.3.2. Torture in Montenegro

A number of reports appeared in 2003 of brutality in Montenegro, most of them involving alleged police misconduct aimed at extorting confessions. Such cases were reported from Nikšić (*Dan*, 25 February, p. 6), Podgorica (*Dan*, 19 April, p. 9), Pljevlja (*Vijesti*, 28 and 30 June, pp. 11, 9; *Dan*, 29 June, p. 9; HLC, Press Release, 27 June; *Vijesti*, 11 September, p. 9; HLC, Press Release, 10 September), Bar (*Vijesti*, 19 September, p. 8; HLC, Press Release, 17 September), Budva (*Dan*, 24 July, p. 9 and *Vijesti*, 25 July and 28 August, p. 9), Cetinje (*Dan*, 22 July, p. 9 and *Vijesti*, 18 and 23 July, pp. 9, 8, HLC, Press Release, 17 July).

The HLC lodged criminal complaints in a large number of cases (HLC, Press Release, 10 September; HLC, Press Release, 17 September; *Vijesti*, 15 September, p. 9; *HLC,* Press Release, 17 July). Some of them concerned cases from preceding years, for example that involving seven Montenegrin MUP personnel who reportedly brutalised people in Berane, Podgorica and Bar (HLC, Press Release, 28 January, *Vijesti*, 29 January, p. 9).

Like their colleagues in Serbia, Montenegrin police seek to justify the unlawful actions of their personnel by claiming that the victims are delinquents. When the HLC filed criminal complaints against three policemen employed by the Security Centre in Pljevlja in June 2003 (Kenan Osmankadić, Bato Čačić and Veljko Dragaš) who had brutally beaten six local young men (Emir Suljević, Dragoljub Džuver (23), Admir Durutlić (21), Jovo Ćosović (20), Mirko Gazdić (20) and Dušan Dedeić (19)), the police said that the six were drug addicts and had been carrying illegal weapons (*Vijesti*, 28 and 30 June, pp. 11, 9; *Dan*, 29 June, p. 9; HLC, Press Release, 27 June).

According to a statement issued by the Montenegrin police, a total of 117 complaints about police activities were lodged in Montenegro in the first eight months of 2003, including 31 that had been investigated. According to Pavle Dragović, the head of the Montenegrin police disciplinary commission, in only two of 43 cases involving the use of force was the action deemed to have been unjustified (*Vijesti*, 28 September, p. 9).

2.3.2.1. Legal proceedings in connection with police brutality in Montenegro – Damages in connection with police brutality were awarded to one plaintiff in Montenegro in 2003 (the Tošić cases, the Court in Pljevlja – HLC, Press Release, 29 April). Criminal proceedings have also been initiated by the court against police inspector Željko Golubović, who is charged with maltreating Tošić in order to extort a confession (HLC, Press Release, 29 April).

Disciplinary actions were undertaken against several policemen in Montenegro (*Dan*, 24 July, p. 9; *Vijesti*, 25 July and 28 August, p. 9) In August 2003, police Internal Control confirmed that policemen in Pljevlja, Budva and Cetinje had exceeded authority. Departmental head Ljubomir Čvorović was quoted as saying that disciplinary actions had been started against policemen, and that in the May-July period a total of 52 policemen had been punished and ten sacked for ignorance of regulations (*Vijesti*, 4 August, p. 7).

2.4. Prohibition of Slavery and Forced Labour

Trafficking in human beings continued to be a serious problem in Serbia and Montenegro in 2003, but there is little reliable information about the exact number of victims involved.

According to a US State Department report for 2003, SaM is still primarily a country of transit, but increasingly also a country of origin and a destination for

the victims of trafficking in human beings for the purpose of sexual exploitation. Although SaM was described as a country making significant steps in preventing and suppressing trafficking in human beings, it was also noted that appropriate standards in this area had still not been achieved. It was stressed in particular that the law still did not feature full protection of the rights of the victims of human trafficking in criminal procedures, that the conviction rate in such cases was still very low, and that there existed suspicion about complicity by various state authorities.[268]

The problem does get a lot of media attention, but coverage is unprofessional, superficial and sensation-seeking, particularly in the infamous case of trafficking in human beings in Montenegro (OSCE Mission, Press Release, 19 November; and ASTRA, *Trgovina ženama: Priručnik za novinare*, 2003). Much confusion is seen in numerous articles in the local press as regards information about the crimes and perpetrators and the bases for the prosecutions, and it remains unclear whether what is involved is simple misinformation or the application of inappropriate regulations in practice (see reports on the case of sixteen-year-old B. Š.) (*Blic*, 3 May, p. 11; *Danas*, 13 July, p. 12; *Vijesti*, 22 April, p. 4].

After the adoption of the Constitutional Charter in February 2003, the powers and responsibilities of the Yugoslav Team for Fighting Trafficking in Human Beings were transferred to two separate republican teams.

2.4.1. Trafficking in human beings in Serbia – In a joint report published in November 2003, the OSCE/ODIHR, UNICEF and UNOHCHR pointed out that an increasing number of women and young girls were being trafficked for the purpose of sexual exploitation from Serbia to Bosnia and Herzegovina, Montenegro, Kosovo and Macedonia, and from there to Greece and Italy.[269]

Police Colonel Dušan Zlokas, the National Co-ordinator for the Fight Against Trafficking in Human Beings, has said that between March 2002 and mid-December 2003 some 101 victims of human trafficking had been registered in Serbia, the true number being far higher.

Prosecutions are now pending in a total of 61 cases dating from 2002 and another 46 from the first quarter of 2003. The trials have been transferred from the regular courts to a special department of the District Court in Belgrade for Criminal Offences of Organised Crime (Special Court).[270] By the end of November 2003, a

268 See US Department of State, *Victims of Trafficking and Violence Protection Act 2000: Trafficking in Persons Report,* 2003 (www.state.gov/g/tip/rls/tiprpt/2003); The Report covers the April 2002-March 2003 period.

269 The Report points to an increase in the incidence of trafficking in human beings from the countries of the region, as compared with victims from eastern European countries, as in this case criminal offences are harder to detect and prove. See UNICEF, UNOHCHR, OSCE/ODIHR, *Trafficking in Human Beings in South Eastern Europe – 2003 Update on Situation and Responses* , 2003, p. 147.

270 *Id*, p. 139.

single legally-binding judgment for offences involving trafficking in human beings had been issued in Serbia (BCHR archive, November 2003).

Public pressure has prompted the police to step up the drive to stamp out trafficking in human beings. Zlokas also said the majority of the registered victims were citizens of Romania (47), followed by Moldova (30) and the Ukraine (16). A total of 63 escort services and 46 bars in Belgrade have been closed down (Beta, 14 December).

Serbian police uncovered early in the year a large group suspected of involvement in slave labour, transporting victims of slavery and illegal deprivation of liberty. In mid-January, four citizens of SaM were arrested and in March also the group's organiser, Milivoje Zarubica (*Glas javnosti*, 27 March, p. 25; *Večernje novosti*, 19 January, p. 6; *Blic*, 11 April, p. 11). Police in Niš arrested in March another five persons suspected to have had ties to Zarubica's group (*Politika*, 23 April, p. 14). Early in June, the Second Municipal prosecutor in Belgrade filed charges against Zarubica, accusing him of taking part since 1999 in the illegal transports to the FRY of at least 56 citizens of Romania, Moldova and the Ukraine. The number includes seven juveniles (*Večernje novosti*, 3 June, p. 17).

2.4.2. Trafficking in human beings in Montenegro – According to the OSCE/ODIHR-UNICEF-UNOHCHR report, in Montenegro there is a growing number of women and young girls, victims of trafficking in human beings, originating from Serbia or the neighbouring countries, as well as a falling number from the eastern European countries.[271] NGOs based in Montenegro have established that some Roma displaced from Kosovo and living in refugee camps have been selling children (*Blic*, 3 May, p. 11, *Danas*, 13 July, p. 12, *Vijesti*, 22 April, p. 4).[272]

In the two years that it has existed, the Women's Safehouse in Podgorica has sheltered a total of 58 victims of trafficking in human beings (*Vijesti*, 31 October, p. 10).

According to data released by the Government of Montenegro,[273] between June 2002 and July 2003, the Montenegrin MUP filed criminal complaints against a total of 24 persons for the criminal offence of trafficking in human beings (*Vijesti*, 2 February, p. 5).

Prosecutors filed requests for investigations against a total of 17 persons; four of those persons were formally charged, and one was convicted: in April 2003, the

271 See UNICEF, UNOHCHR, OSCE/ODIHR, *Trafficking in Human Beings in South Eastern Europe – 2003 Update on Situation and Responses* , 2003, p. 147.

272 *Id*, p. 153.

273 Position and Conclusions of the Montenegrin Government in Connection with the Report by Independent Experts to the General Secretaries of the OSCE and the CoE on a Visit to Po dgorica on 22–24 July 2003, 16 October.

court in Rožaje sent Senad Dacić to prison for five months for the crime of trafficking in human beings (*Vijesti*, 18 April, p. 11 and *Vijesti*, 18 February, p. 7).

The case of Moldovan citizen S. Č, a victim of trafficking in human beings, provoked a minor political crisis in Montenegro.[274] During a meeting with an investigating judge in February 2003, S. Č. accused numerous senior Montenegrin officials of physically abusing her. In spite of extensive evidence collected,[275] the Podgorica prosecutor did not initiate criminal proceedings against four men suspected of involvement in trafficking in human beings and mediation in prostitution (Bajram Orahovac, Ekrem Jasavić, Irfan Kurpejović and Assistant State Prosecutor Zoran Piperović), noting that that there was no evidence for successful prosecution (News *B92*, www.b92.net, 26 May).

The decision provoked protests from the OHCHR and the EU (*Dan*, 10 June, p. 7 and *Vijesti*, 6 June, p. 8), while Amnesty International pointed to potential concealment of evidence and the apparent intention of senior Montenegrin officials to hush up the affair.[276] Montenegrin Prime Minister Milo Đukanović said the affair had been politicised and that certain foreign officials were exerting pressure on his government (*Danas*, 30 June, p. 4).

The OSCE/ODIHR, UNICEF, UNOHCHR report notes that the case featured not just major problems in the enforcement of provisions of the law, but also a lack of co-operation, and even communication, between institutions (which have quite good co-operation within the Project Bureau for the Protection of Victims)[277] which all conspired to keep the case out of the courts.[278]

In July 2003, a team of independent OSCE and CoE experts[279] visited Montenegro at the invitation of its government to look into the conduct of the judiciary (*Vijesti*, 26 July, p. 9). The team said in its report that even in everyday cases it was unusual for a prosecutor to abandon a case if reasonable suspicion existed that a criminal offence had been committed. It said that the prosecution had made no serious effort to protect the victim/witness (OSCE/CoE report, October 2003). The report pointed out the [relatively small] size of Montenegro and the existence of numerous family and personal ties and other factors considerably obstructing justice in cases of this type.[280]

274 More on the background of the case in the *Human Rights in Yugoslavia 2002*, II.2.4.2.

275 After the investigation was completed, the deputy prosecutor declined to bring charges, issuing an unusually lengthy explanation (the report on the results of the investigation had 110 pages, and the prosecutor's explanation 40; see www.osce.org/news/generate.php3?news_id=3718).

276 See AI, *Serbia and Montenegro: High Profile Sex Trafficking Case Collapses – Suspicion of a Cover-up*, 5 June (www.amnestyusa.org/news/2003/serbia06052003.html).

277 More on the Project Committee in *Human Rights in Yugoslavia 2002*, II.2.4.2.

278 See UNICEF, UNOHCHR, OSCE/ODIHR, *Trafficking in Human Beings in South Eastern Europe – 2003 Update on Situation and Responses*, 2003, p. 159.

279 See www.osce.org/news/generate.php3?news_id=3718.

280 *Id*.

According to the OSCE/CoE report, during their meeting with Zoran Radonjić the prosecutor had belittled S. Č, all going to show that there was little awareness of this form of violating human rights. The report said that although secrecy of investigations was mandatory and a special confidentiality order had been issued in connection with the case, facts about it had been leaked to the media.[281] No one was prosecuted for this breach of confidentiality regulations and the order.

In November, Ana Vuković, an investigating judge of the Basic Court in Podgorica, submitted to Montenegrin state prosecutor Vesna Medenica evidence that during the inquiry into the human trafficking affair she had been followed and wiretapped by the Montenegrin SDB (News *B92*, www.b92.net, 19 November). No prosecutions in connection with this claim had been initiated by the end of the year.

On the last day of October, the Montenegrin Government sacked the Deputy State Prosecutor, Zoran Piperović, a suspect in the S. Č. case, and prosecutor Zoran Radonjić, who had decided against prosecuting the case. The Government said in a brief statement that it had taken its decision "at the recommendation of the Montenegrin State prosecutor, in accordance with the law" (*Vijesti*, 1 November, p. 9).

The independent experts of the OSCE and CoE concluded that a new prosecution could be initiated on the basis of new evidence in the case. This possibility has also been mentioned by the state prosecutor. But the outgoing Minister of the Interior, Milan Filipović, has said that no request for the collection of new evidence had been received from the state prosecutor's office (Beta, 3 December). The Montenegrin State Prosecutor had by the end of the year taken to steps to renew the investigation in the human trafficking case.

2.4.3. Cross-border smuggling of human beings – Several cases of smuggling human beings across borders were reported in 2003. Police in the Montenegrin town of Ulcinj (Beta, 4 April), Belgrade (*Glas javnosti*, 12 May, p. 9; *Politika*, 6 May, p. 11), Podgorica (*Dan*, 15 May, p. 7; *Vijesti*, 16 May and 3 June, pp. 9, 9), Pančevo (News *B92*, www.b92.net, 25 October) arrested several dozen people involved in the smuggling.

In December 2003, the trial opened before the Special Court for Organised Crime in Belgrade of Mulazam Husein Shah, a Pakistani national, who is together with five citizens of Serbia and Montenegro (Belgraders Stanislav Samardžić and Srđan Garabiljević, Danijela Stamenković and Vojkan Stokić, from Vinci near Golubac, and Bojan Vučković from Batrovci) accused of criminal conspiracy, illegal transfer of people across national frontiers and trafficking in human beings. (*News B92*, www.b92.net, 9 December).

281 The Belgrade weekly *Arena* published a picture and personal details of S. Č., as well as the Moldovan citizen's testimony to the investigating judge (*Arena*, 12 September, p. 2).

2.5. Right to Liberty and Security of Person; Treatment of Persons in Deprived of their Liberty

Both on the legislative and practical planes, the most dangerous period in 2003 in the spheres of personal liberty and security was the state of emergency,[282] when police launched a wide-ranging action during which, according to the UNOHCHR, about 10,000 persons were taken into police custody for periods exceeding three days, the conclusion being that the "police action exceeded by far the immediate aim – apprehending the perpetrators of the murder [of Serbian Prime Minister Zoran Đinđić]" (UNOHCHR, *Quarterly Report*, February – April).

A case which preceded Đinđić's death – the release of a person suspected of another attempt on his life – caused much controversy in the public and drew attention to the work of the judiciary. On 21 February, Đinđić was involved in an incident on a section of the Beograd-Zagreb highway which passes through the city subsequently thought to have been an attempt to assassinate him. Dejan "Bagzi" Milenković, the driver of a lorry believed to have deliberately tried to cause an accident, was initially suspected only of car theft and forgery. On 23 February, Milenković was remanded in custody due to a "possibility of flight" (*Politika*, 23 February, p. 1 and *Danas*, 24 February, p. 1). The next day, the Fourth Municipal Court in Belgrade, taking into consideration offences in which Milenković was a suspect according to documents provided by police, ruled positively on his appeal against the detention and released him (*Blic*, 25 February, p. 11). But an arrest warrant for Milenković was issued three days later after the investigation had uncovered positive evidence of his involvement in an assassination attempt. Milenković's release from detention drew widespread criticism about the work of the judiciary, who reacted by saying that it amounted to "pressure by the executive on the judicial branch". "No one, including the prosecution and the police, had asked the court to look for any evidence of an assassination attempt. Since Milenković was released, everybody has been talking about an assassination", Zoran Ivošević, the then Deputy President of the Supreme Court of Serbia, was quoted as saying (*Danas*, 28 February, p. 5).

Except for the 42-day-long state of emergency, fewer breaches of the right to personal liberty and security were recorded in 2003 than in the preceding years (CRNPS, 5 February; Human Rights Committee in Vranje, CRNPS, March). Some of the illegal arrests were attended by police brutality, and are therefore covered in the section devoted to the prohibition of torture and inhumane treatment.[283]

2.5.1. Illegal arrest damage awards – Up to March 2003, the HLC had filed a total of 62 actions for illegal arrests of members of the political opposition in

282 More in IV.1.
283 See II.2.3.

2000, the last year of the Milošević era. The HLC says that most of the proceedings have been completed and damages paid out (*Blic*, 24 March, p. 10).

In 2003, alongside the forced mobilisation awards,[284] the media reported on several other awards in connection with breaches of the right to personal liberty and security, in the following cases: Milovanović (*Politika*, 23 January, p. 11), Aleksov (*Blic*, 11 March, p. 10), Tošić (*Vijesti*, 30 April, p. 24) and Tončić (*Danas*, 31 October, p. 5).

2.6. Right to a Fair Trial

There were considerably fewer violations of the right to a fair trial in 2003 than in the preceding years.[285] Not a single claim appeared in any of the media monitored by the BCHR of politically-motivated trials.

Nevertheless, some pressures by the executive branch on the judiciary were also reported in 2003, especially during the state of emergency.[286] The judiciary itself failed to come to terms with its past to any noticeable degree; only two magistrates were relieved of their posts (*Glas javnosti*, 19 February, p. 4)[287] for unconscientous performance of duty.[288]

In 2003, war crimes and organised crime trials began before national courts.[289] Special prosecutors for war crimes and for organised crime are tasked with improving the efficiency of the prosecution of those responsible for these serious offences.

No precise statistics are available of the average length of criminal proceedings and civil litigation in Serbia and Montenegro, but they continued to be noticeably excessive in 2003.[290] Judges polled by the media say the duration of legal procedures is one of the outstanding problems that needs to be solved.

There also exist organisational difficulties in the work of the judiciaries in Serbia and Montenegro. There are delays in implementing planned organisational changes whose aim is upgrading efficiency. Despite the passage of two deadlines

284 More in IV.1.

285 According to the Human Rights Committee, more violations of the right to a fair trials w ere reported in 2003 in the Jablanica and Pčinja Districts than in 2002.

286 More in IV.1.

287 Due to the strict enforcement of the 1998 Act on Public Information. See, *Human Rights in Yugoslavia 1998, 1999, 2000*, II.2.8.

288 According to the UNOHCHR Report, about 50 judges have passed the mandatory retirement ag e, before which nine of them were elected to the Supreme Court of Serbia and 14 to the Dist rict Court in Belgrade (UNOHCHR, Quarterly Report, February-April 2003, 2.4).

289 See II.2.2.2, IV.1.

290 See CoE, *Serbia and Montenegro: compliance with obligations and commitments and implementa - tion of the post-accession co-operation programme* (hereinafter: CoE Report), the second periodical report (July – October 2003), SG/Inf(2003)38, 7 November 2003, item 25.

(1 October 2001 and subsequently 1 January 2004) for the formation of courts of appeal in Serbia and new types of courts of general jurisdiction, as well as administrative courts, no such courts had been set by the end of 2003. Although the Act on the Court of Serbia and Montenegro became effective in June 2003, it does not yet exist as its judges have not been elected;[291] the court replaces the Federal Court and the Federal Constitutional Court, whose unsolved cases keep piling up in anticipation of the election of judges to the Court of Serbia and Montenegro.

At the same time, the responsibilities of the military judiciary, abolished by the Constitutional Charter, have still not been transferred to the civilian courts; military courts therefore continue operating without a legal foundation.[292] Late in November 2003, representatives of the military judiciary, the Supreme Court of Serbia, the Serbian Ministry of Justice and the Ministry of Defence of Serbia and Montenegro reached agreement for the military courts to continue working[293] until all cases are transferred to civilian courts. Such an accord goes against the Constitutional Charter and the Act on the Implementation of the Constitutional Charter. It remains unclear who has the power of decision on cases which were within the jurisdiction of military courts. Late in October 2003, Nikola Petković, the Supreme Military Prosecutor, was quoted as saying that most of the 30 trials of VJ personnel charged with breaches of humanitarian law had been transferred to civilian courts.[294]

2.6.1. The Judiciary

The executive branch continued to exert pressure on the judiciary, especially after the assassination of Serbian Prime Minister Zoran Đinđić on 12 March and the subsequent state of emergency. Courts were criticised for tardiness and leniency. Serbian government ministers continued a trend seen in 2002[295] of inappropriate public presentation of otherwise quite legitimate views about the need to improve the efficiency of the judiciary and cleanse its ranks. The President of the Supreme Court of Serbia, Leposava Karamarković, resigned late in March following pressures from the minister of justice, members of the parliamentary administrative committee and other senior officials.[296]

Especially in the first two months of 2003, the media were used as a tool to attack selected members of the judiciary; they also exhibited various slants in their reporting of numerous legal proceedings, in particular those involving organised

291 Under the Act on the Implementation of the Constitutional Charter all institutions must be formed within no more than 30 days of the date the Charter became effective (Art. 3).

292 The Constitutional Charter transfers the jurisdiction of military courts, prosecutors and public attorneys to the civilian authorities of the member states, but the requisite laws have still not been adopted.

293 News *B92*, www.b92.net, 22 November.

294 See I.4.6.2.

295 See *Human Rights in Yugoslavia 2002*, II.2.6.1.

296 See IV.4.1.

crime, war crimes and politically-motivated murders (UNOHCHR, *Quarterly Report*, November 2002 – February 2003).

In February, after the release of Dejan "Bagzi" Milenković,[297] the Serbian Minister of Justice Vladan Batić, once again called for lustration in the judiciary, accusing judges of issuing "odd judgments". Criticising the leniency of the sentences passed in the case of the attempted assassination of SPO leader Vuk Drašković on a road south of Belgrade, Batić said judges were "deflecting all justified criticism by concealing themselves behind empty phrases about the independence of the judicial branch". He added that "one out of ten judges will lose his job" (*Večernje novosti*, 26 February, p. 10).

Reacting to accusations about the Milenković case, the Fourth Municipal Court in Belgrade said that Milenković had been released from detention because he had not been a murder suspect, and that the "minister sees fit to assess the work of the court and legality of a concrete decision without concrete insight into the case" (*Večernje novosti*, 26 February, p. 10).

Reacting to criticism voiced by government officials in connection with the Drašković case, the Judges' Association of Serbia said it was an "insult to the dignity of the court and an attempt to influence the outcome of a trial" (*Danas*, 5 February, p. 5).

On 13 July, a bomb planted by unknown assailants blew up outside the Palace of Justice in Belgrade, causing some damage but no injuries. Spokespersons for both governments said the bomb had been planted by organised crime as a warning the authorities to "halt the struggle against organised crime" (*Politika*, 14 July, p. 10).

2.6.1.1. Reform of the judiciary – The process of reforming the judiciary was very slow and showed few tangible results, concluded the CoE, calling for more reforms in both member states.[298] The authorities in Serbia formed a Council for Reforming the Judiciary chaired by the Minister of Justice. Although it has adopted an action strategy, the Council has undertaken no major actions, prompting the CoE to call for better efficiency and for its members to be consulted in the process of adopting new legislation.[299]

Serbian judges and prosecutors still see no properly-defined strategy for reforming the judiciary.[300] Frequent, non-transparent and rapid changes of normative regulations made without consulting legal experts lead to poor legislative solutions, uncertainty and problems in enforcing them properly. This year's amendments to laws of importance to the judiciary have helped weaken the judiciary and increase the influence of the executive on it.[301]

297 See II.2.5.
298 See CoE Report, Item 18.
299 *Id*.
300 *Id*, Item 17.
301 See I.4.6.2.

Most judges and prosecutors are dissatisfied with the existing co-operation with the police (OSCE, *Report on Judicial Reform in Serbia*, March 2003). Some judges have said that fears of adverse reactions by the executive led them to issue decisions they are expected to make. Judges say corruption and incompetence among their co-workers inherited from the previous decades represent serious problems.[302]

NGOs have organised numerous seminars for employees of the judicial branch,[303] and the government of Serbia founded the Judicial Centre for the Training and Professional Advancement of Judges and Prosecutors (5 February 2002), and that of Montenegro the Judical Training Centre (16 June 2000). Judges say much more still needs to be done in educating the profession in the area of human rights and the rule of law.[304]

2.6.2. Apprehension and prosecution of members of the former regime – According to data released by the Serbian authorities, a total of 65 criminal complaints against members of the former regime had been lodged by September 2003. They are suspected of inappropriate and illegal expenditure of budget funds and abuse of office. The suspects include three former FRY deputy prime ministers, the former director of the customs service, the Serbian parliament speaker, the head of the Serbian SDB, 13 federal and Serbian government ministers and deputies, the head of the Serbian TV (*RTS*) and an army general (*Danas*, 10 September, p. 5).

Indictments have been filed against Borka Vučić, a former director of the Beogradska banka bank, Mirjana Marković, the wife of Slobodan Milošević, ex-ministers Branislav Ivković and Borislav Miličić, former head of the Customs Administration Mihalj Kertes, former Serbian Commissioner for Refugees in Serbia Bratislava Morina, former Serbian Government Secretary Živka Knežević, Socialist Party official Uroš Šuvaković and the former director of *Politika*, Hadži Dragan Antić. They are all charged with abuse of office and financial misappropriation. Mirjana Marković has left the country and is the subject of an international arrest warrant (*Glas javnosti*, 18 January and 14 March, pp. 9, 29; *Danas*, 20 February, p. 4; *Večernje novosti*, 19 April, p. 15). By the end of 2003, the only trials concluded were those of the *RTS* director[305] and the ex-head of the SDB, Rade Marković[306] (*Danas*, 10 September, p. 5).

The *in absentia* trial of Slobodan Milošević's son Marko on charges of abducting Otpor member Zoran Milivojević began on 24 September. International arrest warrants have been issued for Milošević and co-defendant Vladislav Ašanin, one of his former employees (*Danas*, 5 February, p. 12; Beta, 24 September).

302 *CoE Report*, Item 23.
303 See BCHR website at www.bgcentar.org.yu.
304 *CoE Report,* Item 29.
305 See 2.2.4.
306 See 2.2.1.

2.6.3. Judicial accountability – Two judges were reported to have broken the law in 2003.

According to the Leskovac-based Human Rights Committee, a judge of the Municipal Court in Leskovac received a four-month suspended sentence for the criminal offence of a breach of the law by a judge. The Committee said that in spite of the judgment and the serious nature of the offence he had continued to serve as a judge, as he is reportedly a member of the Christian Democratic Party of Serbia, whose head is the Justice Minister, Vladan Batić (Human Rights Committee, Leskovac, March – August 2003 Report).

The HLC filed with the First Municipal Court in Belgrade on behalf of Podgorica resident Faruk Dječević a criminal complaint against five judges of the Federal Court who are suspected of the criminal offence of a breach of the law by a judge. Judges Jelisaveta Gajović, Miroslav Vrhovšek, Rajko Nišavić, Đurađ Seničić and Milica Tomanović served on a panel which had on 22 April 1999 overturned judgments of the Basic and Higher courts in Podgorica and the Supreme Court of Montenegro cancelling Đečević's termination of employment with the Secondary Mechanical Engineering School in Podgorica and awarding him damages. According to the HLC, the Federal Court based its decision on a false claim that the statutory deadline for the protection or employment rights had been exceeded (HLC, Press Release, 9 May)

2.6.4. Other trials – The Municipal Court in Preševo on 6 October 2003 ordered the State Union of Serbia and Montenegro, the Ministry of Defence and the Republic of Serbia to pay 604,800 dinars to Gani Arifi (about 10,000 Euros) in compensation for the destruction of his house in the hamlet of Bujić, near Preševo, which had been burned down by Serbian police (MUP), the army (VJ) and paramilitary units during the 1999 NATO intervention against the FRY. The court did not establish precisely whether the house had been torched by VJ, MUP or paramilitary personnel; its decision was taken on the basis of accounts by eyewitnesses who said that the fire was started by persons in military uniforms, but could not specify their units. The court said that it had accepted the eyewitness accounts as they had tallied with a fact known to the general public, which did not need verification, that at the time a state of war was declared VJ personnel had been stationed in the village of Karađaka, of which Bujić is a part (HLC, Press Release, 6 October).

2.6.5. Other violations of the right to a fair trial – The District prosecutor in Vranje filed on 21 April charges against Serbian Orthodox Church Bishop Pahomije on suspicion of sexually abusing five boys from Vranje (*Blic*, 22 April, p. 10). The case did not make much progress in 2003 on account of constant failures of both the bishop and his attorney to appear in court (*Večernje novosti*, 9 October, p. 16), and the tardiness of the judiciary. An investigation into the case was launched on 22 February by the Vranje Municipal Court (*Večernje novosti*, 11 January, p. 4; *Glas javnosti*, 15 January, p. 6 and 30 January, p. 31). *Vranjske novine*, the first

paper to report on the allegations, came under much pressure; its owner received death threats and had his car windows smashed (Beta, 3 March and 19 April).

In mid-May 2003, the HLC informed the judiciary that Bishop Pahomije was constantly exerting pressure on witnesses. The church court of the diocese, which is chaired by Pahomije, initiated proceedings against clergyman Goran Arsić, deacon Milorad Milosavljević and Jovana Stanković, a nun, immediately after they had agreed to testify against the bishop (HLC, Press Release, 15 May). The HLC said that the Code on the Criminal Procedure provides for ordering detention for a defendant trying to influence witnesses. Dragan Nikolić, the boys' legal representative, claims the bishop is putting pressure on witnesses, leading one of his clients to revoke before the investigating judge testimony given earlier to police (HLC, Press Release, 15 May; *Večernje novosti*, 6 May and 28. July, pp. 7, 15 and *Glas javnosti*, 20 July, p. 31).

2.7. Protection of Privacy, Family, Home and Correspondence

No significant breaches of the right to privacy were reported in 2003, the only problem that appeared being electronic surveillance in Serbia and in Montenegro. *Blic* quoted the President of the Supreme Court, Sonja Brkić, as saying that the BIA (Security and Information Agency) was involved in legally-approved surveillance of senior opposition as well as ruling party officials, and that there were more requests for such activities in 2003 than in the preceding years (*Blic*, 12 October, p. 4). Justice Brkić immediately denied that she had released any sort of information about the subject (News *B92*, www.b92.net, 12 October),[307] but *Blic* continues to maintain that it had conveyed her statement accurately.

The US administration's human rights report for 2002 cast new light on the problem of electronic surveillance in Montenegro. The report said that the "law permits the State Security Service [SDB] to eavesdrop on citizens, especially opposition groups, without authorisation by a court. Some observers believe that the Yugoslav Army is monitoring the Montenegrin Government" (*Monitor*, 18 April, p. 13). Duško Marković, the head of the Montenegrin SDB, denied the charges and described them as "just another biased and malicious statement", because, he added, the "SDB and MUP are abiding by the law in full" (*Vijesti*, 13 April, p. 4). However, Ana Vuković, investigating judge in the S.Č. human trafficking case,[308] submitted to the state prosecutor proof that in her work she had been followed and monitored by the Montenegrin SDB (News *B92*, www.b92.net, 19 November).

307 More on the possibility of authorising measures of this kind in I.4.7.3.
308 See 4.2.1.

2.8. Freedom of Thought, Conscience and Religion

A population census carried out in 2002 whose results were published in 2003 indicates that 95% of the population of Serbia are religious believers. This figure includes 85% who are adherents of the Orthodox Church, 5.5% are Catholics, 3.2% Moslems and 1% Protestants. Just 0.5% of the population said they were atheists, while 4.5% did not declare themselves (*Danas*, 5 July, p. 5).

This right, which is generally deemed to be respected in full, was once again marked in 2003 by the problem of attacks against certain religious communities and alternative national service for army conscripts in the civilian sector.

2.8.1. Relations between religious communities – The year was once again marked by attacks on the smaller religious communities, desecration of graves and incidents in Montenegro caused by tensions between the Serbian Orthodox Church (SPC) and the Montenegrin Orthodox Church (MOC).

Discrimination against alternative religious groups is advocated even by some police officers: Captain Zoran Luković has published a book named *Verske sekte i pravoslavlje* (Religious Sects and Orthodoxy). Describing it as a "manual for self-defence from new theologians," Luković said pseudo-religious beliefs were among the greatest evils of contemporary civilisation (*Glas javnosti*, 8 July, p. 12).

Events surrounding Društvo za duhovnu nauku Sanatan (The Sanatan Spiritual Scientific Society) provoked much media attention. Sanatan's headquarters, the house of Dragana Bukumirović, was pelted with rocks on two occasions in May 2003 by residents of Beli Potok, a rural suburb of Belgrade. The attackers said Sanatan was a dangerous religious sect. A fire broke out in the house on 24 May. The site was visited by representatives of the Ministry for Human and Minority Rights of SaM and of international organisations (BCHR archive, notes of a conversation with a ministry official, 23 December). Some papers reported on the case in an irresponsible and sensationalistic manner. The authorities, in particular the police, exhibited a passive and negligent attitude (HLC, Press Release, 5 June; BCHR, Press Release, 6 June). Sanatan moved out of Beli Potok in early June.

Late in June, the Ministry for Human and Minority Rights of SaM issued on the basis of Article 20 (1 and 2) of the Act on the Association of Citizens in Associations, Social Organisations and Political Organisations Founded on the Territory of the SFRY[309] a decision erasing *Sanatan* from the register of organisations and banning its activity. The prohibition came at the recommendation of the Belgrade Public Prosecutor and on the basis of information provided by the crime

309 *Sl. list SFRJ,* No. 42/90; *Sl. list SRJ*, Nos.16/93, 31/93, 41/93, 50/93, 24/94, 28/96, 73/00. See I.4.11.2.

department of Belgrade police about the association's programme and activities, as well as a translation of Kshatradarma, a book outlining its tasks, aims and programme. It was concluded on this basis that the "aims and tasks of the association do not comply with the information listed in the founding charter and statute" (*Blic*, 27 May, p. 10; *Danas*, 31 May, p. 8; *Glas javnosti*, 4 June, p. 10; Beta, 27 June; BCHR archive, notes of a conversation with an official of Ministry for Human and Minority Rights of SaM, 23 December).

Adventist churches and priests were attacked in Zrenjanin and in Kragujevac in 2002 (*Politika*, 18 April, p. 13; Beta, 13 June).

Graves were desecrated at a number of sites. In Karanovac near Varvarin, central Serbia, an Orthodox graveyard was desecrated; three juveniles from a Winter Youth Camp organised by the Pentecostal Church were blamed, leading preacher Mihajlo Andrić to issue an apology to locals (*Večernje novosti*, 9 January, p. 10). Later that month, unknown persons damages graves at a Catholic cemetery in Novi Sad (*Dan*, 7 February, p. 8). In September, two juveniles damaged several dozen graves at the same site. Criminal complaints were lodged against the pair (*Politika*, 2 October, p. 11). On 27 April, assailants whose identities remain unknown went on a rampage in the old Jewish cemetery in Niš, which has lain derelict for years (*Glas javnosti*, 3 May, p. 6).

The ongoing dispute between the SPC and the MOC has been causing incidents for a number of years. Late in May, a pupil of the SPC Seminary in Cetinje was stabbed with a knife (*Dan*, 24 May, p. 8). Stressing that a total of 17 serious incidents in which several persons were hurt had happened since 1992, the SPC Metropolis in Montenegro asked the authorities to put a stop to the terror against pupils and teachers (*Vijesti*, 27 May, p. 9).

2.8.2. Civilian service in the military – Late in August, the Council of Ministers of Serbia and Montenegro issued a decree (*Sl. list SCG*, No. 37/03) recognising the right to alternative civilian military service for conscripts which will be realised in health-care, social, humanitarian, fire-fighting, rescue and similar services. The Decree finally formally separates civilian service from service without bearing arms; the Ministry of Defence said the Decree would become effective in September (*Danas*, 29 August, p. 1).

In November 2003, the Defence Ministry said a total of 260 conscripts had applied for alternative civilian service and that 370 institutions had been chosen for that purpose (*Politika*, 15 and 25 November, pp. 9, 9). The service will begin in mid-December, once contracts are concluded with the said civilian institutions (*Politika*, 15 November, p. 9).

One violation of the right to conscientious objection was reported after the Decree was issued: Aleksandar Stošić, who had applied for civilian service, was sentenced by the Military Court in Niš to ten months' imprisonment for draft

avoidance. The president of the court[310] said Stošić's sentence was based on regulations on civilian military service in force before the Decree became effective (*Vijesti*, 17 September, p. 9).

2.8.3. Abortion – Early in April, leaflets appeared in Valjevo printed by an organisation affiliated with the Orthodox church in Petnica which calls itself the Association for Fighting Against Abortion. "Anyone who is ready to take part in or support abortion/murder has no right to condemn any other crime, however abominable", says the leaflet (*Danas*, 9 April, p. 17). Posters with a similar content appeared in the spring in the Belgrade district of Novi Beograd (EFE Spanish News Agency, 20 March).

2.9. Freedom of Expression

The main topics in this area in 2003 were the foundation of a Broadcasting Council and libel trials of journalists. One newspaper was banned. There were frequent physical assaults on journalists, but also unprofessional media reporting.

2.9.1. The Broadcasting Council

The Broadcasting Act (*Sl. glasnik RS*, No. 42/02), adopted in July 2002, provides for the foundation of a Broadcasting Council, the chief authority of the Broadcasting Agency, in charge of issuing broadcasting licences, control of the enforcement of the law and the establishment of a strategy of development in the broadcasting sector.[311] The manner in which the Council's members were elected is unlawful and divested of any legitimacy a body supposed to have been completely independent.

The Council would have been formed in 2002 had deadlines prescribed by the law been honoured; in the event, its members were elected on 11 April 2003. Two of the members[312] were elected in contravention of the procedure prescribed by the said law (they were nominated just three days before the vote, although the law prescribes a period of no less than one month), while there are strong indications that another member[313] does not meet the requisite conditions for election to the body.

The election provoked protests from the local public and the International Federation on Journalists (*Politika*, 24 April, p. 8); Snježana Milivojević (Council representative of media organisations) and Vladimir Vodinelić (representative of the NGO sector) resigned from the body in protest over the failure to respect the law (BCHR, Press Release, 11 June; *Danas*, 6 and 12 June, pp. 4, 3).

310 More on the military judiciary in I.4.6.2.
311 See *Human Rights in Yugoslavia 2002*, I.4.9.3.
312 Nenad Cekić and Vladimir N. Cvetković.
313 Goran Radenović, Council member from Kosovo and Metohija.

Early in July, the Serbian Parliament staged another debate on the way the Council was formed and voted that it should continue working in its present composition (*Politika*, 16 July, p. 1). Freimut Duve, the OSCE representative for media freedom, then proposed a new election of Council members (*Danas*, 3 August, p. 5). The Centre for Anti-War Action, Otpor, Građanske inicijative (Civic Initiatives) and the BCHR have said that they would not take part in the election of a new Council member and replace an NGO candidate who had resigned with full justification. The organisations said that by electing a new member they would only lend further support to a body which "relinquished all its authority and reputation at the very first step, [whereby they would also] implicitly accept lawlessness" (Communiqué of BCHR, CAA, Otpor, Građanske inicijative, 17 July).

In their first public appearances after their election to the Council, the two disputed members presented views proving that they were not impartial figures but are in fact ready to usurp the authority of the entire Council (Communiqué of BCHR, CAA, Otpor, Građanske inicijative, 17 July). The two urged the local and international public to "look closely into all post–5 October financial and legal transactions of Veran Matić". Matić heads Belgrade's *B92*, a media house which is known for its opposition to the former regime and which thoroughly scrutinised the legality of the proceedings surrounding the Council's formation.

2.9.2. Litigation

2.9.2.1. Libel actions – Several public figures continued existing practice in 2003 by filing suits against journalists for libel. It was announced in May that a total of 170 suits, mostly for libel, had been filed against the media mainly by politicians and show-business celebrities (*Glas javnosti*, 20 May, p. 4). This prompted the OSCE and Reporters without Boarders to organise a gathering devoted to the decriminalisation of slander and libel at which it was pointed out that resorting excessively to legal provisions on slander and abusing them represented violations of the freedom of speech. It was stressed in particular that public figures had to exhibit a higher level of tolerance to public criticism.[314]

One of the few positive examples is the fate of a suit lodged by Vladimir "Beba" Popović, a former head of the Serbian Government's Communication Bureau, against *NIN* weekly and its journalist Mirjana Milosavljević. Asking for damages of 2,000,000 dinars (around 30,000 Euros), Popović claimed he had been defamed in a text which criticised his attitude towards the media and claimed that he had been removed from the Bureau at the orders of the late Prime Minister, Zoran Đinđić. The suit was rejected by Gordana Komnenić, a judge of the First Municipal Court, who said that participants in political life, like other public figures, must be ready and willing to take public criticism. The view of the court was that

314 More in www.osce.org/news/show_news.php?ut=2&id=3714.

Popović could have called a news conference and denied the media claims (*NIN*, 4 December, p. 9). An appeal against the decision has been lodged; the District Court in Belgrade is expected to process it early in 2004 (BCHR archive, conversation with Miodrag Majić, spokesman for the First Municipal Court, 25 December).

Apart from *NIN*, Popović also sued the HLC, *Radio B92*, *Večernje novosti* and the weeklies *Vreme* and *Blic news*. In the last-mentioned case, the Third Municipal Court in Belgrade ordered Željko Cvijanović, the editor-in-chief of *Blic news,* to pay a fine of 50,000 dinars for a defamatory text published on 3 July 2002 claiming that the prosecutor had ordered the bugging of the office of the then FRY President, Vojislav Koštunica (*Danas*, 20 February, p. 5; *Glas javnosti*, 31 May and 21 June, pp. 5, 8).

In his actions against the HLC and *Radio B92*, Popović is seeking damages to the amount of 2,000,000 dinars (around 30,000 Euros) as compensation for mental suffering and defamation of character. He claims that *B92* broadcast an "inaccurate report" of the HLC that during the state of emergency he had exerted pressure on the media and journalists (HLC, Press Release, 13 June; *Blic*, 10 August, p. 5). Popović has also sued *Vreme* and its journalist Miloš Vasić, again claiming damages of 2,000,000 dinars (30,000 Euros) for texts which critically assess his work in the Communication Bureau (*Danas* 3 July, p. 5). His reasons for the suit against *Večernje novosti* and editor-in-chief Đuro Bilbija are identical (*Glas javnosti*, 21 June, p. 8).

In February 2003, the District Court in Belgrade ruled in favour of an appeal lodged by the daily *Danas* against damages of 300,000 dinars awarded to writer Dobrica Ćosić and returned the case for re-trial (*Danas*, 13 February, p. 1).[315] Ćosić also filed a slander suit against Milan Čolić, whom the Municipal Court in Novi Sad sentenced in early October 2003 *in absentia* to three months' imprisonment. In a text *Danas* published in October 2001, noting that Ćosić had in his capacity as the then President of the FRY ordered the shelling of Vukovar, Čolić asked: "Can a man who by his doing caused the deaths of tens of thousands of his compatriots be regarded as an intellectual?" The court explained its judgment by the fact that Ćosić had become the federal president on 15 June 1992, while the Vukovar operations had been completed in November 1991 (*Danas*, 2 October, p. 5).

Late in April, Katarina Katanić, a journalist of the Kragujevac daily *Lid,* was sent to prison for four months with a year's probation for libel uttered in September 1999, when Katanić had likened the Otpor movement, which brought the charges, to Nazis (*Dan*, 26 April, p. 6). In June, the editor of the Lazarevac-based *Kolubara* was found guilty of defamation (*Blic*, 10 June, p. 13), as was the editor of Užice-based *Radio Luna*, in August (*Danas*, 14 August, p. 5).

315 More in *Human Rights in Yugoslavia 2002*, II.2.9.3.

2.9.2.2. Newspaper bans – In June 2003, the District Court in Belgrade ordered withdrawn from circulation an issue of the weekly *Svedok* which had published an interview with Milorad "Legija" Luković, explaining that the ban was issued on account of "direct war propaganda and incitement to violence threatening the constitutional order".

In spite of the generally irresponsible and sensation-seeking slant of the weekly, which therefore does not play the sort of role free and serious media should have in a democratic society, in the concrete case the court's decision was taken in a clumsy and unconvincing manner and represented misapplication of the Public Information Act and international human rights conventions. The court said that "although the text does not explicitly call for violence, that is the general context – publishing an interview in the present social milieu and having in mind well-known facts from the subject's past represents incitement to a resumption of violence and war propaganda." But issuing a ban requires direct incitement on one of prescribed grounds (e.g., a call for overthrowing the constitutional order by force, propaganda in favour of war or violence), i.e., that it could happen as a direct consequence of the text (BCHR, Press Release, 11 June).[316]

In its judgment the Court also cites the International Convention on Civic and Political Rights and the European Convention for the Protection of Human Rights, stressing that these documents permit curbs on the freedom of expression. Although the very mention of international human rights instruments is novel and welcome in the judiciary of Serbia and Montenegro, the Court nevertheless neither took into account nor applied the principle of proportionality of limitation, which international standards regard as crucial in limiting human rights. The principle also exists in national legislation, which requires that a ban be "necessary in a democratic society" (BCHR, Press Release, 11 June).

2.9.3. Unprofessional Conduct by Journalists

Some cases were also recorded in 2003 of unprofessional conduct by journalists assuming the role of courts, mainly involving publication by sensation-seeking media of information about the perpetrators of serious criminal offences or about the private lives of public personalities.

In September and October 2003, prosecutions were initiated against two Belgrade dailies for publishing confidential information. On 12 September, charges were brought against Radiša Katić, who published in *Kurir* data from the investigation into the murder of Ivan Stambolić. The First Municipal Prosecutor in Belgrade said that under the law such information was confidential and that its publication violated the rules of procedure, the rights of the indictees and the principle of autonomy of courts (*Večernje novosti*, 30 October, p. 10). The same prosecutor filed

316 See I.4.9.6.

late in October charges against the editor-in-chief of *Balkan* on similar grounds. *Balkan* had published a special separate section with testimony of witnesses in the case of the assassination of Zoran Đinđić (*Blic*, 30 October, p. 10).

2.9.4. Pressures on Journalists

The Serbian Parliamentary Committee for Culture and Information said that some media reports were "obstructing the work of the police", and the Minister for Culture and Information, Branislav Lečić, said that "retrograde forces continue working on their goal of creating an atmosphere of distrust of the state authorities". The Independent Association of Journalists of Serbia (NUNS) urged the authorities to "refrain from public criticism of selected texts and instead to institute legal proceedings against those they believe broke the law" (*Blic*, 30 May, p. 11).

2.9.4.1. Police assaults on journalists. – Several journalists were attacked by policemen in 2003.

In January, police officer Slaviša Marjanović attacked Jovica Krtinić, a reporter of the weekly *Reporter* covering the Vuk Drašković attempted assassination trial in the Palace of Justice in Belgrade. On 5 February, a criminal complaint was filed against Krtinić for obstructing a public official in the performance of duty, i.e., physically assaulting a police officer (*Reporter*, 4 February, p. 15; *Danas*, 6 and 7 February, pp. 4, 5).

Late in September, during a search of homes in Veliki Trnovac, southern Serbia, personnel of the gendarmerie (Serbian paramilitary police) confiscated materials taped by *RTV Spektri*, based in nearby Bujanovac. The policemen held the crew in custody for several hours (Fonet, 29 September).

There were also some prosecutions for attacks on journalists. Early in February, the prosecutor in Požarevac brought charges against a former head of the local police, two former police officers and the current chief of the local police station for the criminal offence of unlawful arrest of three journalists during the night between 8 and 9 May 2000 (*Danas*, 4 February, p. 5).[317] The court awarded damages for unlawful arrest and mistreatment in April 1999 to the correspondent of Germany's *SAT1* TV, Hans Peter Schnitzel, and his translator, Dušan Glišović (*Danas*, 15 January, p. 5).

2.9.4.2. Physical assaults on journalists by political figures – Some political figures and their bodyguards physically assaulted journalists in 2003. The most prominent case was that of the President of the Nova Srbija party and the mayor of Čačak, Velimir Ilić, who attacked a reporter of the Novi Sad-based *TV Apolo* during an interview. Angered by a question about the business activities of his brother, Ilić kicked the interviewer in the knee (*Danas*, 2 June, p. 1). *TV Apolo* filed a criminal

317 More in *Human Rights in Yugoslavia 2000*, II.2.8.1.

complaint against Ilić for coercion, endangering the security and broadcasting of a TV programme (*Danas*, 7 June, p. 4). Late in November, the prosecutor dismissed the complaint, noting that it could not be seen on the relevant video footage whether Ilić had hit the reporter; however, the prosecutor did not take into account the medical report on his injuries (Beta, 27 November).

A local official of the Democratic Party of Serbia in Požarevac attacked a journalist of *Blic* (*Glas javnosti*, 10 February, p. 32; *Večernje novosti* 11 February, p. 3; *Glas javnosti*, 27 March, p. 7). In September, security personnel in the Smederevska Palanka local council attacked a cameraman of local *TV Dević* (*Glas javnosti*, 7 September, p. 9).

Stara Pazova Mayor Jovan Tišma barred *Večernje novosti* journalist Berislav Mijić from a news conference. In his texts, Mijić had publicly asked the local authorities how it was possible for Europe's then biggest illegal synthetic drugs factory, discovered by police in February 2003, to have been set up in Stara Pazova. Mijić was the target of several threats and a private suit against him for spreading false information and alarming the public; late in November, the court acquitted Mijić (*Večernje novosti*, 14 February and 19 April, p. 11, 7).

2.9.4.3. Other pressures on journalists – In May 2003, in a café in Kikinda, local resident Nenad Tomić attacked *Kikindske novine* photographer Aladin Bakhit (*Danas*, 21 May, p. 15). During the *ECHO* music festival in Belgrade in July, an employee of INEX Security attacked a journalist of the weekly *Vreme*. Also in July, dismayed about his reporting about his company, *Stobeks* owner Dobrivoje Stojnić attacked in Loznica a correspondent for *Večernje novosti* (*Večernje novosti*, 30 July, p. 7). In November 2003, a hand grenade exploded outside the home of the correspondent of *Danas* in Požarevac (*Danas*, 17 November, p. 15).

Journalists were attacked, but others were sacked, after being deemed "unsuitable". One such was the editor-in-chief of *Somborske novine*, who was sacked in April, allegedly "for employing temporary staff". The paper's trade union claims the editor was fired because of texts about various abuses by the local authorities (*Danas*, 10 April, p. 17).

Early in September, Ružica Stojković, a reporter employed by *Belle Amie TV* in Niš, lost her job after management said she was unprofessional and had abused her show for political purposes. The sacking came after Stojković had reported on the acquisition of a piano for the city for which the local authorities had paid far above its real price and without a procurement contract (*Danas*, 5 September, p. 13).

2.9.5. Pressures on the Media in Montenegro

Montenegrin media also came under various pressures in 2003. Early in June, two Bar-based reporters were taken into custody by local police, who told them that they were witnesses in a dispute between a local politician and the media, who had allegedly failed to carry his party's statements (*Vijesti*, 6 July, p. 9).

In April, the Montenegrin Employment Bureau withdrew its daily vacancies ads in *Vijesti*. No official explanation was given for the suspension, but Bureau director Branimir Bojanić said the decision was motivated by the manner in which *Vijesti* covered the activities of the state authorities. During the year, *Vijesti* stepped up its critical attitude towards the authorities in Podgorica. A number of international and local media organisations expressed profound concern over what they said was a "politically-motivated decision" (*Vijesti*, 3 May, p. 7).

Late in September, a correspondent for the daily *Dan* was physically assaulted in Berane by local resident Ranko Božović, who said he was angry about the "style of [his] reporting" (*Vijesti*, 30 September, p. 10; *Dan*, 4 October, p. 11).

2.9.6. Language of Hatred

Numerous minority groups were once again the target of a language of hatred in 2003. Some cases came in for condemnation from the public and political figures, but no criminal prosecutions were reported.

By the end of the period covered by this Report, one person had been sent to prison for inciting ethic and racial hatred; late in September, a court in Ulcinj sentenced Emil Ganić to 14 months' imprisonment for the said offence. In December 1998, in a café in that southern Montenegrin town, Ganić had issued threats based on their ethnic origin to locals Nebojša Janjić and Nikola Škrbić (*Vijesti*, 24 September, p. 11). Given that Ganić is a Bosniak – a Bosnian Moslem – it seems unusual that the only legal proceedings for spreading hatred should have been instituted against a member of a minority, in a situation where many more such outbursts can be attributed to the majority people.

The Kruševac-based crossword magazine *Šok bumerang* published an article on [ethnic] Albanians featuring strong elements of a language of hatred. The BCHR has said that the text "insults in a most loathsome manner the personal dignity, personal and national feelings of the Albanian ethnic community, and is accompanied by photographs aimed at proving that the Albanians are ugly animals". Claiming that it had not been his intention to insult ethnic Albanians, the editor-in-chief said the text had been taken off the Internet and that ethnic jokes were "ten a penny in the media" (Beta, 22 May; BCHR, Press Release, 13 May). It remains unknown whether the local prosecutor has begun an investigation.

Graffiti insulting various minority groups appeared in Kotor (HLC, Press Release, 27 March), Novi Sad (Beta, 20 January), Subotica (Tanjug, 10 March), Kragujevac, Kikinda (*Danas*, 4 August, p. 3) and Jagodina (*Danas*, 3 February, p. 12).

In 2003, local Croats living in the Montenegrin seaside town of Kotor were again the targets of verbal and physical assaults, threats and discrimination, though fewer than in the preceding years. Neither police nor the judiciary showed any

inclination to punish those responsible. The local municipal council members united in condemning a graffito ("Ubij, zakolji, da Hrvat ne postoji" – Kill and Slaughter All Croats) which appeared on the building of the local forestry enterprise on 19 March 2003, but its authors remain unknown (HLC, Press Release, 27 March).

A hitherto unknown organisation calling itself Patrioti Srbije (Serbian Patriots) threatened Aljoša Mimica, professor of Belgrade University's Faculty of Philosophy, because he is a Croat. Mimica said it was not the first threat he had received, and filed a criminal complaint (*NIN*, 3 April, p. 38).

Leaflets appeared in January in the Novi Sad district of Telep, predominantly populated by ethnic Hungarians, warning them that they would be "expelled to Hungary" (Beta, 20 January). Similar graffiti appeared in March in Subotica (Tanjug, 10 March).

Just before New Year's Eve, unknown assailants set fire to two shops in Kragujevac owned by Chinese traders and smashed windows on a third (*Politika*, 3 January, p. 11). Early in April a skinhead group calling itself Krv i čast (Blood and Honour) plastered posters around Kikinda blaming Chinese people for "undermining the Serbian economy and robbing the Serbian people" (*Danas*, 4 August, p. 3). In a report on the final match of the men's World Volleyball League in July, a sports correspondent of the Podgorica daily *Publika* described the match officials, who were from China and the Republic of Korea, as "Referees: stinking yellowskins". The journalist and the paper's sports editor were sacked (*Dan*, 21 July, p. 6).

There were fewer anti-Semitic graffiti and other outbursts in 2003 than in the preceding years, but bookshops continued to stock texts of that orientation: *The Protocols of the Wise Men of Zion* could be found a bookshop in the Youth Centre in central Belgrade (*Reporter*, 14 January, p. 6).

2.10. Freedom of Peaceful Assembly

There were very few violations in 2003 of the right to free assembly. The Serbian police said that a total of 21,623 public gatherings with some 5,347,000 participants had taken place in the first six months of the year. The organisers of 190 of them had not applied for a permit; police banned 26, and intervened to stop 24 gatherings (*Danas*, 21 July, p. 5).

One of the stormiest gatherings was a public protest staged during a police effort to arrest Veselin Šljivančanin, a retired army colonel indicted by the ICTY for a war crime – the murders of 260 civilians at the Ovčara farm near Vukovar in 1991. In a tense stand-off lasting several hours, about a thousand people assembled outside Šljivančanin's flat in Belgrade on 13 June and some even clashed with police. Two members of the main board of the Socialist Party were arrested, while

opposition deputies Aleksandar Vučić (SRS) and Borislav Pelević (SSJ) invoked parliamentary immunity from prosecution (*Danas*, 13 and 16 June, pp. 1, 3 and *Glas javnosti*, 17 June, p. 2).

In June, after the water-polo team of Serbia and Montenegro had beaten Croatia in a European championship match in Slovenia, a group of youths threw rocks at the Croatian Embassy in Belgrade, ripped down the flag and smashed shop windows and parked cars. Police arrested a total of 38 persons. On the same afternoon, several buildings in Novi Sad were vandalised. The few policemen on the scene had to fire their guns in the air to ward off the crowd. One person was wounded by a bullet, 30 rioters and 15 policemen were treated for injuries. The magistrate sent a total of 10 persons to jail for 10 to 20 days (*Danas* and *Glas javnosti,* 17 June, pp. 1, 17; *Danas*, 20 June, p. 13).

In September, during a parliamentary debate on a motion of no-confidence in the Serbian government, several thousand members of the Independent Trade Union of Serbia protested in Belgrade for several days, demanding the government's resignation and suspension of the ongoing privatisation process. The protesters also threatened to storm the parliament building. Ten demonstrators, five policemen and a journalist were hurt in an incident outside on building on 30 October. Police said in a report on the event demanded by the parliamentary Committee for Security that its personnel had not used force (*Danas*, 31 October, p. 9).

In mid-October, the tribunal at the Hague filed indictments against General Nebojša Pavković, a former Yugoslav Army Chief of the General Staff, army General Vladimir Lazarević and the former and current heads of the Serbian police public security departments, Generals Radoslav Đorđević and Sreten Lukić. Several thousand policemen then assembled in central Belgrade's Republic Square to show solidarity with Lukić. The gathering was addressed by a senior police officer, and support also came from the Serbian Prime Minister, Zoran Živković (*Večernje novosti*, 25 October, p. 4).

2.11. Freedom of Association

The media monitored by the BCHR in 2003 reported no violations of the freedom of association, and no serious violations of that freedom is believed to have taken place in Serbia and Montenegro during the year.

2.12. Peaceful Enjoyment of Property

The problem of the return of property nationalised after the Second World War remained unsolved in 2003, and was as before the main obstacle to the full exercise of the right to the peaceful enjoyment of property in Serbia and Montene-

gro. Several protests over the failure to adopt a denationalisation law were mounted in Belgrade by the owners of nationalised property (*Večernje novosti*, 24 January, p. 13). Members of the League for the Protection of Private Property were evicted from their offices in Belgrade early in June during a drive to collect signatures in favour of the adoption of a law on a ban on the sale of nationalised property and its return to its rightful owners. Two members of the *League*, both US citizens, were arrested on the occasions. The eviction was explained by an official request made by the current owner of the nationalised office space, while League members say they were thrown out on orders by the authorities (*Blic*, 20 June, p. 12).

2.13. Minority Rights

Early in 2003, the authorities published the results of a population census carried out in April 2002 in Serbia less Kosovo. The population of the territory covered is 7,498,001, including 6,212,832 Serbs (82.86%), 293,299 ethnic Hungarians, 136,087 Bosniaks, 108,193 Roma, 69,049 Montenegrins, 70,602 ethnic Croats, 61,647 ethnic Albanians, 80,721 who declared themselves as "Yugoslavs", 25,847 ethnic Macedonians and 5,104 Slovenes. There are also 59,021 Slovaks, 20,497 Bulgarians, 34,576 Romanians, 15,905 Ruthenians, 1,158 Jews, 3,901 Germans, 2,588 Russians, 2,211 Czechs, 522 Turks, 293 Tsintsars and 327 Chinese. There are 814 ethnic Egyptians and 484 Ashkali (Republican Statistics Bureau, Press Release, 24 December 2002; *Danas*, 4 January, p. 5; *Večernje novosti*, 12 January, p 3).

Late in December 2003, the results of the census in Montenegro were also published; 40.64% of the population declared themselves as Montenegrins, 30.01% as Serbs, 9.41% as Bosniaks, 7.09% as ethnic Albanians, 4.27% as Moslems, 1.05% as Croats and 0.43% as Roma (*Vijesti*, 19 December, p. 9).

An ethnic tolerance study conducted for this Report indicates that the lowest level of tolerance in Serbia was shown for ethnic Albanians and Bosniaks, and in Montenegro for the Roma minority.[318]

The 2002 Act on the Protection of the Rights and Freedoms of National Minorities (*Sl. list SRJ*, No. 11/02) achieved only partial results in 2003. Most of the national minority councils prescribed by the Act whose aim is to contribute to the preservation of minority languages and cultures through education have been established.[319]

2.13.1. Ethnic Albanians – The 2002 census showed that 61,647 ethnic Albanians live in Serbia less Kosovo. They are the majority population in Kosovo,

318 See III.3.13.
319 See I.4.13.

which is under UN Security Council Resolution 1244 the subject of an international civilian and military administration.[320] Most of the ethnic Albanians in Serbia outside Kosovo live in three southernmost municipalities alongside the border of the province – Bujanovac, Preševo and Medveđa. In Preševo there are 31,098 Albanians and 2,984 Serbs, in Bujanovac 23,681 Albanians and 14,782 Serbs and in Medveđa 2,816 Albanians and 7,163 Serbs.

A number of incidents took place in the three municipalities in 2003: 1) attacks on ethnic Albanian members of the local multi-ethnic police force and of the local administrations; 2) attacks on Serbian police and army personnel, and 3) attacks on Albanian and Serb homes aimed at creating instability and ethnic tensions. According to an International Crisis Group (ICG) report, a very small number of those cases are the result of genuine ethnic intolerance (ICG, *Southern Serbia's Fragile Peace*, December 2003).

Attacks on ethnic Albanian members of the local multi-ethnic police force and of the local administrations took place in Bujanovac (*Blic*, 6 February, p. 10; *Večernje novosti*, 26 September, p. 14).

Attacks on Serbian police and army personnel took place in the villages of Končulj (Tanjug, 27 January), Levosoje (*Blic*, 6 February, p. 10), Muhovac (*Politika*, 24 February, p. 11; *Večernje novosti*, 25 February, p. 10), and in Bujanovac (*Večernje novosti*, 21 April and 12 August, p. 15, 5; *Danas*, 13 August, p. 2), in the village of Ranica near Preševo (*Politika*, 6 October, p. 10). Several days later, two ethnic Albanians were killed near Ranica (*Politika*, 6 October, p. 10).

Responsibility for some of the attacks was claimed by the "Albanian National Army" ("ANA", Armata Kombtare Sqiptare in Albanian) (*Politika*, 24 February, p. 11; *Večernje novosti*, 25 February and 12 August, pp. 10, 5; *Danas*, 13 August, p. 2).

Unknown assailants bombed the home of Ramiz Ramizaj in Lučane near Bujanovac, slightly injuring Ramizaj's grandson Bekim Šaćiri (*Glas javnosti*, 20 August, p. 2). Two shells impacted late in August in the courtyard of the Cultural Centre in Preševo, injuring two 15-year-old ethnic Albanian children (*Danas*, 25 August, p. 1).

On several occasions, Serbian police personnel found firearms, ammunition and military equipment in Albanians' homes, in Končulj and Veliki Trnovac in the Bujanovac area (*Večernje novosti*, 9 February, p. 5; *Blic*, 10 February, p. 10; *Politika*, 2 April, 21 June and 27 October, p. 8, 8 and 10) and in Preševo (*Danas*, 3 March, p. 3). In a raid carried out in February in Končulj and Veliki Trnovac, the police arrested 12 ethnic Albanians for possession of illegal firearms and ammunition. The same afternoon, over 1,000 Albanians staged a protest in Bujanovac, demanding their release. The authorities said the "actions have nothing to do with

320 S/RES/1244, 10 June 1999. More on the situation in Kosovo *infra* IV.3.

politics of ethnic relations, but are simply part of a crackdown on terrorist groups". Five of the men were set free the same evening, while a judge of the District Court in Vranje ordered a month's detention for the other seven (*Večernje novosti*, 9 February, p. 5, and *Blic*, 10 February, p. 10). Several thousand Albanians in Bujanovac and Preševo continued protests on 13 and 19 February, demanding their release (*Večernje novosti*, 14 February, pp. 3, and 20 February, p. 4). It was not known at the end of the year if criminal proceedings had been initiated against any of the men.

In March 2003, Serbian paramilitary police shot dead two local Albanians near Bujanovac, after they had "mounted an armed attack on policemen trying to check their IDs" (*Glas javnosti*, 8 March, p. 2).

About 3,000 secondary-school pupils staged a protest in Preševo on 28 November, the Albanian national holiday, demanding unification with Kosovo. Although they were warned against it by the local mayor, Riza Halimi, children climbed on the city hall building and replaced the Serbian flag with that of Albania. Police did not intervene (*Danas*, 29 November, p. 2).

Years of discriminating against ethnic Albanians have led to a situation in which the vast majority of employees in the public sector in the three municipalities are Serbs (ICG, *Southern Serbia's Fragile Peace*, December 2003, p. 14). The situation has improved slightly after the local elections in 2002 and the introduction of the multi-ethnic police.[321]

2.13.2. Bosniaks – The 2002 census shows a Bosniak population of 136,087 in Serbia without Kosovo, mainly in the Sandžak region, where numerous serious human rights violations took place during the conflict in the 1990s; Serbian courts have so far issued first-instance judgements against some of their perpetrators.[322]

Early in September, a 35-member Bosniak National Council was formed in Novi Pazar, in accordance with the Protection of the Rights and Freedoms of National Minorities Act (*Večernje novosti*, 7 September, p. 6), but so far nothing has been reported about its activities.

The Mayor of Novi Pazar, Vasvija Gusinac, a member of Sulejman Ugljanin's List for Sandžak, asked the Serbian authorities to make possible the use of the Bosniak language and Latin script in the administration, judiciary, education system and the electoral procedure (*Večernje novosti*, 26 February, p. 5).[323] About ten days later, directors of schools and school boards in nearby Tutin voted to introduce Bosniak as a parallel and equal language with Serbian and to change the names of all seven schools in the town (*Večernje novosti*, 7 March, p. 7).

321 See *Human Rights in Yugoslavia* 2002, II.2.13.1.
322 See 2.2.2.2.
323 More in *Human Rights in Yugoslavia 2002*, II.2.13.3.

2.13.3. Roma – The Roma are according to several indicators the most vulnerable national group in Serbia and Montenegro.[324] Courts rarely offer protection to Roma who are the victims of discrimination. Roma squatters continued to be evicted in 2003 without the benefit of an offer of temporary lodgings.[325] Roma who have fled from Kosovo are in an especially grave position.[326]

According to data released by the Centre for Researching Ethnicities late in March, there are more Roma in Serbia than shown by the results of the 2002 census. A total of registered 201,353 Roma live in 593 communities in Serbia, where there are also 46,238 Roma displaced from Kosovo. The centre has estimated that another 150,000 Roma live in communities whose populations are under 100, which the study did not encompass. Over one-half of that population are aged under 25, and just 1% older than 60.

The exercise of the rights of the Roma is additionally hampered by the fact that many are not registered anywhere and have no documents,[327] which means that they are denied numerous rights, from health care to education.[328]

A study carried out in October 2003 by the Institute for Strategic Research and Prognoses indicates that over 92% of all Roma households in Montenegro cannot cover their basic food needs (*Vijesti*, 10 November, p. 6), and that 74.7% have no running water in their homes (*Vijesti*, 21 October, p. 7).

According to the Serbian Ministry of Education, just 58 of the roughly 70,000 children (0.08%) who enrolled in secondary school in 2003 were Roma. The 2002 census shows that 21.9% of all Roma complete their primary education, while 7.8% graduate from secondary school and just 0.3% from two-year college or university. According to the Centre for Researching Ethnicities, just 30% of all Roma enjoy basic literacy and just 18.6% have permanent employment (*Danas*, 29 March, p. 5; *Glas javnosti*, 20 March, p. 5; Tanjug, 7 April; *Večernje novosti*, 8 April. p. 9 and Beta, 10 October).

The situation is no better in Montenegro. According to the Roma Centre of Montenegro, three-quarters of the Roma population are illiterate, and just 7.1% attend school (*Dan*, 8 April, p. 11 and 23 April, p. 10; *Vijesti*, 21 October, p. 7). Not a single Romany is employed in the state or local administrations, and 95% of the Roma population of working age have no permanent job (*Dan*, 8 April, p. 11 and 23 April, p. 10). The situation is even worse for Roma women – 90% are illiterate and just 0.3% gainfully employed (*Vijesti*, 21 October, p. 7).

324 See 2.1. i 2.1.1.
325 ERRC i UNOHCHR, Memorandum, *Zaštita prava Roma u Srbiji*, April 2003, p. 29. See more in II.2.18.3.
326 More in IV.4.
327 See *Human Rights in Yugoslavia 2002*, II.2.13.2.
328 ERRC and UNOHCHR, Memorandum – Protection of Roma Rights in Serbia and Montenegro, April 2003, p. 29.

Both in Serbia and Montenegro, Roma children face numerous obstructions in their access to education. In some cases, they are sent to special classes because of insufficient knowledge of the Serbian language, and sometimes even to schools for children with development problems. Roma children make up majorities in classes for children with minor mental deficiencies.[329]

Roma and ethnic Egyptian children displaced from Kosovo were denied access to a school in Berane, Montenegro, allegedly because they were intellectually underdeveloped. But the only real problem was language (HLC, Press Release, 4 September). The language in which aptitude testing is performed continues to be a major problem for Roma children; this leads to a situation in which Roma children, although fully capable, end up in classes for children with developmental problems.[330]

Some positive examples were also recorded: a Roma assistant teacher has been employed by a school in Rožaje to help children learn the language (HLC, Press Release, 4 September).

2.13.4. Minorities in Vojvodina – The media monitored by the BCHR in 2003 reported no major violations of minority rights in Vojvodina, an ethnically diverse province where ethnic Hungarians are the biggest minority (293,299 according to the 2002 census). They are the most organised national minority, which participates actively in government on the republican, provincial and local levels.

Early in February, the Alliance of Vojvodina Hungarians (SVM) renewed is initiative from 2001 for the signature of a protocol on co-operation by nine municipalities in northern Vojvodina with significant ethnic Hungarian populations.[331] Most non-Hungarian politicians in Vojvodina once again condemned the initiative, calling it an attempt to rally people on a national basis. The municipalities which did sign (Subotica, Kanjiža, Novi Kneževac, Senta, Čoka, Ada, Bečej, Mali Iđoš and Bačka Topola) said they planned to establish a foundation for civic security, which also drew strong reactions. "We shall resist the formation of any sort of ethnic entities", Vojvodina Parliament Speaker Nenad Čanak was quoted as saying. The SVM President, Joszef Kasza, said the protocol had arisen out of a need to "help the judiciary by acquiring equipment", while Subotica Mayor Isztvan Ispanovics denied the existence of what had been described as "ethnic and partisan association" (*Blic*, 22 and 25 February, pp. 3, 2; *Danas*, 12 and 24 February, p. 13 and *Politika*, 23 February, p. 7).

Some politicians made misguided statements which contributed little to the reduction of ethnic divisions, instead provoking reactions and condemnation. Addressing the Vojvodina Provincial Parliament late in February, Democratic Party of

329 *Id,* p. 22.
330 See *Human Rights in Yugoslavia 2002*, II.2.13.2.
331 More in *Human Rights in Yugoslavia 2001*, II.2.13.4.

Serbia deputy Miroslav Lješnjak asked how the Ruthenian national community "sees its future in one hundred years' time, when there are now just 13,000 of them, including only 2,500 fertile women". The Mayor of Novi Sad reacted: "Fertility described by doctors is science, while fertility described by politicians is fascism" (Beta, 28 February and *Danas*, 5 March, p. 15).

2.14. Political Rights

Presidential elections were held in Serbia and Montenegro in 2003 and also extraordinary parliamentary elections in Serbia.

Verbal attacks on political opponents continued in 2003, but there were no physical assaults, so characteristic of preceding years.

The media reported on unlawful use of deputies' voting cards in the Serbian Parliament; on several occasions doubts were raised whether deputies whose names had appeared on the roll of those present were in fact in the building. The first case was that of Democratic Party (DS) deputy Neda Arnerić during the election of a new Governor of the National Bank of Serbia, after which doubts were raised whether Nataša Milojević of the Social Democratic Party had been present at the same session. For some time Neda Arnerić avoided answering questions about her presence. After numerous assurances by DS representatives that she had been present, DS Vice-President Boris Tadić announced in his capacity as the head of the DS parliamentary electoral list that Arnerić had in fact not been in the country during the vote for governor. Milojević also initially claimed to have voted, but after footage was shown of her appearance on TV, she admitted to have been absent from the session (News *B92,* www.b92.net, 22 July, 3 September, 14 and 17 December).

2.14.1. The State Union of Serbia and Montenegro – On 5 February, the FRY Parliament adopted and proclaimed the Constitutional Charter (*Politika*, 28 January, p. 1; *Danas*, 5 February, p. 1). The Charter had been approved by the two republican parliaments in January.

The Parliament of Serbia and Montenegro was formed late in February with the indirect election of 126 deputies (91 from Serbia and 35 from Montenegro) in proportion to their parties' share in their parliaments (*Glas javnosti*, 26 February, p. 3).

The body met for the first time on 3 March (*Politika*, 4 March, p. 1), four days later elected the first Union President, Svetozar Marović (*Politika*, 8 March, p. 1), and ten days later also a Government (Council of Ministers), made up of five ministers and Marović as its head, was formed (*Politika*, 18 March, p. 7). Serbia and Montenegro was then admitted to the Council of Europe (*Politika*, 4 April, p. 1).

2.14.2. Political Rights in Serbia

Parliamentary deputies' mandates were a controversial question in Serbian politics in 2003. Late in 2002, the Constitutional Court of Serbia initiated a procedure to investigate the constitutionality of Article 88 of the Election of National Deputies Act, under which deputies' mandates are terminated when they are no longer members of the parties or coalitions on whose lists they had been elected.[332] In May 2003, the Court ruled that mandates were owned by deputies rather than parties or coalitions, but the decision had not been implemented by 13 November, when parliamentary elections were called (*Danas*, 28 May, p. 3; *Politika*, 14 November, p. 1).

2.14.2.1. Presidential votes – The Serbian Parliament Speaker, Nataša Mićić, who became the acting President after a failed presidential vote, issued on 5 February a decision to postpone presidential votes until the adoption of a new constitution or not later than the regular parliamentary session in October (*Danas*, 7 February, p. 1). As no constitution had been adopted by the autumn, on 17 September Mićić called a presidential election for 16 November. Six candidates ran – Dragoljub Mićunović (DOS), Tomislav Nikolić (SRS), Velimir Ilić (NS), Dragan Tomić (SNS), Marjan Rističević (NS) and Radoslav Avlijaš (DSO) (*Večernje novosti*, 18 September, p. 4; *Politika*, 28 October, p. 1). The vote failed to achieve the requisite turnout of 50% of the electorate; the figure was 38.8%. Nikolić won 46.23% of all votes, followed by Mićunović – 35.42% (*Politika*, 19 November, p. 7). The Centre for Free Elections and Democracy (CeSID) said that exceptionally few irregularities had been spotted during the elections (CeSID, Press Release, 18 November).

2.14.2.2. Parliamentary elections in Serbia – In September 2003, opposition parties in the Serbian Parliament moved for a debate on a motion of no-confidence in the parliament speaker and Government. During the debate, Party of Serbian Unity (SSJ) whip Dragan Marković urged police to "storm all institutions, mount a coup and save Serbia". Marković was then ejected from the Parliament for three months (*Večernje novosti*, 24 October, p. 4).

Extraordinary parliamentary elections were called for 28 December on an initiative by the Government.

A total of 13 parties and six coalitions made up a total of 19 electoral lists (Beta, 17 December). According to data released by the Republican Electoral Commission, the turnout was 3,825,471, or 58.75% of the electorate. The SRS won the biggest share of votes, with 27.61%, or 82 seats in parliament, followed by the DSS (17.72% – 53 seats), DS (12.58% – 37 seats), G17 Plus (11.46% – 34 seats), SPO-NS (7.66% – 22 seats) and the SPS (7.61% – 22 seats) (*Politika*, 31 December, p. 1).

332 See *Human Rights in Yugoslavia 2002*, II.2.14.

The SPS list was headed by Slobodan Milošević and that of the SRS by Vojislav Šešelj, who are on trial before the ICTY at the Hague. Two other ICTY indictees were on two other lists – retired VJ General Nebojša Pavković and police General Sreten Lukić. Most legal experts agree that although inappropriate, their presence on the party lists is not actually illegal (*Blic*, 1 December, p. 2; *Danas*, 6 December, p. 6).

Several minor incidents were recorded during the election campaign, in Belgrade (*Glas javnosti*, 5 December, p. 3; Beta, 8 and 15 December) and in Stara Pazova (*Politika*, 10 December, p. 7).

2.14.2.3. Attacks on political opponents – Politically-motivated violence was recorded in Serbia in 2003.

The Belgrade home of parliamentary deputy Živko Selaković was bombed early in February; no one was hurt in the blast. Just days before the incident, Selaković had resigned from the opposition SSJ, after which he received threats (*Blic*, 9 February, p. 3) In August, a hand grenade blew up outside the home of a member of the DS; the suspect was remanded in detention for one month (*Blic*, 29 August, p. 11).

Vice-President of the Democratic Alternative (DA) Nada Kolundžija sustained slight injuries when she was attacked in Belgrade in July (*Danas*, 15 July, p. 4). SPS members were beaten up in Bor and in Požarevac (*Danas*, 31 July, p. 4; *Glas javnosti*, 7 August, p. 8). late in August, SPS supporters beat up an Otpor member in Požarevac (Beta, 26 August).

2.14.3. Political Rights in Montenegro (Presidential Elections)

A low voter turnout frustrated the 22 December 2002 presidential vote in Montenegro which then had to be repeated on 9 February. The turnout was once again below the mandatory 50% of the electorate (the Montenegrin Electoral Commission said the turnout had been 47.5%) (*Dan*, 12 February, p. 3; *Vijesti* 15 February, p. 3). Early in March, the failed elections motivated the Montenegrin Parliament to amend the Act on the Election of the President, abolishing the 50% requirement, and new elections were called for 11 May (*Vijesti*, 11 March, p. 3).

The new vote was won by the candidate of the ruling coalition and the Parliament Speaker, Filip Vujanović, with 64.25% of the votes cast. The combined total of opposition candidate Miodrag Živković and independent Dragan Hajduković was around 32% (*Vijesti*, 14 May, p. 5).

2.15. Special Protection of the Family and the Child

Numerous cases were reported in 2003 of child abuse and violence in the family.

2.15.1. Violence in the family – The Belgrade-based Advisory Centre Against Violence in the Family says that every year it receives about 3,000 complaints about violence in the family (*Blic*, 9 July, p. 10). Every year it is contacted by 3,000 women victims of abuse at home. According to the Victimological Society of Serbia, one out of two women in Serbia is a victim of mental abuse, and one out of three of physical violence (*Politika*, 19 February, p. 11). The Montenegrin organisation SOS telefon says that a quarter of all married women are physically abused by their husbands, and one out of two is a victim of physical violence (*Vijesti*, 18 March, p. 8).

The first ever court judgement in connection with violence in the family was issued in September 2003, a full year after the crime was introduced in statutes in Serbia and Montenegro. Željko Jovanović, a resident of the village of Pasjača near Niš, was sent to prison for six months for brutally beating his wife Mirjana (*Politika*, 4 September, p. 19).

During eight months of 2003, the prosecutor in Podgorica received a total of 48 criminal complaints in connection with violence in the family (*Vijesti*, 6 September, p. 9). In the four years that it has existed, the Women's Safehouse in Podgorica has been approached by 743 persons seeking protection from violence in the family (*Vijesti*, 31 October, p. 10).

2.15.2. Child abuse – Although no official data have been released, experts say children in Serbia are among the most vulnerable child-abuse groups in Europe. The mobile team of the Bor-based organisation Amitia recorded 52 cases of child abuse between May 2002 and the end of the year (*Blic*, 17 January, p. 10).

In a period between the end of 2001 and start of 2003, some 168 cases of child abuse were recorded in the Požarevac municipality; in 80% of those cases the physical violence was attended by sexual abuse (*Glas javnosti*, 20 January, p. 5).

During 2003, the media reported on four convictions for child abuse (*Blic*, 13 January, p. 11; *Politika*, 6 May, p. 15; *Večernje novosti*, 6 March, p. 15; *Politika*, 9 June, p. 10; *Glas javnosti*, 26 June, p. 9). Child abuse and murder trials were initiated in Belgrade (*Večernje novosti*, 12 March, p. 13) and in Zrenjanin (Beta, 25 March). Numerous criminal complaints were filed and investigations launched into some cases (*Glas javnosti*, 10 March, p. 9; *Blic*, 17 April, p. 10; *Blic*, 6 August, p. 10 and *Večernje novosti*, 9 August, p. 17).

On 13 January, the court in Bor ordered a girl from the village of Brestovac to be taken into care after she was found to have been the victims of physical abuse by her parents. In 2002, the girl was hospitalised in Bor several times with broken bones, burns, missing fingernails and bruises below her eyes. The girl was placed with a foster family (*Vijesti*, 14 January, p. 5 and *Glas javnosti*, 16 January, p. 5).

A number of cases of sexual abuse of children were reported (*Danas*, 15 October, p. 1). According to the Women's Lobby, a total of 25 cases of incest were

known to have occurred in Montenegro in 2002, none of which were reported to police. The organisation says it believes the true incidence of incest to be far higher, but that the children and their mothers are reluctant to notify the police, fearing adverse social reactions (*Vijesti*, 7 April, p. 9). Belgrade resident Ivan Musafović (88) was sent to prison for six months for sexually abusing children and immoral acts (*Blic*, 4 April, p. 11); Pirot resident Ninoslav Minić (24) received an eight-year prison sentence (Beta, 7 April), D. J. (74); Belgrade pensioner D. J. (74) was sent to jail for a year (*Blic*, 21 April, p. 10); Vranje school-teacher Petruš Đorđević (56) was sent to prison for four months (*Glas javnosti*, 17 April, p. 11), Podgorica resident Goran V. Marković was sent to jail for a year (*Vijesti*, 28 June, p. 11); Vlasotince resident Tomislav Milenković was sent to prison for six months (*Večernje novosti*, 24 July, p. 7); Belgrader Ivan Minić got one year (*Glas javnosti*, 24 July, p. 7); Vranje resident Dalibor Asanović was sent to a psychiatric institution (*Politika*, 11 August, p. 10).

In March, the prosecutor in Vranje filed charges against three wards and an employee of the local Centre for Children without Parental Care in connection with continued acts of sexual abuse against M. B., six year-old girl (*Večernje novosti*, 28 March, p. 15 and *Blic*, 29 March, p. 11).

The case of Bishop Pahomije, accused of sexually abusing several boys in Vranje, received much media attention in 2003.[333]

2.16. Right to Citizenship

The media monitored by the BCHR did not report any breaches of the right to citizenship in 2003.

2.17. Freedom of Movement

The media monitored by the BCHR did not report any breaches of freedom of movement in 2003.

2.18. Economic, Social and Cultural Rights

The social and economic situation Serbia and Montenegro was characterised by continuing hardship in 2003, with a high poverty rate. The high unemployment rate inherited from the past period was only worsened by the economic transition, which continued to spark off strikes. According to the Serbian police, in the first six months of 2003 alone, a total of 94,00 people participated in 391 strikes. In 50

333 More in 2.6.6.

cases, workers took to the streets, and in 35 cases they set up roadblocks (*Danas*, 21 July, p. 5). The strikes were motivated by unpaid wages, hard working conditions, poor management of enterprises, problems with the ongoing privatisation (*Glas javnosti*, 22 January, p. 5; *Danas*, 3 February. p. 5; *Politika*, 21 February, p. 8; *Glas javnosti*, 4 March, p. 4; *Blic*, 12 March, p. 11; *Večernje novosti*, 15 October, p. 11; *Politika*, 23 September, p. 18; *Večernje novosti*, 20 September, p. 11; *Danas*, 23 September, p. 4; Beta, 30 September and Ministry of Defence of Serbia and Montenegro, Press Release, 30 September). Four hunger strikes were reported (*Glas javnosti*, 21 May and 16 July, pp. 5 and 23; *Blic*, 27 August, p. 9; *Glas javnosti*, 23 July, p. 5; *Vijesti*, 10 June, p. 6).

Pensions and other social benefits were paid out relatively regularly in 2003.

2.18.1. Unemployment – In September 2003, the official unemployment total was 954,793, 54.3% of whom were women (*Večernje novosti*, 26 July, p. 5, *Danas*, 4 July, p. 9 and *Glas javnosti*, 9 October, p. 7; Beta, 24 November). According to data released by the Serbian Ministry of Labour, the registered jobless rate is 13.8% of the population of working age. The percentage calculated according to more realistic European standards is far higher: about 30% (Beta, 9 December). Compared with May 2002, this is an increase of 16%, and the trend continues (*Vreme*, 17 July, p. 28). But the Serbian Government says the jobless rate is far lower than the official figure: an estimated 550,000 to 670,000 employed persons are unregistered, and at least 300,000 are registered with Employment Bureaus (*Vreme*, 23 January, p. 5 and 30 January, p. 14; *Večernje novosti*, 4 February, p. 5; *Danas*, 20 February, p. 8; *Blic*, 11 July, p. 8).

According to May 2003 data, 76,000 persons are unemployed in Montenegro – this is one-third of all people of working age (*Monitor*, 9 May, p. 28).

2.18.2. Poverty – An estimated 1.8 million people in Serbia live in absolute poverty, two-thirds of the population earn only enough to cover their food needs, and only 11% have enough money to be able to consider how to spend it (*Večernje novosti*, 24 May and 1 July, pp. 7 and 8 and *Blic*, 25 May, p. 5). The average monthly salary in May was 11,555 dinars, compared to 12,062 dinars in December 2002. Every month in Serbia, an average of 200,000 employees get no pay at all (*Večernje novosti*, 29 June, p. 10 and *Glas javnosti*, 2 July, p. 7).

In the existing social welfare system, there are about 500,000 child benefit recipients, and about 35,000 families get welfare payments (*Danas*, 24 March, p. 5). The Red Cross has said that late in March there were a total of 82 soup kitchens in Serbia serving one daily free meal to about 50,000 people. About 70% of these people have said that this was their only daily food intake (*Blic News*, 9 April, p. 26).

Some 60% of the population of Montenegro are poor (*Dan*, 26 January, p. 4); 10% live in absolute poverty, spending less than 107 Euros a months (*Vijesti*,

17 July, p. 5). The average monthly expenditure for a family was 733 Euros, while average salaries were 210 Euros (*Monitor*, 14 February, p. 22).

2.18.3. The right to housing – Both in Serbia and in Montenegro, numerous evictions were reported in 2003 without prior offers of alternative accommodation; most of those affected were Roma.

The majority of the people displaced from Kosovo in 1999 live in shanty towns. The authorities in Serbia and Montenegro have thus far shown little interest in providing proper accommodation for them (HLC, Press Release, 24 January).

The HLC demanded that the competent municipal authorities provide alternative accommodation for about 250 members of 52 Roma families, mainly refugees from Kosovo, whose illegal dwellings in Belgrade's Radnička street were demolished on 19 May 2003. Some of the people whose homes were razed by bulldozers said that they had not even managed to save their personal papers, that they had to move their belongings out into the street and that the municipality of Čukarica had provided a single lorry for transporting them (HLC, Press Release, 20 May).

In September 2003, the HLC asked the Belgrade city authorities to provide accommodation for the Demirovićs, a Roma family of eight evicted on 29 July 2003 from a flat in which they had been squatting since 1992. The Demirović children are aged from two months to thirteen years. They have since been living in the street outside their former abode. On 6 August, the Social Work Centre asked the municipality of Stari grad to provide alternative accommodation for the Demirović family (HLC, Press Release, 12 September).

In February 2003, after the Belgrade local authorities announced plans to build homes for 50,000 residents of disease-ridden shanty towns, mainly Roma, about 2,000 locals staged a protest in the suburb of Zemun Polje, one of the sites of the future development. A leaflet reading "Samo Srbi treba da žive u Zemunu" (Only Serbs Should Live in Zemun) appeared during that period. The protesters claimed that they had been motivated by fears that their quality of living would worsen rather than intolerance of the Roma (*Politika*, 17 February, p. 1; *Blic*, 23 February, p. 8; BCHR, Press Release, 11 March).

Ethnic Albanians threatened with eviction were not offered alternative accommodation in the Montenegrin towns of Kotor (HLC, Press Release, 6 February) and Berane (HLC, Press Release, 15 September).

2.18.4. People with special needs – In Serbia and Montenegro there are no accurate data on handicapped persons. There are an estimated 800,000 persons with innate or acquired deficiencies (*Politika*, 4 December, p. 11). The 12-member Community of Organisations for Handicapped Persons of Serbia assembles about 500,000 invalids (*Blic*, 4 December, p. 8). The Community says that handicapped persons do not enjoy such a status officially in Serbia and Montenegro and that their rights are not being denied completely, but exercised insufficiently (*Danas*, 4

December, p. 5). Organisations assembling handicapped persons say the 2,000-dinar monthly benefit for outside assistance received by about 20,000 invalids in Serbia is much more of a welfare category than a genuine service. They say about 80% of all handicapped persons belong to the poorest segment of Serbian society (*Glas javnosti*, 3 December, p. 6).

On 2 February, employees of the Novi Sad pastry shop Evropa turned away Siniša Tucić, a literature student who suffers from cerebral palsy, explaining that the establishment was about to close, but resumed work after he had left (*Blic*, 14 February, p. 10).

III
CITIZENS' PERCEPTIONS OF HUMAN RIGHTS LAW AND PRACTICE IN SaM

1. Introduction

1.1. Methodology

The Belgrade Centre for Human Rights has been monitoring the legal awareness of the citizens of Serbia and Montenegro since 1998. Such surveys have been conducted once a year, with the exception of 1999.

Data collection method

Data were collected on a random representative sample of the adult population of Serbia and Montenegro, with a standardized questionnaire, used by trained interviewers, face to face, in the respondents' homes.

Sample frame

1991 population census, 2002 population census for Serbia (without Kosovo and Metohija), SMMRi estimate of population dynamics and voter rolls in Montenegro in 2002.

1.1.1. Sample

Sample type

Random, three-stage, stratified sample.

Strata

Belgrade, Central Serbia, in Montenegro: Podgorica (including Danilovgrad), coastal part (including Cetinje) and Northern part (mountainous).

Allocation

According to stratum, proportional to stratum size.

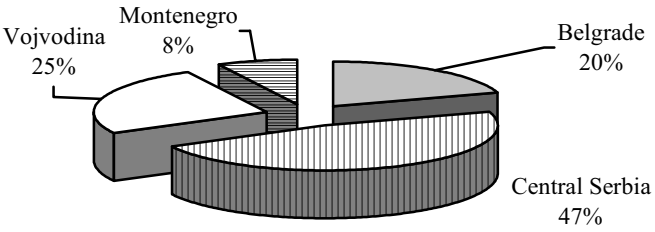
Stages

1. Territory of polling place (about 200 households) chosen by likelihood proportional to size – PPS
2. Households chosen by method of random walk (simulation of SRSWoR)
3. Member of household chosen by Kish scheme

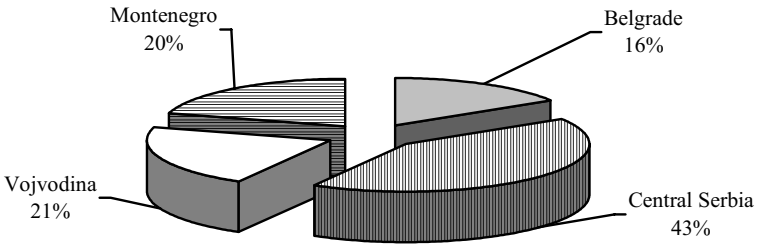
Sample size

1938 respondents; 1540 from Serbia, 398 from Montenegro

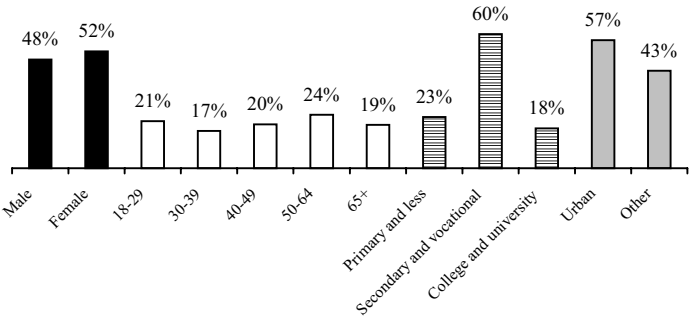
Graph 1: Structure of weighted sample by region



Graph 2: Structure of unweighted sample by region



Graph 3: Structure of weighted sample by gender, age, education and type of settlement



1.1.2. Questionnaire

The questionnaire consisted of 86 questions divided into 4 main parts: Understanding of Human Rights, Legal Awareness of Individual Rights (18 special rights), Enjoyment of Human Rights and Demographics.

In order to monitor trends closely, most questions from the previous questionnaire were kept in the same form, changes related to new questions within given subjects and deletion of some questions which in the new circumstances have lost their relevance.

1.1.3. Time period of survey

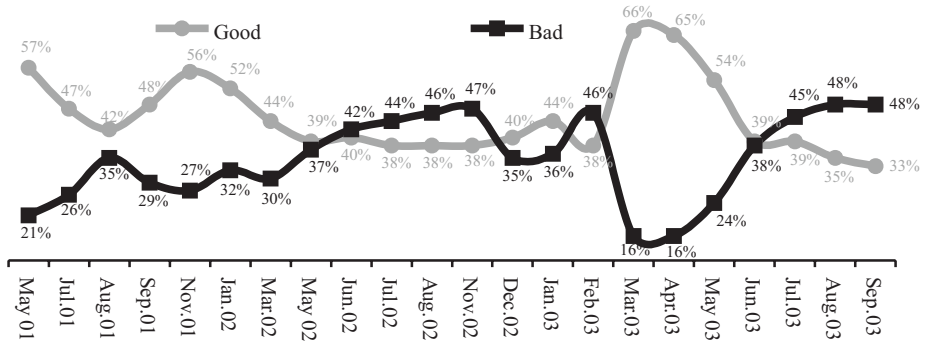
Fieldwork was conducted from 17 to 19 September 2003.

1.2. Political Environment

After a sudden rise in optimism during the state of emergency, in September the trend of decline in general optimism, along with decline in trust in institutions, political parties and political leaders has continued.

The synthetic indicator of the general political climate, measured by answers to the question on how the citizens assess the direction the country has taken, has reached the lowest value since the 2000 political changes. Only 33% of the total adult respondents in Serbia think that the direction is good, while for 48% the direction is bad.

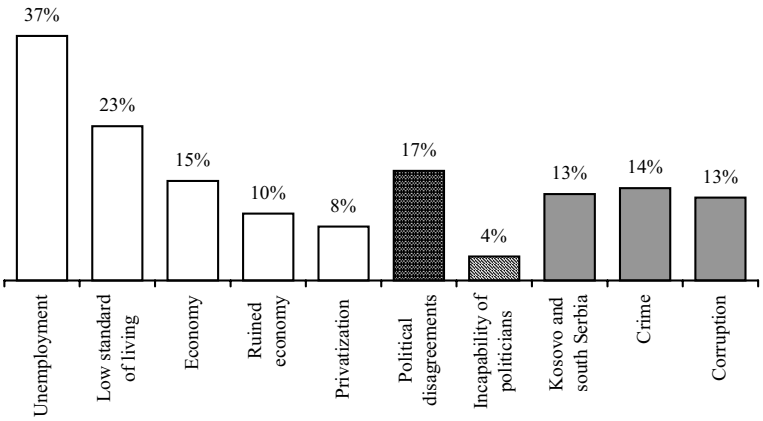
Graph 4: The direction of Serbia is ...



At the top of the list of the most important problems Serbia faces are still economic problems, primarily unemployment and low standard of living, but in comparison to previous periods, the percentage of inhabitatnts that include political disagreements in the list of problems (17%) has significantly increased, even more

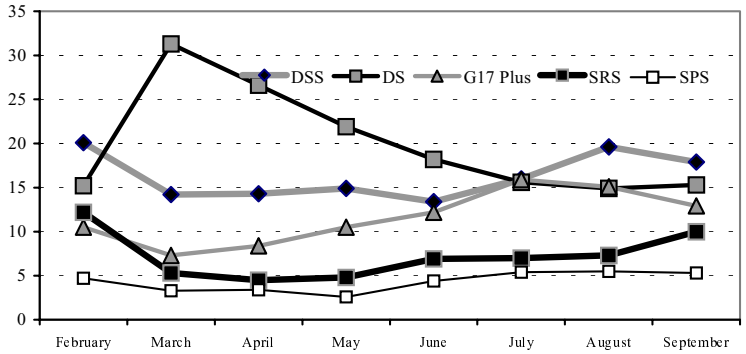
than the percentage that referred to problems in Kosovo and south Serbia (13%), crime (14%) and corruption (13%), which are also on the increase. Only 3% of respondents stated that one of the three most important problems was bad legislation.

Graph 5: Spontaneously mentioned main problems in Serbia (three possible answers) Most common answers, September, 2003



Support for the strongest political parties has varied: since August, DSS has been again in the first place, which it kept in September, with 18% of support in the total population; DS is in the second place, with 15% of support, followed by G17+ with 13% and SRS with 10%. SRS and SPO (which in August had 3%) are the only parties showing an increase in their ratings.

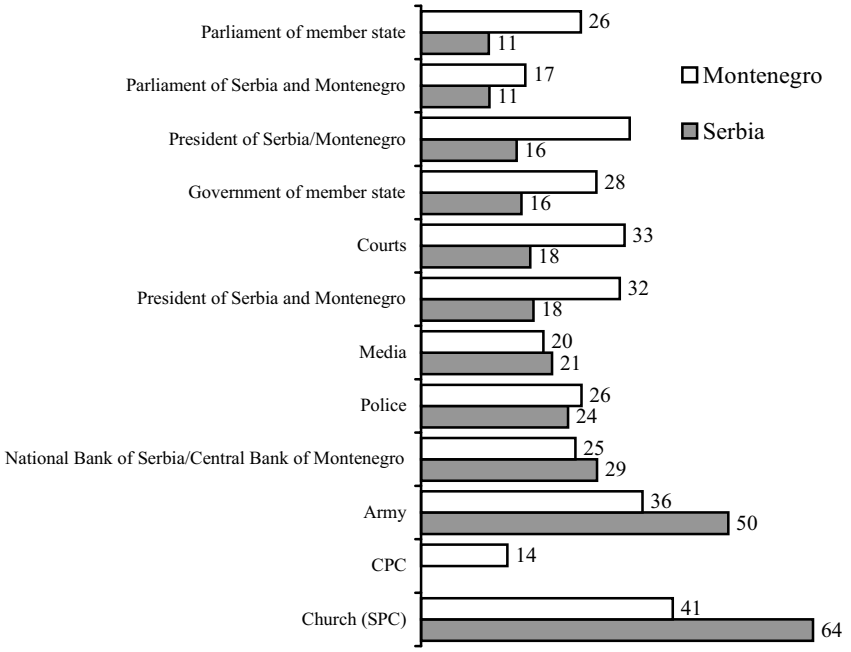
Graph 6: If parliametary elections were held this Sunday, which party would you vote for?



Evaluation of political leaders has a constant declining trend, so the difference in evaluation is dramatically reduced.

Finally, a general trend of decline in confidence in Serbia, has an effect on confidence that the citizens have in institutions. With the exception of the church, army and media, all institutions, both federal and member state enjoy higher confidence among the citizens of Montenegro than Serbia. In Serbia, only the church enjoys confidence of more than half of respondents, the army among half of the respondents. The National Bank less than one third, the police and the media about one fifth, and other institutions enjoy the confidence of less than one fifth of respondents.

Graph 7: % of population with confidence in these institutions



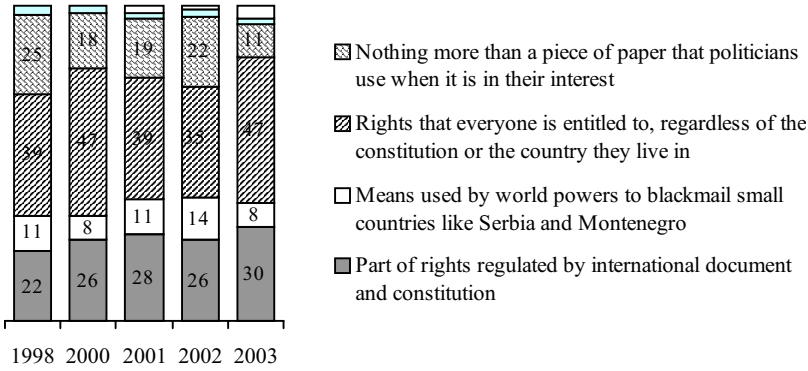
2. Understanding of Human Rights

2.1. Understanding of Human Rights

The general understanding of human rights, defined in the answer to the direct question ,,What are human rights", in September 2003, shows a positive shift in comparison to the previous two years: the percentage of respondents that interpret it in a naturalist way (as rights that naturally belong to everyone) has increased and is now on the December 2000 level (47%), when optimism due to regime change was high.

In comparison to the previous two years the share of respondents accepting the positivist view has increased, while the percentage of those who understand human rights in a realistic-political way (something that politicians resort to when it is in their interest) or as means of blackmail of smaller countries by world powers.

Graph 8: What are human rights?

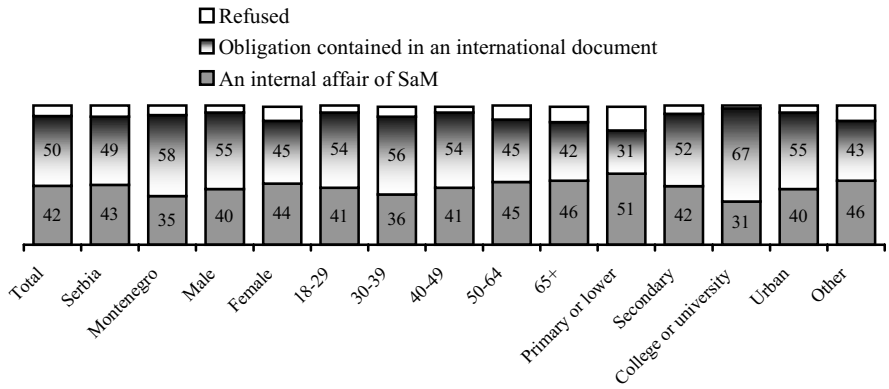


2.2. Protection of Human Rights in Serbia and Montenegro

Half of the respondents of Serbia and Montenegro did not know that human rights are protected by international law.

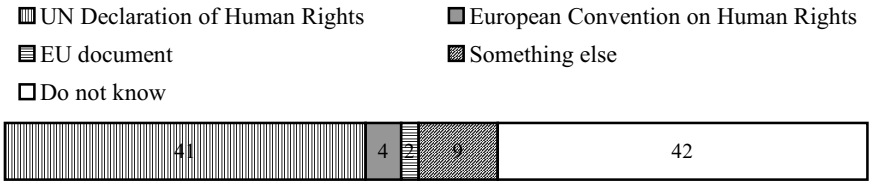
Although a smaller part of the respondents (36%) states that human rights are nothing more than a piece of paper, means in the interest of politicians or of blackmail by the international community, only half of the respondents thought that respect of human rights in Serbia and Montenegro was protected by an international document. In the remaining half, 42% thought that it was internal affair of a state, while 8% did not know the answer to this question.

Graph 9: Is respect of human rights in Serbia and Montenegro..... % of answers



42% of the half of those who thought that respect of human rights in SaM was protected by an international document did not know which document it was, 41% stated that it was the UN Declaration of Human Rights (or an UN document), 4% stated that it was the European Convention and 2% thought it was a document of the European Union. The Covenant on civil and political rights is obviously not known to the citizens of SaM.

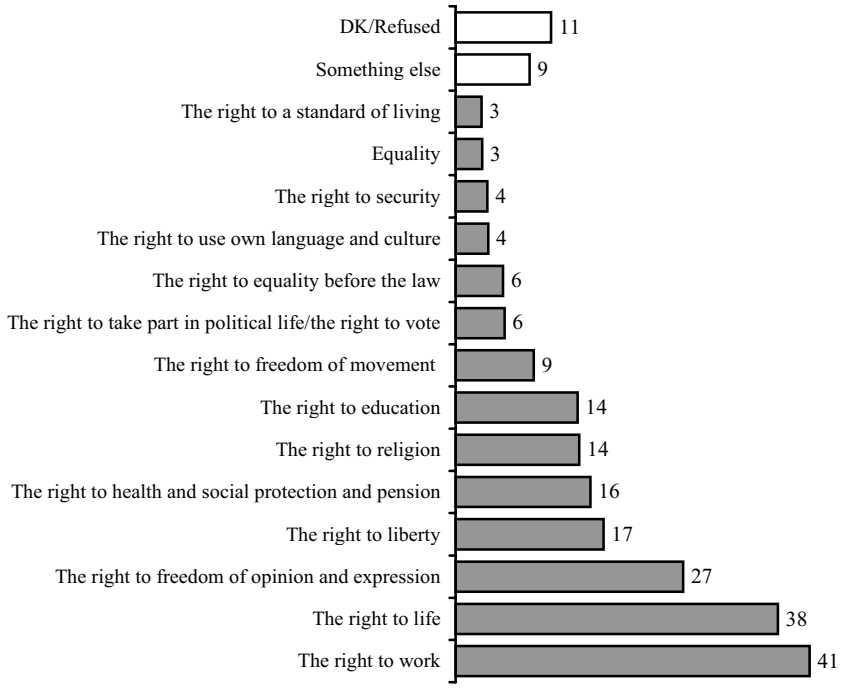
Graph 10: Which document guarantees human rights in SaM? (Percentage of answers of 50% of the population that thinks that respect of human rights in SaM is protected by an international document)



2.3. Importance of Particular Human Rights and Their Respect in SaM

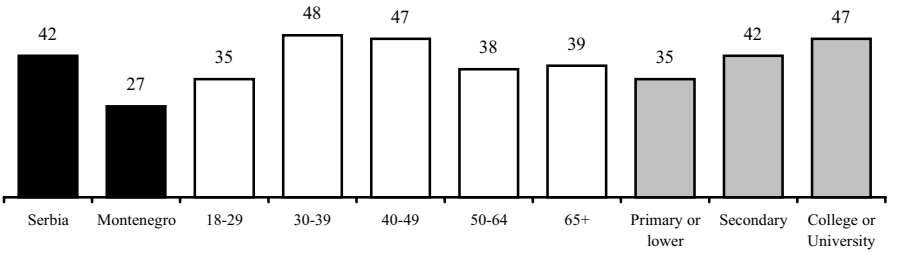
The right to work, The right to life and the right to freedom of opinion and expression were the three human rights which citizens of SaM mentioned most often spontaneously.

Graph 11: Which human rights come to mind first?



The right to work was mentioned by a larger percentage of citizens in Serbia than in Montenegro, respondents aged 30 to 50 and those with higher education.

Graph 12: % spontaneously mentioned right to work, among three human rights that first came to mind to citizens of Serbia and Montenegro, by republic, age and education



In comparison to the population average (27%), younger respondents, aged 18 to 29 (36%), respondents with college or university education (34%) and citizens

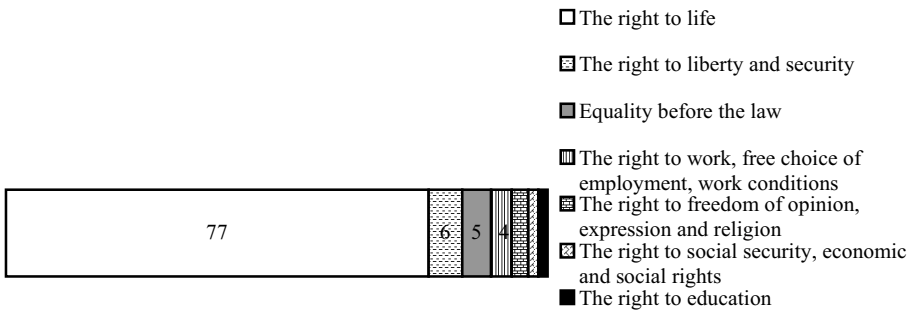
who live in urban areas (34%) more often stated *the right to freedom of opinion and expression.*

In comparison to the population average (14%), younger generations, aged 18 to 29 and 30 to 39 mentioned *the right to education* (19% and 18%).

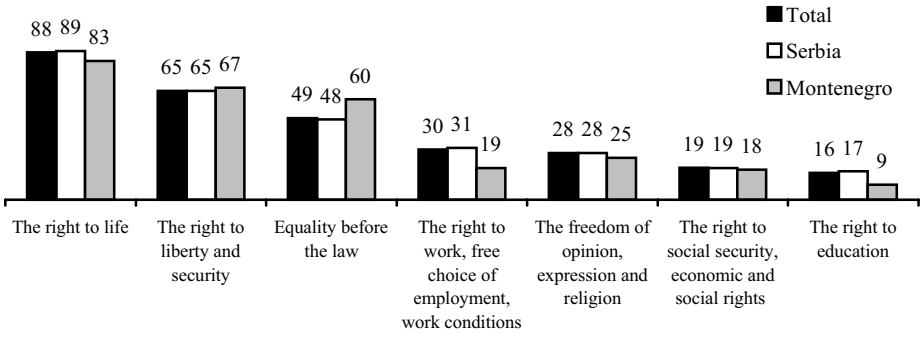
The oldest group of respondents more often than average (16%) mentioned *the right to health and social protection and pension* (21%).

The right to life is the most important right for the majority of population (77%), followed by *the right to liberty and security* and *equality before the law.*

Graph 13: The Ranking for seven human rights by importance
(% of population giving the following rights the first rank of importance out of 7 possible rights)



Graph 14: The Ranking of seven human rights by importance
(% of population that ranked the following rights as the three most important)

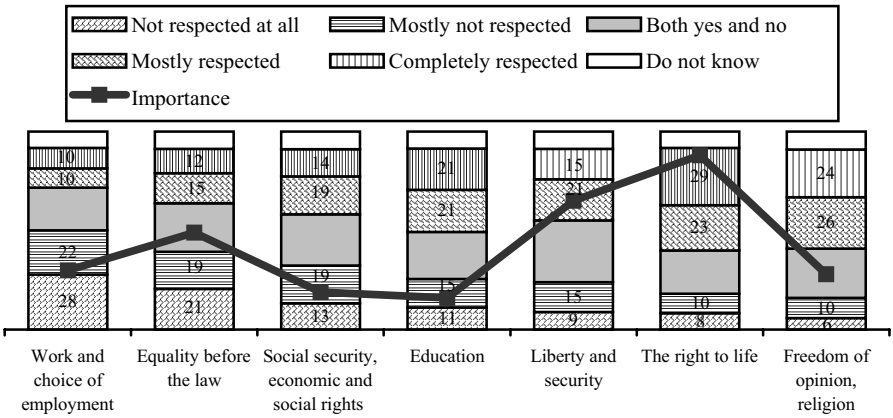


The three human rights, among seven offered, ranked as the most important were: *the right to life, the right to liberty and security* and *equality before the law.*

A higher percentage of citizens from Montenegro than from Serbia quoted *equality before the law,* while a higher percentage of citizens from Serbia quoted *the right to work, free choice of employment and favourable work conditions.*

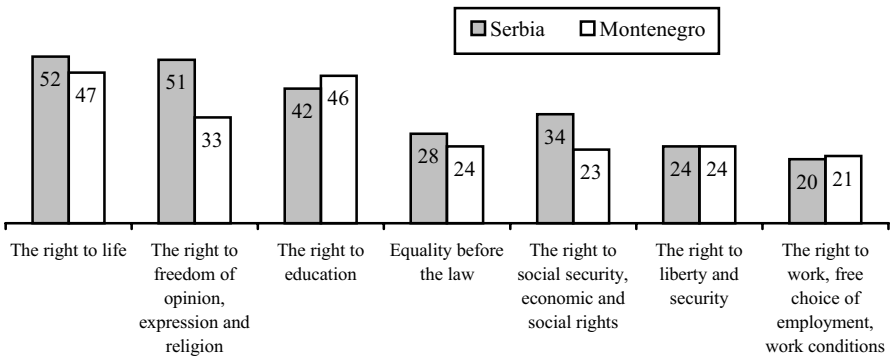
Graph 15: To what extent are the following human rights respected in Serbia and Montenegro

(% of answers in population in comparison to importance stated by ranking that right among the first three most important)



Graph 16: To what extent are the following rights respected in Serbia and Montenegro

(% of answers ,,mostly respected" and ,,completely respected")



Citizens of Serbia and Montenegro significantly differed only in determining to what extent the right to freedom of opinion, expression and religion was respected in Serbia and Montenegro: a larger number of citizens from Serbia than from

Montenegro thought that this right was respected in Serbia and Montenegro; this opinion was expressed by slightly more than half of the citizens from Serbia, and only one third of citizens from Montenegro. Somewhat more citizens from Serbia (34%) than citizens Montenegro (23%) thought that in Serbia and Montenegro the right to social security, economic, social and cultural rights was mostly respected.

3. Special Rights

The knowledge of the citizens of Serbia and Montenegro about their own rights differed significantly from right to right, but a smaller percentage of respondents was familiar with their rights, most often these were more educated citizens.

On average, citizens more often show awareness of formal protection of human rights than trust that this protection is actually realized in practice: 52% of respondents think that the right to life is respected in SaM, but 64% think that life of citizens in SaM is endangered; 70% think that in SaM there is freedom to disseminate information, but the same number thinks that there is censorship of the press; 70% of the respondents think that there is no corporal punishment in SaM, but almost half believe that the police is still resorting to it; majority of respondents (72%) think that violence in families against women and children is punishable, but that official institutions are not addressing it properly (66%); 67% of the respondents think that citizens of SaM have the right to elect their representatives in government institutions, but only 15% think that those elected represent the interests of citizens...

3.1. Prohibition of Discrimination

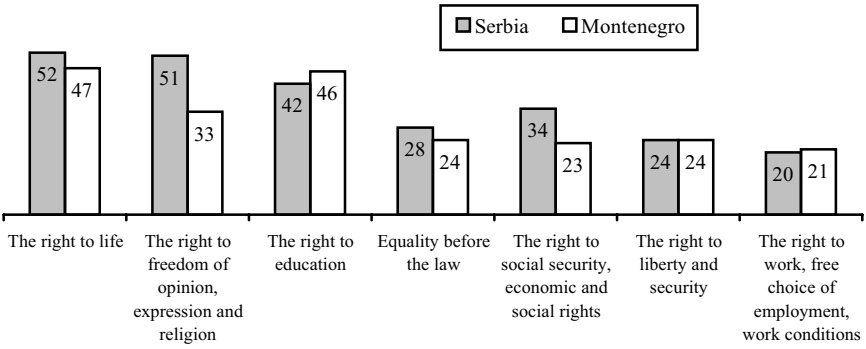
Citizens of SaM are of the opinion that regarding the discrimination of three groups-women, ethnic minorities and homosexuals-the least favorable position is that of homosexuals, then women, and that discrimination of ethnic minorities is the least significant.

More than half of the respondents, 52%, are of the opinion that there is discrimination against homosexuals, 39% think that in terms of employment and career advancement, women are in a less favourable position than men, and only 18% thought that ethnic minorities were in a less favourable position than the majority population in the same category.

In comparison to the previous year, with the exception of evaluation of presence of women in politics (which can be explained by the crises in the Serbian Parliament, whose present speaker, as well as Acting President of the Republic, was a woman), citizens of SaM showed increased sensitivity towards the possible presence of discrimination against women as well as ethnic minorities and those with homosexual orientation.

The percentage of respondents that thought women were insufficiently present in politics has decreased: in 2002, this opinion was shared by 51% of the respondents, while this year it was 42%. That women are insufficiently present in politics believes a half of the female respondents (51%) and only one third of male respondents (33%). This attitude is much more expressed by citizens with higher education.

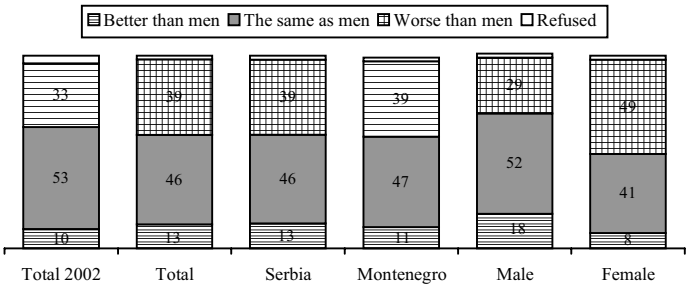
Graph 17: To what extent are women present in political life in SaM



However, in comparison to the last year, the percentage of those who thought that women had equal chances of employment and career advancement declined (from 53% to 46%), while the percentage of those who thought that women had worse chances than men increased (from 33% to 39%).

The position of women in terms of employment is evaluated by men more favorably than by women: 52% of men and 41% of women thought that men and women had equal chances, while 49% of women and only 29% of men thought that women had fewer chances in comparison to men.

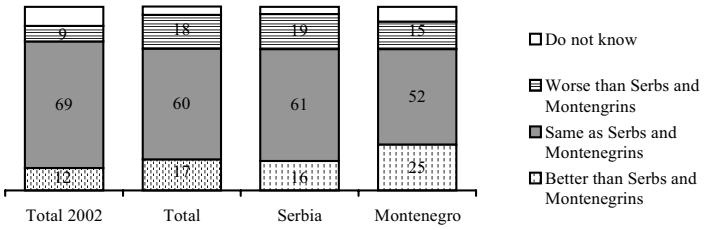
Graph 18: What chances of employment and career advancement do women have in comparison to men (% of answers)



In comparison to the last year, the percentage of the respondents who thought that ethnic minorities had equal chances of employment and career advancement as the ethnic majority decreased by 9%, but this opinion is still held by 60% of the total population.

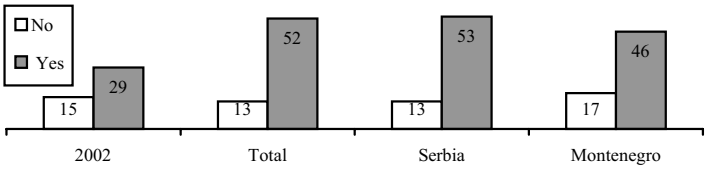
The attitude towards discrimination of women and ethnic minorities has not changed significantly in comparison to the last year: significantly a larger part of respondents thinks that in terms of employment and career advancement there is discrimination against women (39%) rather than ethnic minorities (18%).

Graph 19: What chances of employment and career advancement do ethnic minorities have in comparison to Serbs and Montenegrins – % of answers

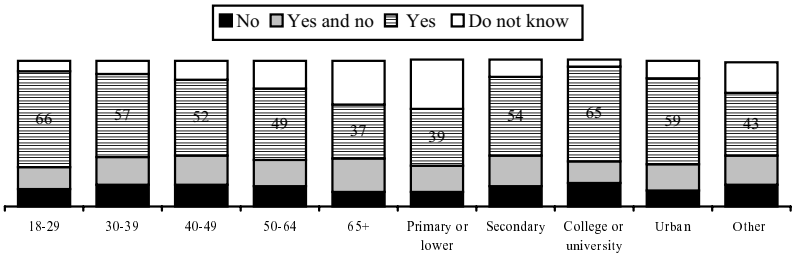


As for the attitude towards homosexuals, the percent of respondents who thought discrimination and boycott existed, increased (from 29% to 52%).

Graph 20: Is there boycott and discrimination against homosexuals in our country



Graph 21: Is there boycott and discrimination against homosexuals in our country (% of answers)



The greatest differences in the attitude towards the presence of discrimination were shown between citizens with different levels of education. Those with higher education believed more often that all mentioned forms of discrimination existed.

Younger respondents (18 to 29 year old) in larger percentage than all other segments of the population expressed the opinion that ethnic minorities have less favourable chances of employment than Serbs and Montenegrins (23%), as well as the opinion that discrimination and boycott of homosexuals existed (66%).

3.2. Right to Life

Majority of citizens (64%) are of the opinion that life of citizens in SaM is endangered, primarily by bad economic situation.

This attitude was expressed more by citizens in Serbia (65%) than those of Montenegro (58%).

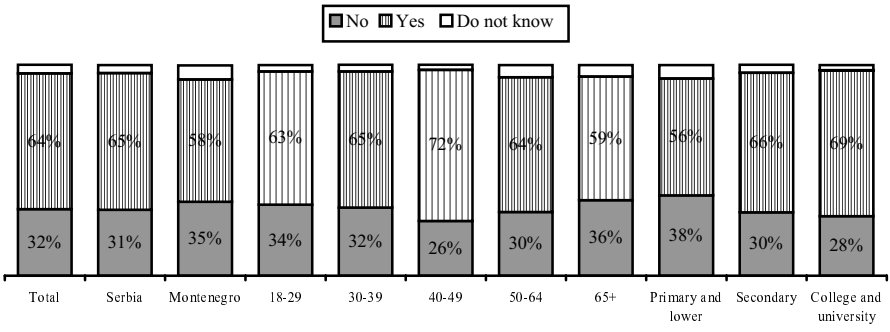
About 65% of those who thought that life of citizens in SaM was endangered (which makes 42% of the total population) spontaneously mentioned some of the reasons connected to the economic situation in the country: low standard (41%), unemployment (14%), undeveloped economy (12%).

Economic reasons were mentioned somewhat more in Montenegro than in Serbia.

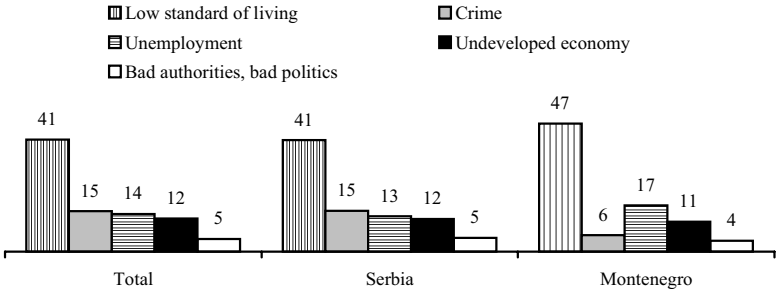
Crime as a source of threat was mentioned by 15% of Serbian interviewees (about 10% of the total population of Serbia), but only 6% in Montenegro (3% of the total population of Montenegro).

Majority of respondents of SaM (nearly 80%) agreed that life of SaM citizens was more endangered than life of citizens in EU countries.

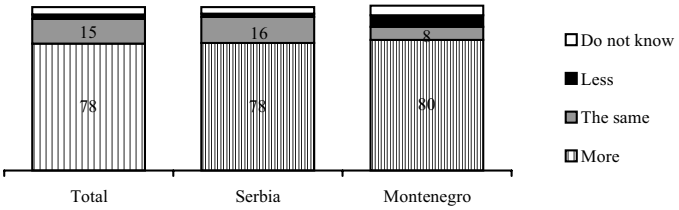
Graph 22: Is life of citizens in SaM endangered in any way



Graph 23: What endangers the life of citizens most -spontaneous answers of the population that thinks life of citizens in SaM is endangered (up to 3 answers)

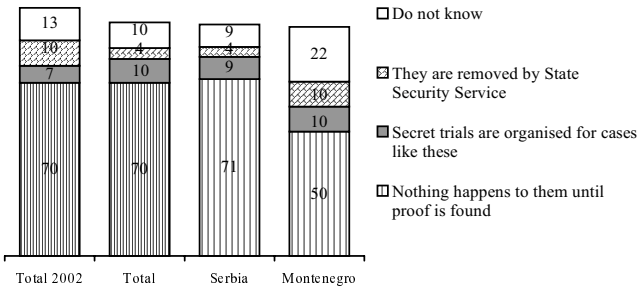


Graph 24: To what extent is life of citizens in SaM endangered in comparison to EU countries



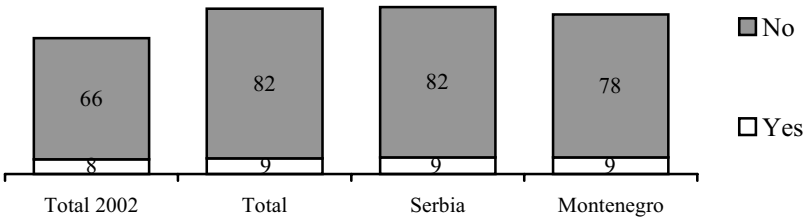
Although majority of citizens think that the right to life of average citizens in SaM is endangered mostly by hard economic situation, majority of them find that the right to life of hardened criminals is mostly respected: 70% of the respondents think that hardened criminals are left alone until proof is found for their crimes, which is the same attitude the respondents had last year.

Graph 25: What happens to those who are hardened criminals, but there is no evidence to back this up



In comparison to the last year, the number of citizens who think that there is no capital punishment in SaM has risen sharply, from 66% to 82%.

Graph 26: Is there capital punishment in SaM

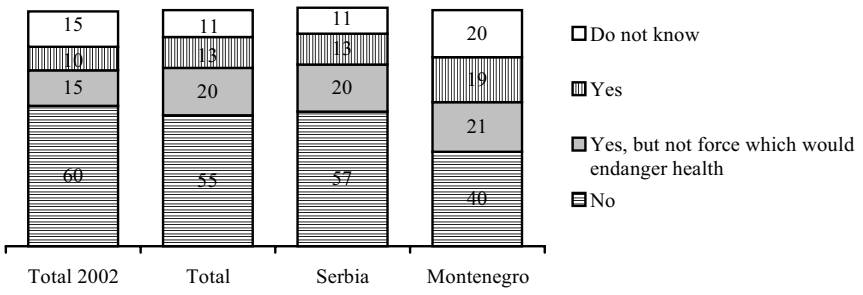


3.3. Prohibition of Torture, Inhuman or Degrading Treatment or Punishment

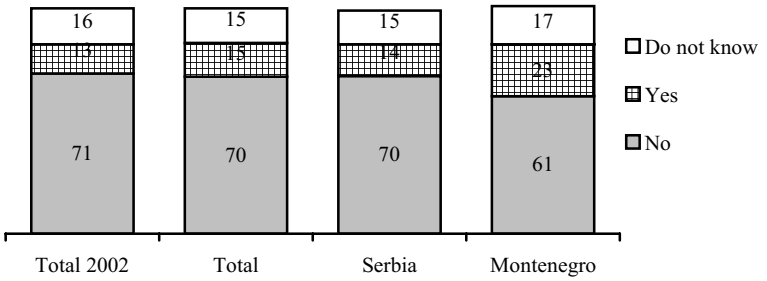
Although the majority of SaM citizens think that the use of force in obtaining confession (55%) and corporal punishment is not allowed (70%), almost half of the respondents (49%) think that police, regardless of the law, uses corporal punishment, and one quarter (26%) thinks that police uses corporal punishment in cases of serious crime.

The percentage of respondents who thought that the use of force in obtaining confession was not permitted is slightly smaller than last year, while the number of those who believed that the use of force was permitted has increased (from 25% to 33%), although most of them still think that the use of force is allowed up to a point where it does not endanger health (20%). A higher percentage of Montenegrin citizens than Serbian citizens think that the use of force in order to obtain confession is permitted.

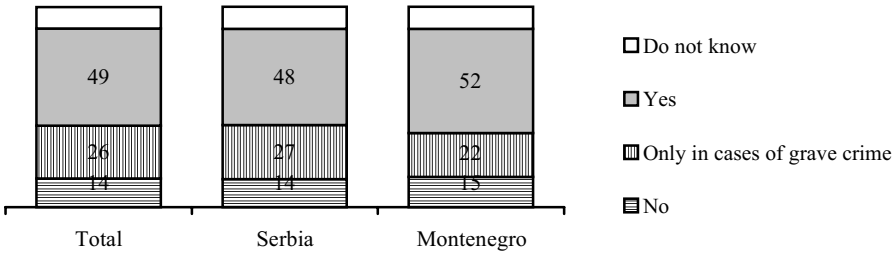
Graph 27: Is the use of force over those accused of grave offences permitted in order to obtain confession?



Graph 28: Is there corporal punishment in SaM

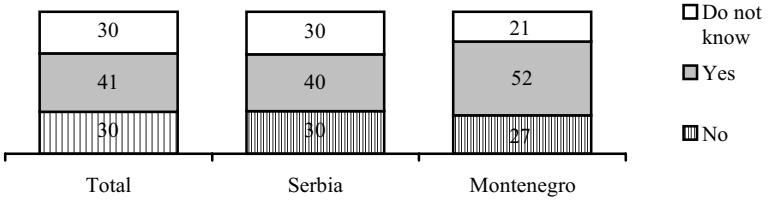


Graph 29: Do the police resort to corporal punishment, even though the law prohibits it?



Almost one third of the respondents do not know the obligations of the state to provide refuge for those whose life is endangered in their country of origin, 41% think that the sate is bound to give them refuge and 30% think that it is not. A much larger number of Montenegrin citizens (52%) than those from Serbia think that the state has this obligation.

Graph 30: Does our state have an obligation to give refuge to those whose life or corporal integrity has been endangered in their country of origin?

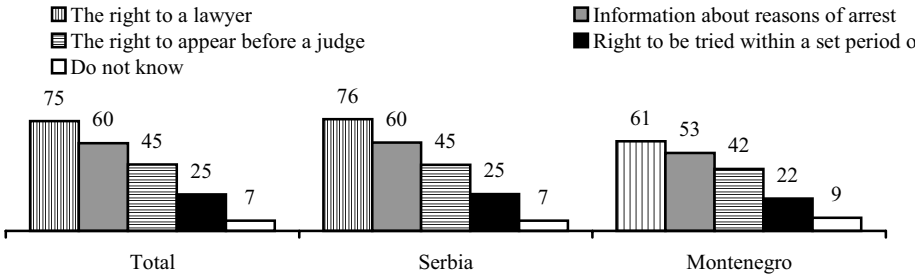


3.4. Liberty and Security of the Person; Treatment of Prisoners

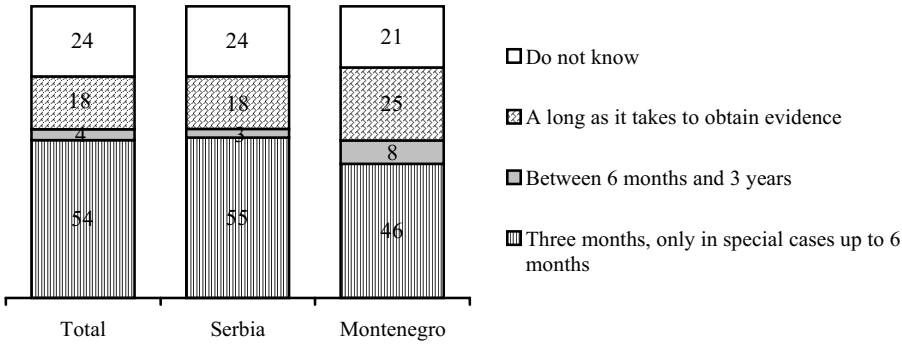
On average, less than half of the respondents were familiar with the rights of the detained: the majority thought that the arrested had the right to a lawyer (75%) and information on the reasons for arrest (60%), but less than a half claimed that such a person had the right to see a judge (45%), while only one quarter thought that such a person was entitled to a trial within a certain period of time.

Only slightly more than half of the respondents gave the correct answer to the question of maximum custody period permitted by law in SaM, and only one third gave the correct answer to the question about the time limit in which the arrested should appear before the judge.

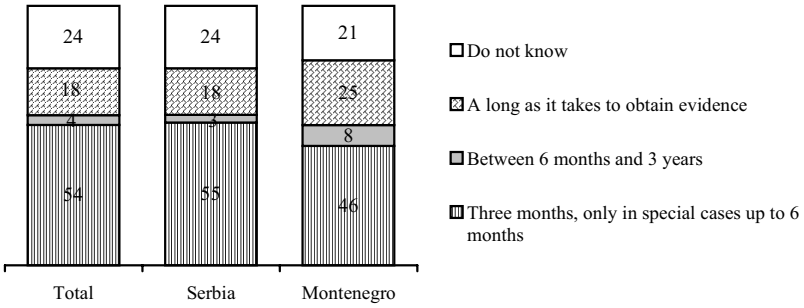
Graph 31: What are the rights of the detained, what obligations do the police have towards that person



Graph 32: How long, according to our law, can the detained person be kept in custody for investigation?



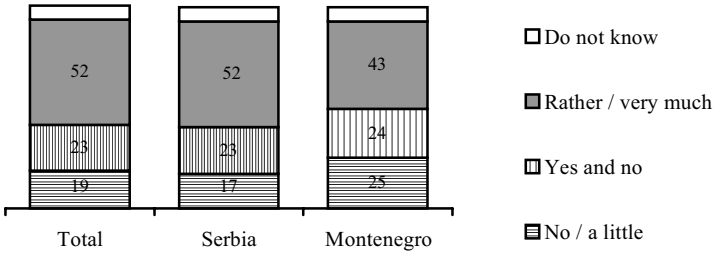
Graph 33: When should the detained person appear before a judge?



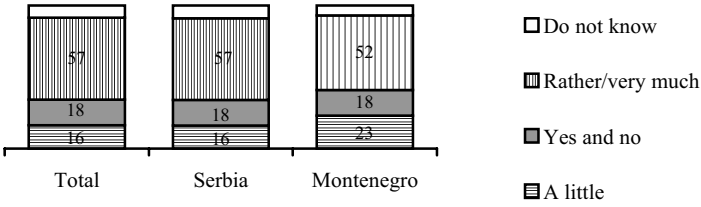
3.5. Prohibition of Slavery and Forced Labor

Slightly more than a half of the respondents, 52%, thought that sex trafficking was present in SaM to quite a large or very large extent, 57% thought that this form of crime was very serious for the society, and 75% that official institutions were not addressing this problem in a sufficient manner.

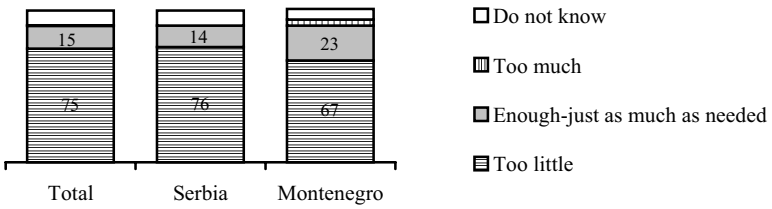
Graph 34: To what extent is sex trafficking present in SaM



Graph 35: How serious is this type of crime for the society?



Graph 36: To what extent are official institutions addressing this problem?

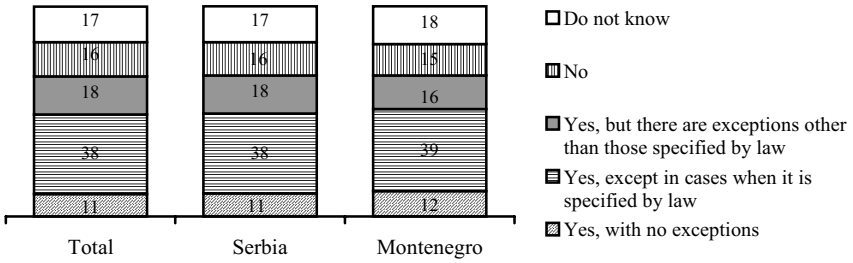


3.6. Right to a Fair Trial

On average, less than one half of the respondents expressed that in SaM the right to a fair trial was respected without exceptions and that judges were good and independent.

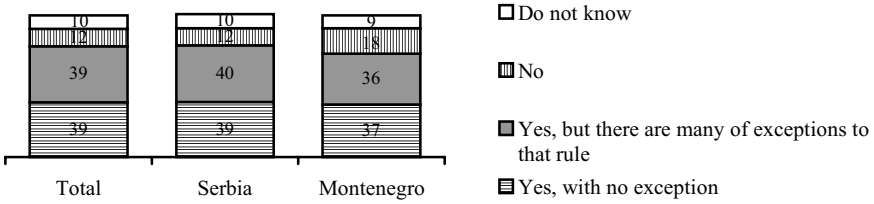
Slightly less than a half of the respondents (49%) thinks that the right to a public trial is applied with the exception of cases when it is not specified by law.

Graph 37: Is the right of public judicial trial respected in SaM?



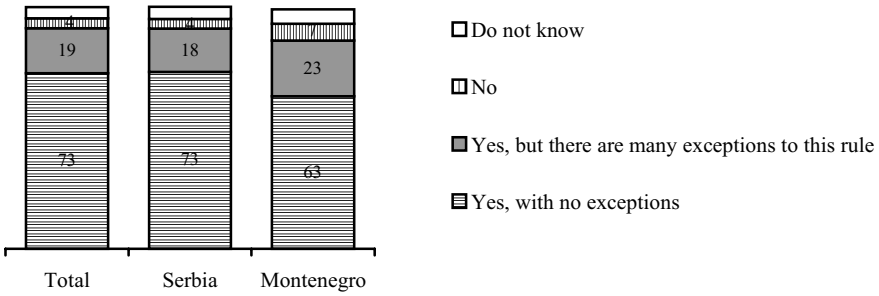
39% of the respondents believe that in SaM the rule that everybody is presumed innocent until proved guilty is applied without exception.

Graph 38: Is in SaM the rule that everybody is presumed innocent until proven guilty applied?



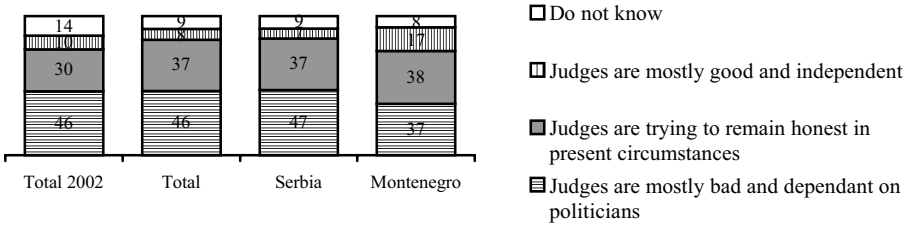
With regards to respect of the right to a fair trial, the majority of the respondents only believes in the respect of the right to the choice of legal counsel, 73%.

Graph 39: Is everyone entitled to choose freely the lawyer to represent them?



Only 10% of the respondents thought that judges were good and independent, and 46% thought that judges were bad and dependent on politicians, while 30% thought that judges were at least trying to remain honest in present circumstances.

Graph 40: What is your opinion of the judges that are at present administering justice in SaM? Which attitude comes closest to your own?

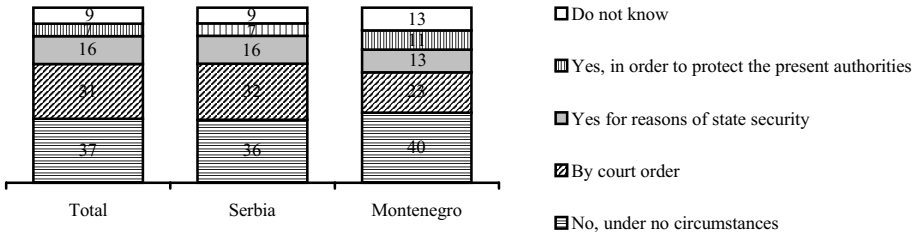


3.7. Protection of Privacy, Family, Home and Correspondence

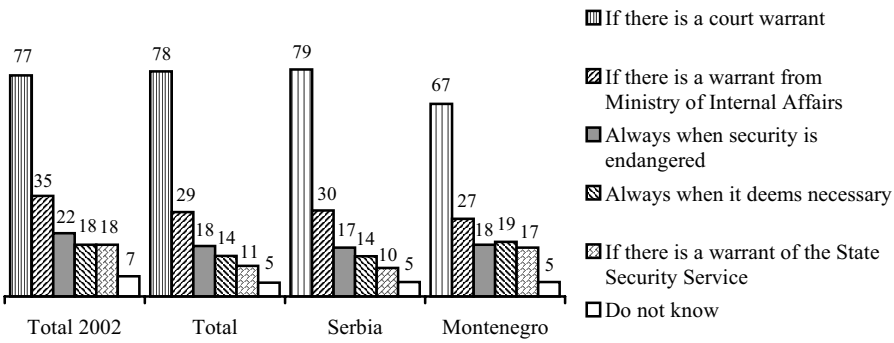
Most SaM citizens think that the protection of private life, family, home and correspondence in SaM can be infringed under various circumstances: a larger percentage thinks that this is permitted by the decision of the court, a smaller percentage thinks that it is permitted whenever security is endangered, based on a warrant issued by Ministry of Internal Affairs, State Security Service, even based only on police estimate.

Somewhat more than one third of the respondents, 37%, think that letter opening and phone tapping is not permitted under any circumstances, 54% think that it is permitted under different circumstances: a little less than one third, 31%, think that it is permitted on authorization from a court, 16% think that it is permitted for reasons of state security and 7% think it is permitted for the purpose of protection of the powers-to-be.

Graph 41: Is it permitted to open letters and tap telephones in SaM?



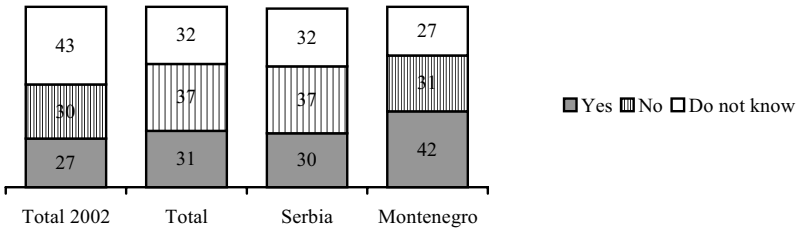
Graph 42: In what cases can the police search private homes? (Multiple answers)



3.8. Freedom of Thought, Conscience and Religion

SaM citizens had divided opinions on whether school curricula in SaM had to be in accordance with an official program: 31% thought that school curricula had to be in accordance with some official program, 37% thought it did not; 32% did not know.

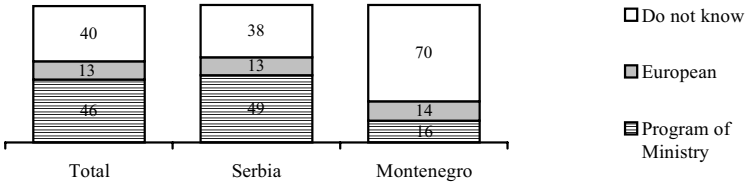
Graph 43: Do school curricula in our country have to be in accordance with an official programme?



Out of 30% of the respondents who think that school curricula must be in accordance with an official program, 46% stated that this program was program of a Ministry, and 40% did not know which program that could be.

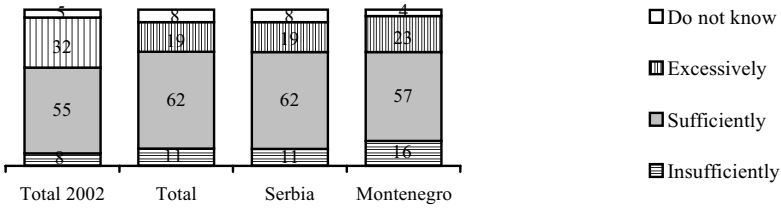
In Montenegro, out of 42% of citizens that thought school curricula had to be in accordance with an official program, majority (70%) did not know which program that could be.

Graph 44: Which official program?
(% of spontaneously given answers by part of the population (30%) who thought that school curricula had to be in accordance with an official programme)



As for the right to freedom of religious beliefs, respondents showed greater accordance: 62% of the respondents thought that this right was present in a sufficient extent, about one fifth thought that it was present excessively, while 10% thought that this right was too limited.

Graph 45: To what extent is the right to freedom of religious belief and manifestation present?



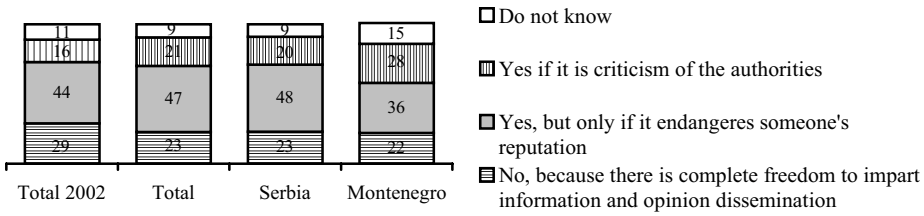
3.9. Freedom of Expression

Opinions on the status of the right to freedom of expression in SaM are contradictory: Although the majority of the respondents (70%) thought that in SaM the right to freedom of expression and information was respected, 42% thought that there was censorship of artistic work, and as many as 70% thought that censorship of the printed media existed, either officially (31%) or unofficially (39%).

Out of 70% of those who thought that in SaM the right to the freedom of information existed, 23% thought that this freedom was not limited, while 47% thought that limitations existed to protect someone's reputation.

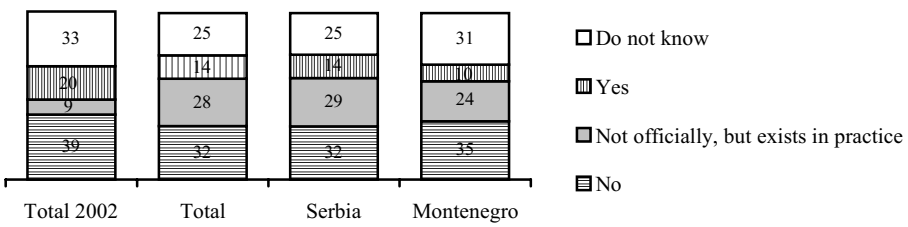
Every fifth citizen thinks that in SaM dissemination of information that criticizes the authorities is punishable.

Graph 46: Can a person imparting information and opinion be punished?

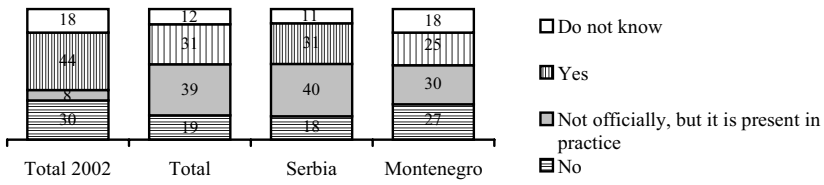


14% of the respondents thinks that there is official censorship of artistic work, and 28% thinks that censorship officially does not exist but is practiced unofficially

Graph 47: Does censorship of artistic work exist in our country?



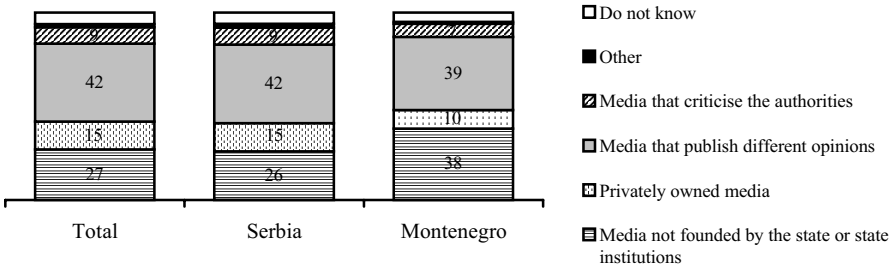
Graph 48: Is there censorship of the printed media?



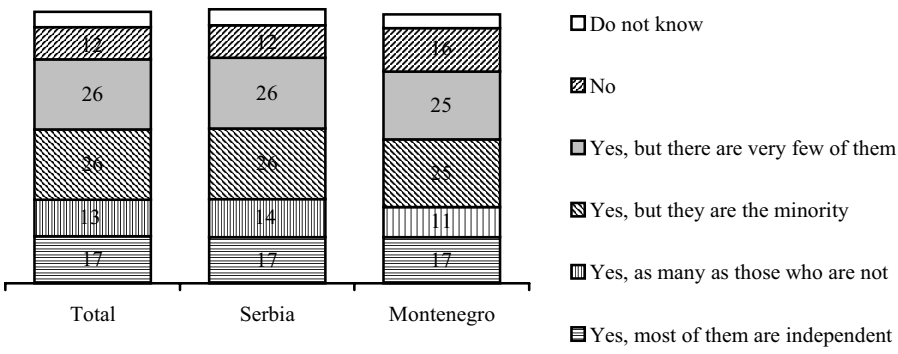
SaM citizens, when asked what independent media are, mostly mean ,,the media that will publish different opinions" (42%), and then ,,the media that were not founded by the state or state institutions" (27%).

About half of the respondents thinks that independent media are in the minority (there are very few of them, in comparison to those who are not independent 26%), while slightly less than one third think that there is an equal number of independent media as those who are not (13%) or that the former are even in the majority (17%).

Graph 49: What is meant by ,,independent media"

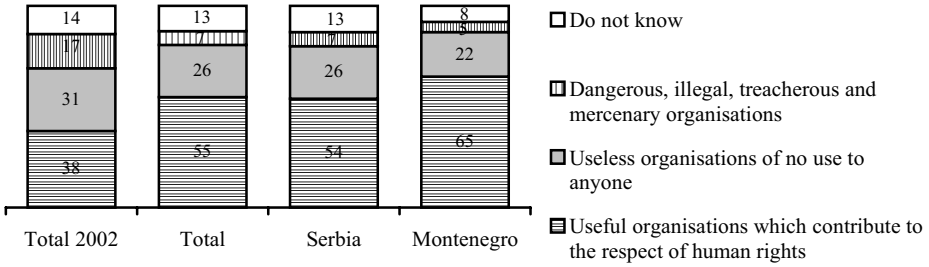


Graph 50: Are there any independent media in our country



Majority of the respondents expressed a positive attitude towards organizations which deal with violations of human rights: 55% think that they are useful and contribute to the respect of human rights; this percentage is significantly higher than before. The percentage of respondents who thought that these were useless organizations has decreased (from 31% to 26%), and the percentage of those who regard them as dangerous treacherous organizations is now only 7% (17% last year).

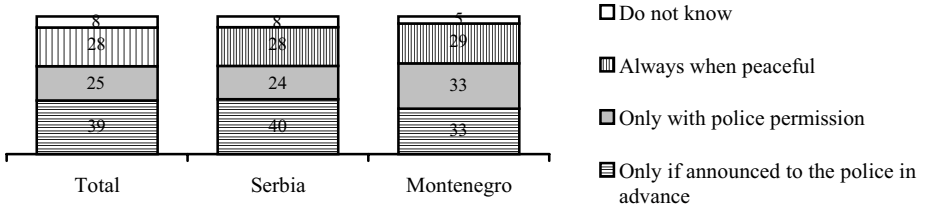
Graph 51: What do you think of organizations that deal with violations of human rights



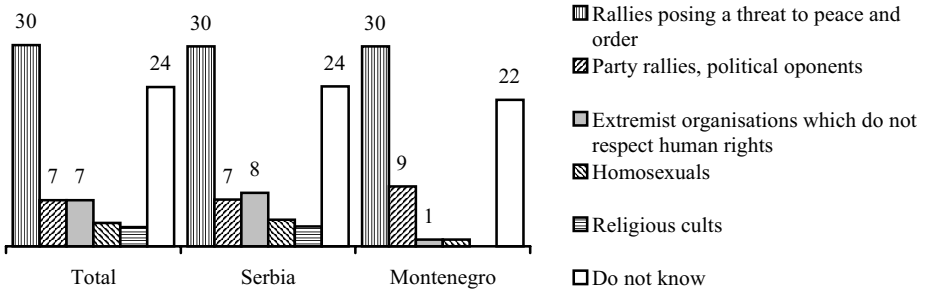
3.10. Freedom of Peaceful Assembly

Majority of citizens think that law allows assembly in SaM without special permission: 39% think that it suffices to submit an announcement to the police, while 28% think that assembly is always allowed when peaceful. One quarter of the respondents thought that this required a special police permission, which, according to one third of this part of the respondents, can be refused if the assembly is a rally posing a threat to peace and order.

Graph 52: Under what circumstances is peaceful assembly in public places permitted by law?



Graph 53: Who can be refused the right to assembly?
(Answers of 33% of the population that thought assembly required a permission)



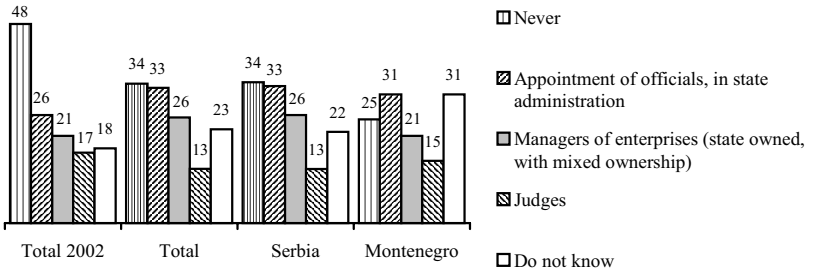
3.11. Freedom of Association

Majority of the respondents (66%) either believe that when nominating candidates for at least some of the positions it is required by law that the candidate is a member of the ruling party (43%) or they do not know what the legal requirements are (23%).

Only 34% of the respondents think that law does not require that the candidate for any position should be a member of the ruling party. Part of the respondents that had this opinion was largely reduced in comparison to the last year, when 48% of the citizens were of this opinion.

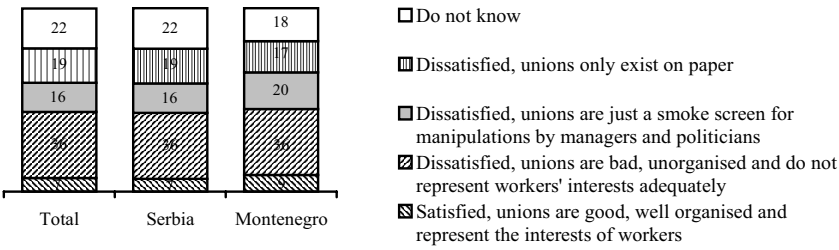
The most frequently mentioned positions for which the citizens thought it was legally required for a candidate to be in some ruling party, were positions in state administration (33%), then positions of managers of state and mixed ownership companies, while 13% thought that the membership was required in the election of judges. Nearly one quarter of the respondents (23%) did not know what the legal requirements were.

Graph 54: When is membership in a ruling party required by law (Multiple answers)



Most citizens (71%) are not satisfied with the way that trade unions function: 36% think that they are unorganized and do not represent real interests of workers, 16% think that they are just a smoke screen for manipulations by managers and politicians, while 19% think that unions exist only on paper.

Graph 55: Are you satisfied with the way that trade unions function



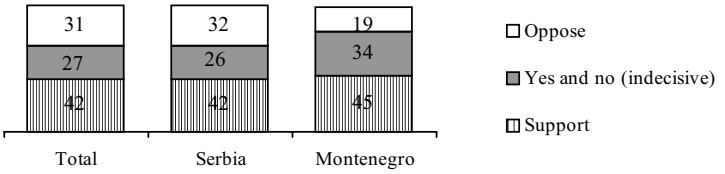
3.12. Peaceful Enjoyment of Property

Less than half of the respondents (42%), support privatization, almost one third (31%) opposes it, and the remaining 27% do not have a clear stand on this.

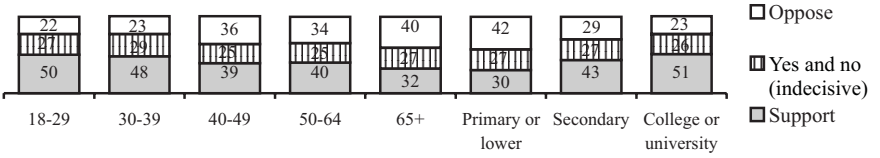
Privatization is much more supported by younger generations, and part of the respondents with higher education.

Most of those who oppose it or are indecisive would support privatization provided that there were programs for social protection of workers, if they were certain that the money from privatization would be spent adequately and that enterprises would be sold at their real price; a somewhat smaller number of opponents and those who are indecisive could accept privatization if enterprises were to be sold to SaM citizens.

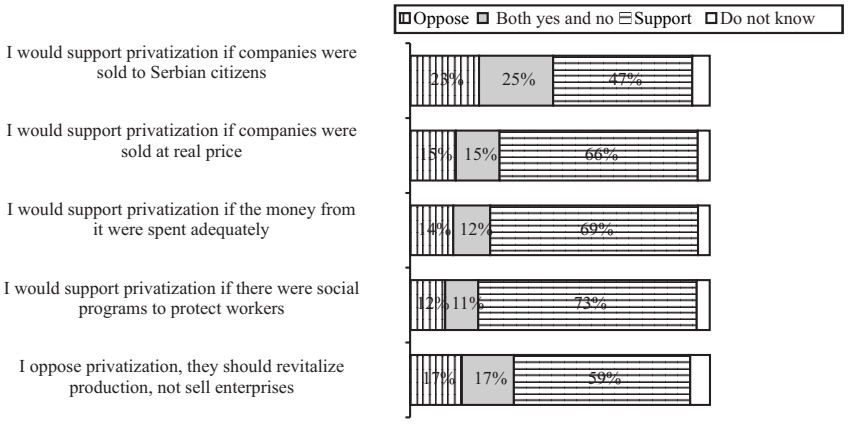
Graph 56: Do you support or oppose privatization of state owned enterprises



Graph 57: Do you support or oppose privatization of state owned enterprises

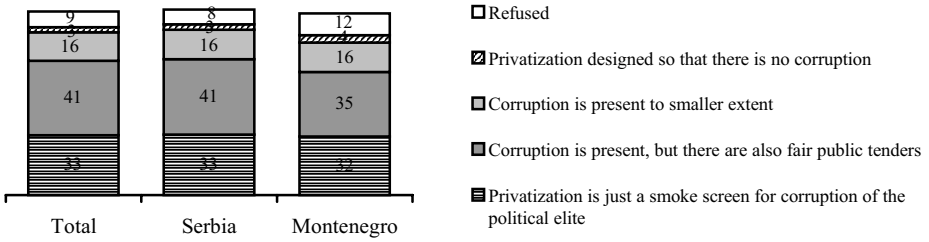


Graph 58: Would you support or oppose privatization on following conditions (58% of those who oppose privatization or are indecisive)



SaM citizens share a general feeling that corruption is present in the privatization process, they differ in opinion to what extent: one third (33%) believe that privatization is only a smoke screen for corruption, 41% think that corruption is present but that there are also fairly conducted public tenders, while 16% thinks that corruption is present to a smaller extent. Only 3% of the respondents believe that there is no corruption.

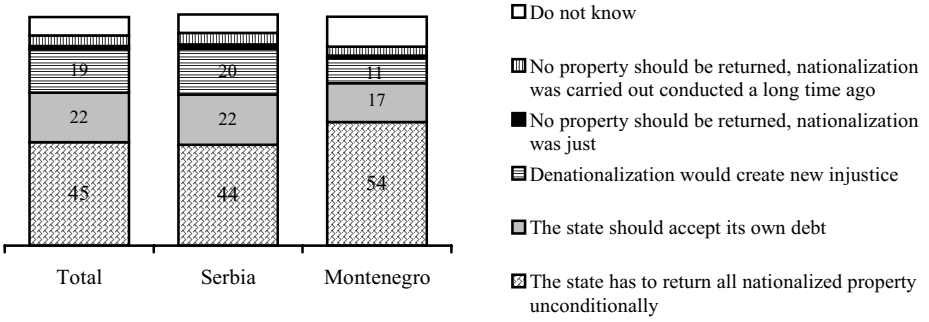
Graph 59: To what extent is corruption present in privatization process



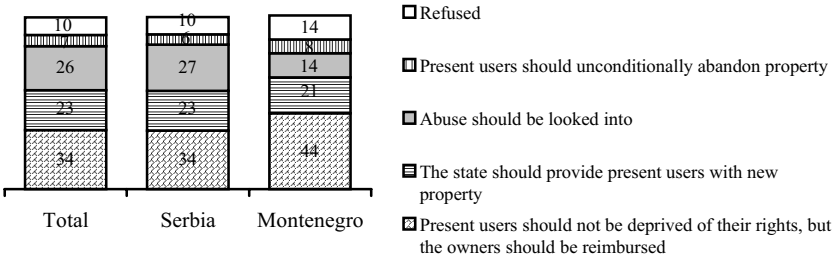
Most citizens think that the state is bound to compensate to the original owners, either by returning nationalized property (45%) or by accepting the debt, to be be repaid in some other way (22%).

More than half of the respondents (57%) think that the state is also bound to take over responsibility for the present owners of nationalized property, either by compensation to original owners without revoking rights of present owners (34%), or by ensuring that present owners are given other property. Somewhat more than one quarter of the respondents (26%) think, however, that present users who came into possession of nationalized property through abuse of their position should be deprived of property unconditionally, and those who obtained nationalized property without their fault should be reimbursed in a satisfactory way.

Graph 60: Considering denationalization, which of the attitude comes closest to your own...



Graph 61: In case of denationalization, what happens to present users of nationalized property



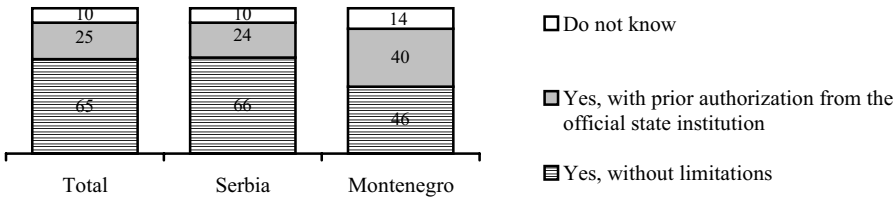
3.13. Minority Rights

According to the respondents view, rights that the state grants to ethnic minorities to use their mother tongue are wider than they should be: 65% think that ethnic minorities in SaM have the right to publish books and attend schools in their mother tongue, without any limitations, but only slightly more than half (52%) approve of this policy; 16% would limit these rights to disloyal ethnic minorities, and 26% to all ethnic minorities.

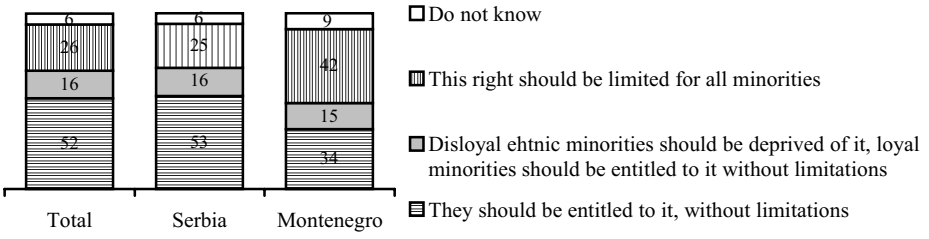
Citizens from Montenegro perceive the state as less tolerant regarding the right to use the language of ethnic minorities, than Serbian citizens; 40% of Montenegro citizens, and 24% of Serbian citizens think that this requires an authorization from the official institutions.

Citizens from Montenegro also have a less tolerant attitude toward the use of the language of ethnic minorities than Serbian citizens: 34% of citizens from Montenegro and 53% from Serbia think that ethnic minorities should have the right to publish books and receive education in their mother tongue, without any limitations, while 42% of Montenegrin citizens and 25% of Serbian citizens think that this right should be limited for all ethnic minorities.

Graph 62: Do ethnic minorities have the right to publish books and attend schools in their mother tongue



Graph 63: What is your personal opinion on the right of ethnic minorities to publish books and attend schools in their mother tongue



Tolerance towards ethnic minorities, measured by ethnic distance, (acceptance-disapproval of ethnic minorities being citizens of SaM, neighbors and superiors or becoming members of families by marriage), shows that citizens express the greatest intolerance towards Albanians and Moslems/Bosniaks, and in Montenegro towards Roma.

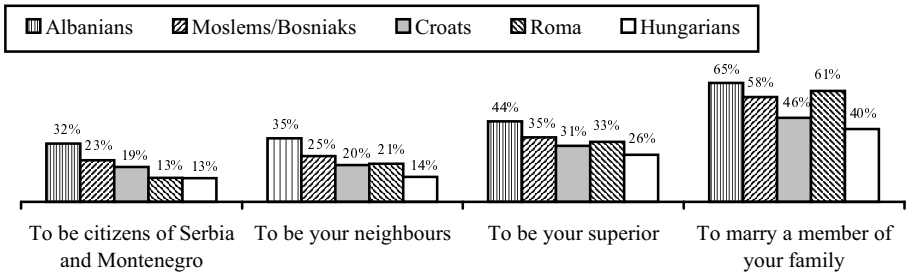
Almost one third of the respondents (32%) is opposed to the idea that Albanians should be citizens of SaM, and 23% oppose the same idea regarding Moslems/Bosniaks.

More than one third of the respondents (35%) think that they would resent having an Albanian as their neighbor.

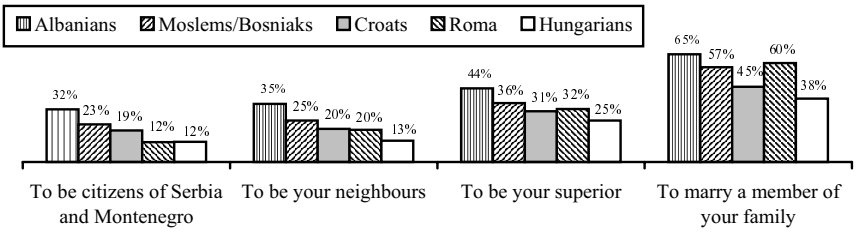
44% would object to having an Albanian as their superior, 35% would object if that were a Moslem/Bosniak, 33% to a Roma, 31% to a Croatian and 26% would object if that were a Hungarian.

The majority of the respondents would disagree if a member of their family were to marry an Albanian (65%), a Roma (61%) and a Moslem/Bosniak (58%), slightly less than a half would object to a Croat (46%) and a Hungarian (40%).

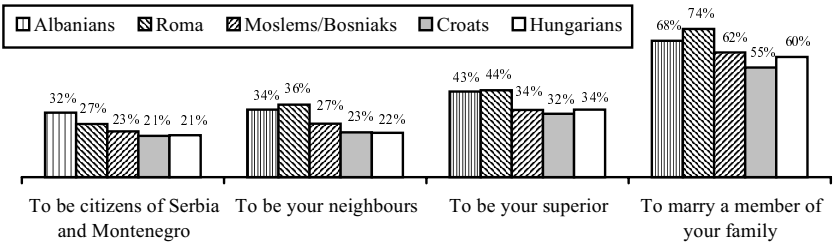
Graph 64: Ethnic distance - Would you mind if members of the following nations were ...
(% of „YES" answers)



Graph 65: Serbia – Would you mind if members of the following nations were ... (% of ,,YES" answers)



Graph 66: Montenegro – Would you mind if members of the following nations were ... (% of ,,YES" answers)



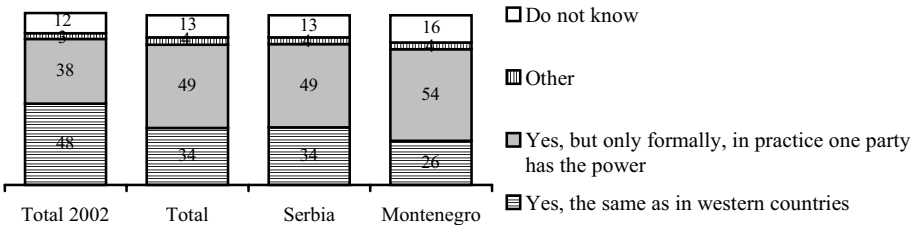
3.14. Political Rights

The majority of the respondents think that political rights in Serbia and Montenegro exist formally more than they are respected in practice.

Almost half of the respondents (49%) think that the multi-party system in SaM exists only formally, while practically only one party has all the power. The percentage of citizens who had this opinion has significantly risen in comparison to the previous year, when this opinion was expressed but 38% of the respondents.

Only one third of the respondents (34%) think that the multi-party system in SaM is the same as the system which exists in western countries, and in Montenegro only 26% of the citizens were of this opinion.

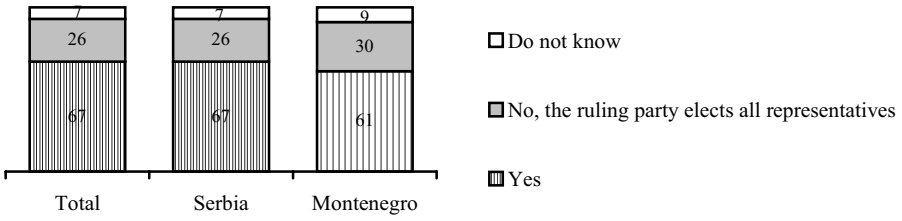
Graph 67: Is multi-party system in SaM the same as in the western countries



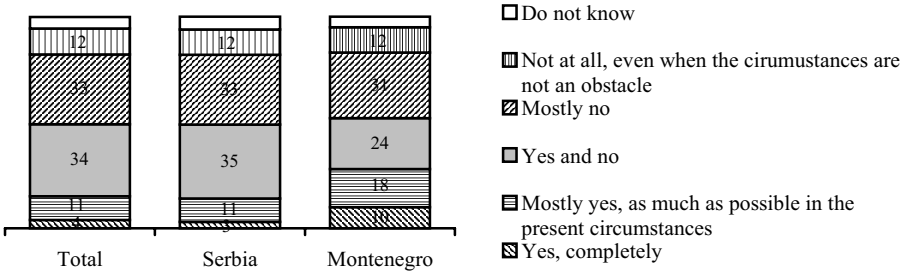
Majority of citizens, 67%, think that nationals of SaM have the right to elect their representatives in government bodies, but only 15% think that elected representatives represent the interests of the people in a way they promised they would in their pre election campaign. (4% fully represent, 11% represent as much as possible in the given circumstances).

45% of citizens think that elected representatives do not represent the interests of those who elected them (33% think that they mostly do not represent interests or not at all, even when the circumstances are not an obstacle).

Graph 68: Do the citizens have the right to elect representatives to government bodies



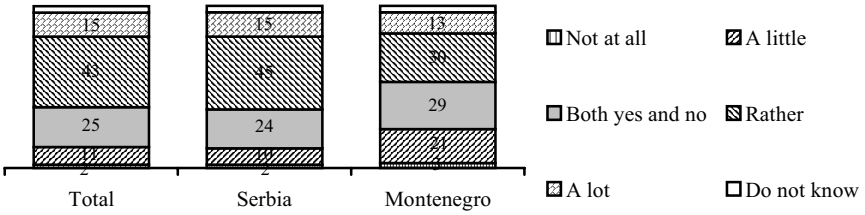
Graph 69: Do elected representatives represent the interests they promoted in electoral campaigns



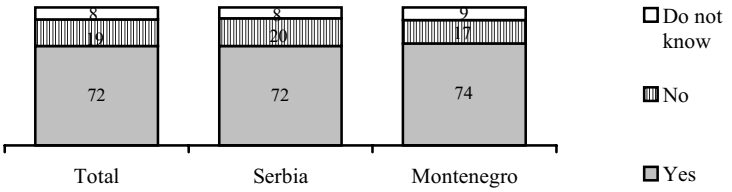
3.15. Special Protection of the Family and the Child

The majority of respondents (58%) believe that family violence against women and children is present in SaM to a large extent, that it is punishable (72%), but that official institutions are not dealing with this matter adequately.

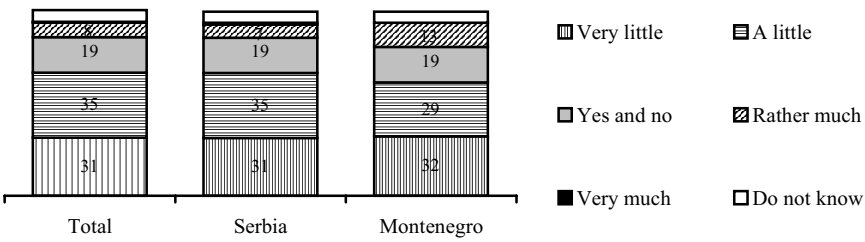
Graph 70: To what extent is violence against women and children in families present in our country



Graph 71: Is family violence against women and children punishable by law

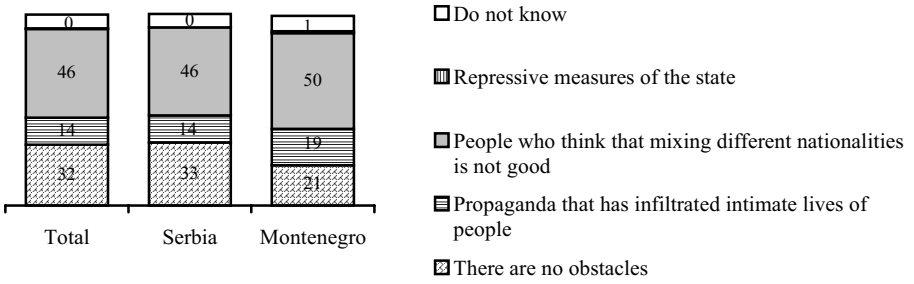


Graph 72: To what extent are official institutions addressing this problem



About one third of the respondents (32%) think that there are no obstacles to enter in mixed marriages in SaM, but even if they existed, they lie primarily with the people who are against mixing of different nationalities (46%), or in propaganda which has infiltrated intimate lives of people (14%), and not in the least in repressive measures of the state.

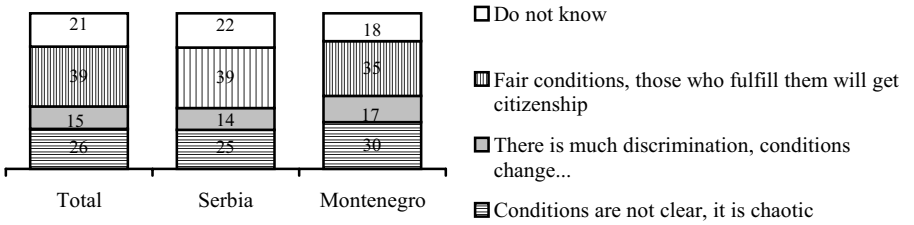
Graph 73: What is the greatest obstacle entering into mixed marriages in our country, if there are any



3.16. Right to Citizenship

Citizens differed in their opinions on the right to citizenship: 39% thought that the conditions for obtaining SaM citizenship were fair and that every person that fulfils them could become national, while 41% thought that the situation was chaotic, either because conditions were not clearly defined (29%) or because they were often changed so that there was much discrimination (15%). Every fifth citizen could not answer this question.

Graph 74: Regarding the conditions for obtaining SaM citizenship, which attitude comes closest to your own

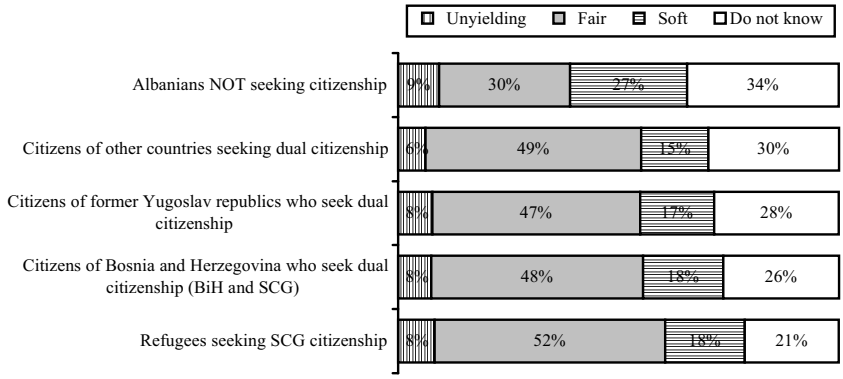


Regarding the attitude of the state towards different groups of people with unclear nationality status, the most frequent opinion was that the attitude of the state was satisfactory.

Citizens were of the opinion that regarding citizenship refugees seeking SaM citizenship were given the most favorable treatment by the state, the state had an appropriate (52%) or even soft (18%) attitude towards them.

The attitude of the state towards Albanians *not* seeking citizenship was more often characterized by citizens as soft (27%), than the attitude it had towards other groups. More than one third of the respondents (34%), was not able to assess attitude of the state towards this group.

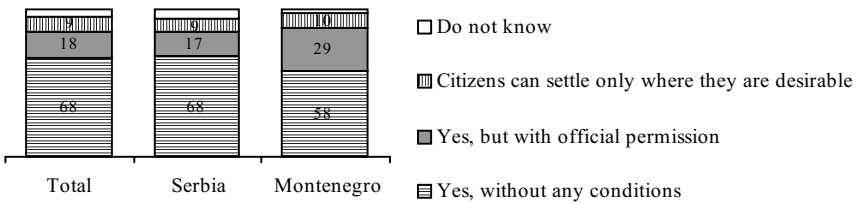
Graph 75: What is the attitude of the state towards...



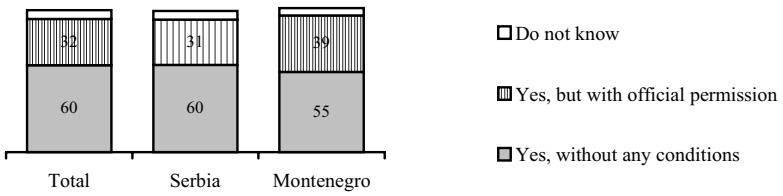
3.17. Freedom of Movement

Although most citizens think that the right to freedom of movement is respected in SaM (68% think that every citizens of SaM can settle wherever he/she wants and 60% think that every citizen can leave SaM without any conditions), almost one third still think that there are some limitations of the right to freedom of movement (18% think that citizens can settle where they want, but with official permission; 9% think that they can settle where they are desirable; 32% that in order to leave SaM an official permission of official institutions is required).

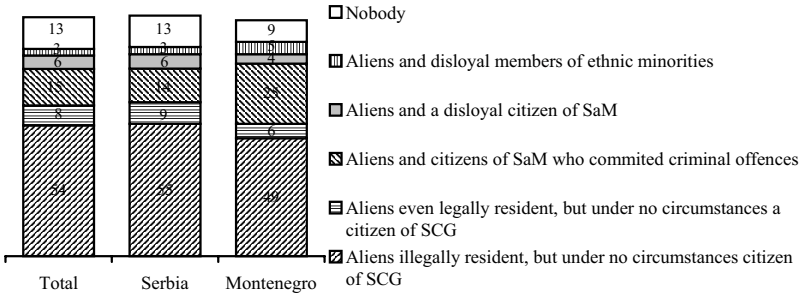
Graph 76: Can every citizen of SaM settle where he/she wants



Graph 77: Can every citizen leave SaM freely



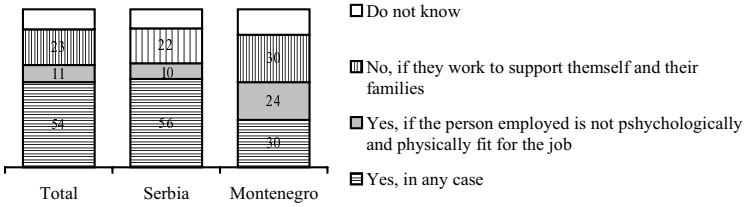
Graph 78: Who can be expelled by our country



3.18. Economic, Social and Cultural Rights

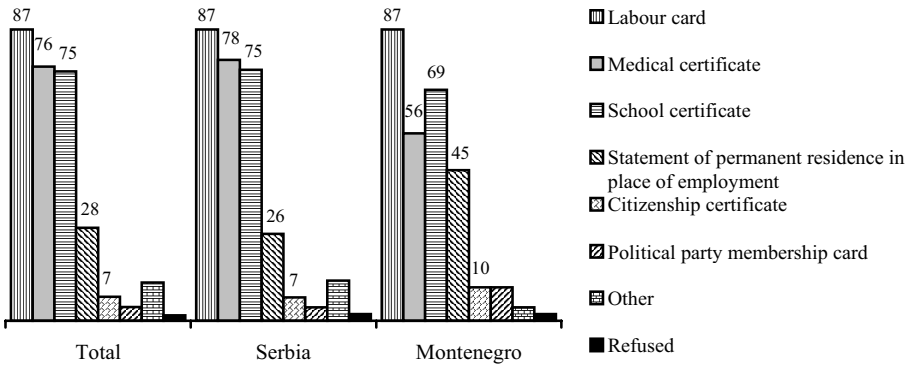
Slightly more than half of the respondents (54%) are familiar with the rule that employing persons under 16 years of age is punishable.

Graph 79: Is employing persons under 16 punishable



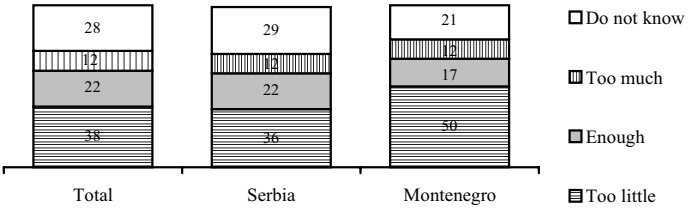
SaM citizens think that in order to be employed it is required to have: labour card (87%), medical certificate (76%) and school certificate (75%).

Graph 80: Which documents are required for employment (multiple answers)

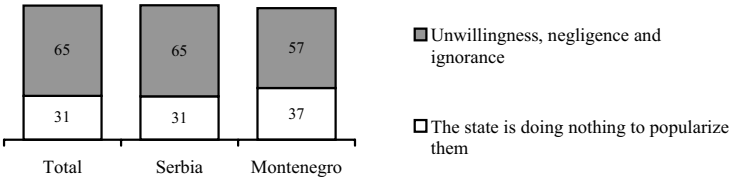


Evaluation regarding the extent to which contraceptives were used in SaM varied from the most often stated opinion that they are used too little (38%), enough (22%) to opinion that they are used too much (12%). Main reasons for insufficient use were unwillingness, negligence and ignorance (65%), more than insufficient activities of the state to popularize this issue (31%).

Graph 81: In your opinion, to what extent are contraceptives used today



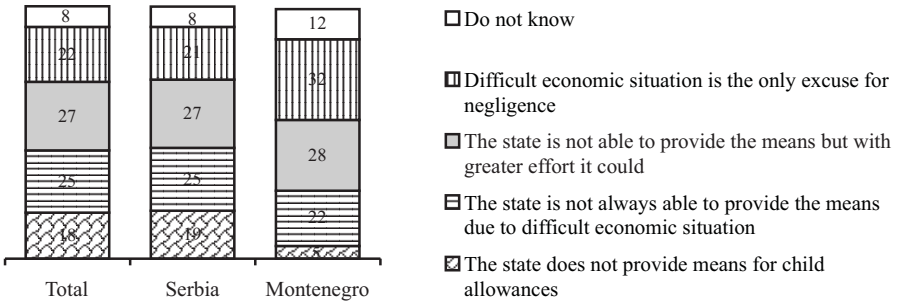
Graph 82: What is the main reason that contraceptives are used too little
(answers of 38% of the population that thought they were used too little)



The majority of citizens (64%) think that the state cannot manage to provide the means for regular payment of child allowance, and 54% thought that the state was responsible for it (the state is not making an effort 27%, it finds excuse for negligence in difficult economic situation 22%), while 25% thought that the reason was not negligence, but economic situation.

Only 18% of citizens believe that the state provides adequate means for payment of child allowances.

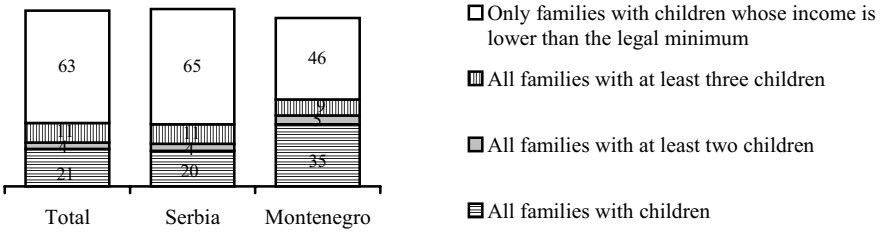
Graph 83: Does the state provide sufficient means for payment of child allowance



Majority of the respondents knew that only families with children with an income lower than the legal minimum were entitled to child allowance.

In Montenegro, however, more than one third of citizens (35%) thought that all families with children were entitled to child allowance.

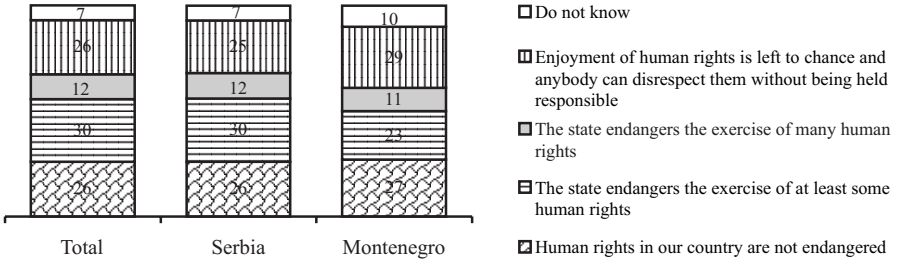
Graph 84: Who is entitled to children's allowance



4. Enjoyment of Human Rights

The majority of citizens (68%) think that the enjoyment of human rights in SaM is endangered: 30% think that the state disregards of at least some human rights, 12% that it endangers the ejoyment exercise of many rights, and 26% that the exercise of human rights in SaM is left to chance, so anybody can endanger them and not be held responsible for it.

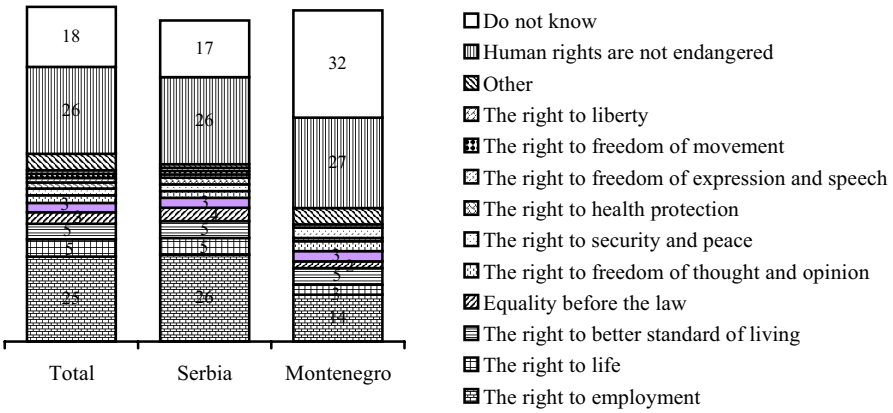
Graph 85: What is the situation like in our country regarding enjoyment of human rights



When asked to choose the human right which was most endangered in SaM, citizens spontaneously most frequently *the right to work* (25%).

The right to work as the most endangered right was mentioned more by citizens of Serbia (26%) than citizens of Montenegro (14%) and by the agen the last working decade of their life, between 50 and 64 (30%).

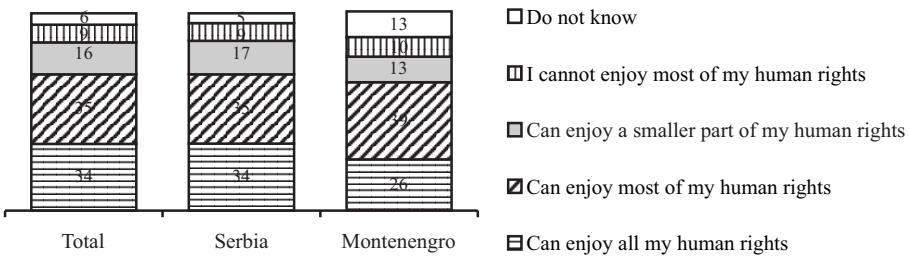
Graph 86: Which human right is most endangered in our country (one answer)
% in population



Evaluation of the enjoyment of human rights in SaM is more positive when looked at from personal perspective than in general: more citizens state that they personally manage to exercise all human rights (34%), than citizens who thought that the exercise of human rights in SaM was not endangered (26%).

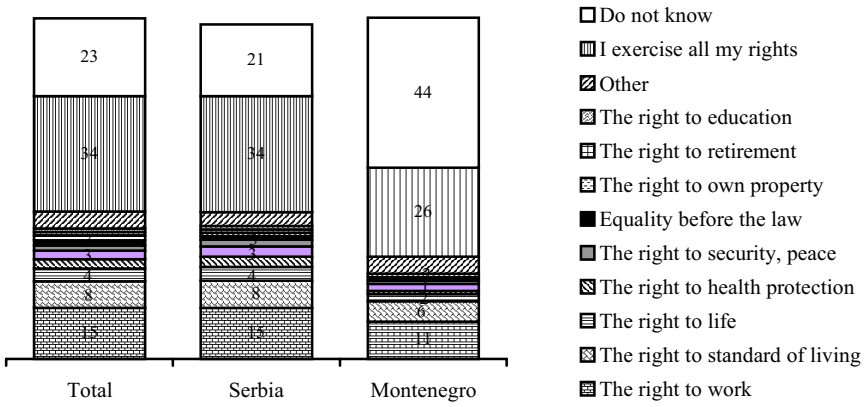
The majority of citizens (69%) think that they are able to enjoy at least most of their human rights. One quarter of the respondents (25%) think that they are not able to exercise all their human rights.

Graph 87: To what extent are you personally able
to enjoy your human rights



Every sixth or seventh citizen (15%) in SaM claims that he/she is deprived of the right to work, 8% claim that their right to standard of living is endangered and 4% said so for their right to life.

Graph 88: Which rights are denied to you personally
(% in population)



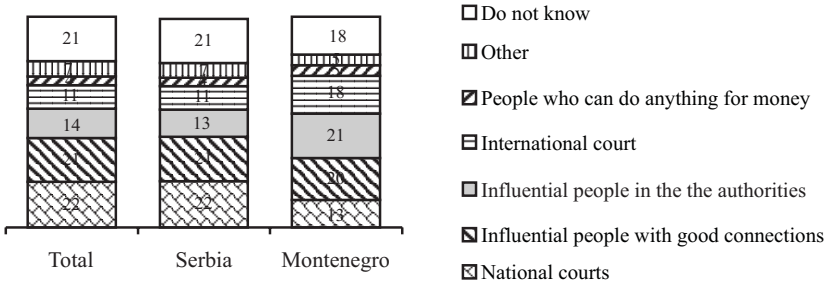
More SaM citizens believe that in case of denial of some of the human rights, it is better to turn to influential people than to seek redress from a court, either national or international.

39% of the respondents think that if human right is denied, it is best to turn to influential people: 21% thought these should be people with good connections, 14% thought it would be best to turn to influential people within the authorities and 4% thought it would be best to seek help from people who can do anything for money.

35% of the respondents think that it would be best to turn to a court: 22% to a national court and 11% to an international court.

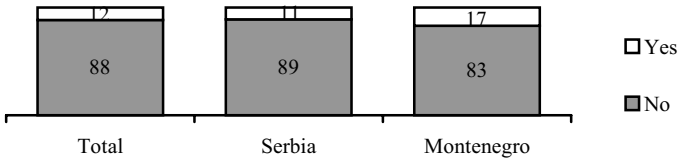
21% of the respondents did not know who they should turn to in case of denial of a human right.

Graph 89: If we were deprived of a human right who should we turn to



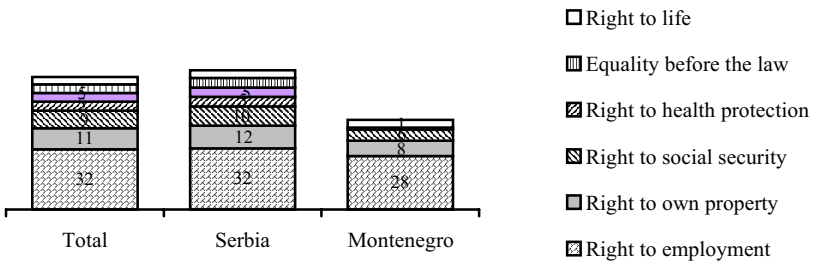
Although one quarter (25%) of the respondents stated that they were denied at least some of their human rights and 35% stated that they could exercise most but not all their rights, only 12% said that they had ever turned to anybody to protect the denied human rights.

Graph 90: Have you ever turned to anybody to protect some human right denied to you



Graph 91: Which human right was denied to you

% of answers of those who turned to somebody to protect the human right denied to you (Serbia and Montenegro 12%, Serbia 11% and Montenegro 17%)



5. Conclusion

The majority of respondents from Serbia and Montenegro were in principle aware of the notion of human rights. However, just one half of them knew that human rights were protected by international law.

Attitudes towards human rights were strongly influenced by concerns about the economic situation, primarily about unemployment and low standard of living, problems perceived as priority. *The right to work and choice of employment* was the right the respondents were preoccupied the most with *The right to work* was most frequently found at the top of the list, as the human right most frequently thought to be jeopardized in Serbia and Montenegro, although the*right to life, right to security and freedom* and *equality before the law* were perceived as the three most important rights. Low standard of living and unemployment were mentioned most frequently as endangering the right to life of citizens of Serbia and Montene gro, the human right which was evaluated as the most important one.

Awareness about individual rights varied from one right to the other, but a common element in all domains was the attitude that protection of rights in Serbia and Montenegro was rather formal than recognized in practice: at the same time, interviewed citizens showed an awareness of the right to fair trial and lacked confidence in courts. They were aware of the right to freedom of thought but believed that the media are controlled, and that independent media were in a minority; they were aware of the political rights but believed that elected politicians do not represent the interests of citizens; they knew that there were laws punishing acts of violence against women and children are punishable, as well as that slavery and forced labour but believed that the relevant institutions were hardly cared of these problems...

The majority of respondents shared the opinion that, in principle, implementation of human rights in Serbia and Montenegro was in jeopardy, but also that they somehow managed to enjoy either all or at least the majority of their human rights. While just one in five citizens think that human rights are not jeopardized in Serbia and Montenegro, somewhat more than one third claimed to enjoy all their human rights and the same percentage claimed to be able to enjoy the majority of their human rights.

General mistrust in state institutions was found to be present in the domain of human rights as well: in case that some of their human rights were jeopardized, the majority of citizens would seek protection through informal channels, by approaching powerful people rather than turning to legal institutions. Just one in five citizens would turn to national courts, and one in ten to international courts.

However, it appears that human rights are in the minds of citizens present in a relativised fashion, and that they themselves are not really ready to support the recognition of human rights in practice without exceptions: almost one half of citizens would restrict the right of national minorities in their right to use their mother tongue; one in two or three citizens would resent an Albanian to be their superior at work, one in three citizens would resent a Muslim/Bosniak, Roma or Croat to be their superior, and one in four citizens would be against having a Hungarian as a superior. At the same time, the majority of the citizens think that opportunities for employment and successful career of members of national minorities are either equal (60%) or even better than the opportunities of the Serb and Montenegrin majority (17%).

Finally, the fact that one half of the respondents were not aware that human rights were protected by international law, as well as the fact that more than two fifths of respondents believed that human rights were an internal matter of the state, indicate that the awareness of human rights law of the average citizen of Serbia and Montenegro is relatively low.

IV
MAIN ISSUES – 2003

1. State of Emergency in Serbia, 12 March – 22 April 2003

1.1. General

Shortly after the 12 March 2003 assassination in Belgrade of the Serbian Prime Minister, Zoran Đinđić, the acting President of Serbia and the Speaker or the Serbian Parliament, Nataša Mićić, declared a state of emergency in Serbia upon recommendation of the Government. The police immediately launched a wide-ranging sweep for the perpetrators of the crime, code-named Operation "Sablja" (Sabre), which soon turned into a general crackdown on organised crime.

The police issued a warrant for the arrest of Milorad "Legija" Luković, the former commander of the Special Operations Unit (JSO) of the Serbian Ministry of the Interior (MUP), and another 22 members of the so-called "Zemun Criminal Clan" who were suspected of being responsible for the murder of the prime minister (Beta, 12 March; *Danas*, 13 March, p. 1). Ten of the men on the warrant are still at large, including Luković, one of the clan leaders.[334] The rest have been arrested, while leading clan members Dušan "Šiptar" Spasojević and Mile "Kum" Luković were shot dead by the police, who claimed the two had put up armed resistance to their arrest (*Večernje novosti*, 28 March, p. 5).

On 25 March, the police arrested JSO officer Zvezdan Jovanović, later accused of being the gunman; the sniping rifle used in the assassination was also found. The Serbian Government at once disbanded the JSO (*Danas*, 25 and 26 March, pp. 3, 1).

Jovica Stanišić, the former head of the Serbian State Security Service (SDB), and Franko Simatović, a former JSO commander and senior officer of the SDB,

334 According to data published on the web-site of the Serbian Ministry of Interior (MUP) www.mup.sr.gov.yu (visited on 12 January 2004).

were also arrested during Operation "Sablja" and later handed over to the International Criminal Tribunal for War Crimes in the Former Yugoslavia at the Hague (*Politika*, 11 April, p. 8).[335] Others arrested included Deputy Republican Public Prosecutor Milan Sarajlić (*Glas javnosti*, 21 March, p. 4), justice Života Djoinčević (*Večernje novosti*, 29 March, p. 7), the former Yugoslav Army (VJ) chief-of-staff, General Nebojša Pavković (*Blic*, 2 April, p. 4), the former Deputy Director of the Serbian Security and Information Agency Milorad Bracanović (*Danas*, 5 April, p. 4), General Aco Tomić, the former head of the VJ Security Department, and Rade Bulatović, security advisor to the former Yugoslav President, Vojislav Koštunica (*Blic*, 2 and 7 April, p. 4; *Glas javnosti*, 9 April, p. 1).

The police said that during the 42-day state of emergency a total of 11,665 persons had been arrested and 2,697 remanded in custody. The Serbian Interior Minister, Dušan Mihailović, said that a total of 3,560 criminal complaints had been filed against 3,946 persons in connection with 5,671 criminal offences (*Politika*, 18 May, p. 6). The Serbian Government has said that during the state of emergency fifteen murders, eight kidnappings and about 200 drug trafficking cases had been solved ("Rezultati vanrednog stanja," Government publication, March-April 2003). During the campaign, police also seized or returned a large number of firearms, including RPG launchers, hand grenades and other explosive devices (*Večernje novosti*, 24 April, p. 7).

Late in April, the police filed criminal complaints in connection with the Đinđić assassination; on 21 August, the Special Prosecutor for Fighting Organised Crime brought charges, and the trial of the 46 persons charged began on 22 December. Seven of the men, who are charged with criminal conspiracy, are being tried separately, three persons have been granted protected witness status, and fifteen of the defendants are still at large (*Danas*, 23 December, p. 1).

The police have also filed criminal complaints against seven persons suspected of organising the attempted assassination of Vuk Drašković, the President of the Serbian Renewal Movement (SPO) on 15 June 2000 in the Montenegrin coastal resort of Budva. Charges were brought on 23 September. The indictees include the former Yugoslav President, Slobodan Milošević, the former Serbian SDB head, Radomir Marković, and the former VJ Chief-of-Staff, General Nebojša Pavković (*Danas*, 10–11 January 2003).

On 28 March, police found the remains of Ivan Stambolić, the former President of Serbia who vanished in August 2000. Five murder suspects were arrested (*Glas javnosti*, 31 March, p. 4). The charges were filed on 23 September, together with those for the Drašković assassination attempt; the trial had not begun by the end of 2003 (*Danas*, 10–11 January).

335 See IV.2.

1.2. Legal Grounds, Compliance with International Standards

1.2.1. The Legal Foundation

The decision to impose a state of emergency was issued by the Acting President of Serbia, Nataša Mićić, based on Article 83 Item 8 of the Constitution of the Republic of Serbia. (*Sl. glasnik RS*, No. 21/03 – hereinafter: Decision). Mićić said the Decision was taken because "the murder of the Prime Minister of Serbia, Zoran Đinđić, endangers the security of the Republic of Serbia, the freedoms and rights or man and the citizen and the work of the state authorities...", and to help detect and apprehend those responsible.

The Acting President then issued an Instruction on Special Measures Applicable During the State of Emergency (*Sl. glasnik RS*, No. 22/03 – hereinafter: Instruction). The Instruction defines derogation from certain human rights guaranteed by the Constitution: The right of personal freedom, the right to the freedom of movement, the right to privacy, the right to go on strike, the right to the freedom of public assembly, and the right to freedom of expression and freedom of the press.

The State of Emergency in Serbia was imposed on the basis of the Law on the State of Emergency (*Sl. glasnik RS*, No. 19/91), whose compliance with the letter of the Serbian Constitution is disputable, to say the least.[336] But the Law has been in force for 12 years, during which time its constitutionality has not been challenged by the Constitutional Court of Serbia. This means that a valid legal foundation for imposing a state of emergency in Serbia in 2003 did exist.

However, the decision to impose the state of emergency and issue an instruction on special measures applicable during the state of emergency were challenged before the Constitutional Court of Serbia, which has not yet ruled on the initiatives.[337]

The Serbian Radical Party said in its proposal that the Decision was unconstitutional and illegal because it imposed a state of emergency in the entire territory of the Republic of Serbia, while Article 79 (4) and Article 83 item 8 of the Serbian Constitution, as well as Articles 2 and 4 of the Law on Measures in Connection with the State of Emergency prescribe that a state of emergency is imposed on a part of the territory of the Republic of Serbia. Although the text of the provisions cited by the applicant is not disputed, his assumption does not take into account the fact that the Constitutional Charter defines the areas which have passed from the

336 See I.3.

337 Proposals to assess the constitutionality and legality of the Decision and the Instruction were filed by the Serbian Radical Party on 14 March and the Democratic New Party on 31 March, and submissions to initiate such a procedure were filed by lawyers Darko Petričević (26 March) and Nebojša Avlijaš (14 April). None of the initiatives challenged the constitutionality of the Law on the State of Emergency, but only the constitutionality of the Decision and the appropriate measures that were implemented.

jurisdiction of the former Yugoslav federation to the jurisdictions of the member-states – Serbia and Montenegro. This is also the case with the power to impose a state of emergency on the entire territory of the state, prescribed by Article 78 item 3 of the Federal Constitution. It follows that the Acting President of Serbia had had the requisite authority to impose a state of emergency on the entire territory of Serbia. This interpretation also complies with the HR Charter, under which a state of emergency in republics is imposed by republican authorities (Art. 6 (1 and 4)).

1.2.2. Compliance with International Standards

The prerequisite for derogating human rights during states of emergency, as happened in Serbia, is the existence of a public emergency which threatens the life of the nation (Art. 4, ICCPR; Art. 15, ECHR). The situation created by the assassination of Prime Minister Đinđić apparently fulfilled this condition.[338] This was confirmed by the reaction of the international community, which admitted Serbia and Montenegro to the Council of Europe during the state of emergency, on 4 April.

In the case of the state of emergency in Serbia, the condition laid down by Article 4 of the ICCPR that the measures of derogation should be made public was fulfilled by their publication in *Službeni glasnik*.

Serbia and Montenegro also met their obligation laid down by Article 4 (3) of the ICCPR: to inform the other states parties to the Covenant about the derogation through the UN Secretary-General.[339]

Under international human rights standards, derogation from observance of certain human rights standards must be submitted for approval to parliament, if they are adopted by an executive order (*Document of the Moscow Session of the CSCE on the Human Dimension*, 1991, 28 (2)). This condition has not been met in full in the case of the state of emergency in Serbia. Although the Decision and Instruction were read out to the Serbian Parliament, its deputies neither voted on it nor approved it in any other way.[340] However, it needs to be stressed that the national legislation does not feature any such precondition.

The most important condition laid down by international documents in connection with derogation from human rights standards is that such derogation must be of an extent strictly required by the exigencies of the situation (ICCPR, Art. 4

338 "The circumstances immediately after the assassination of Đinđić certainly justif ied the imposition of a state of emergency and derogation of certain human rights". HRW, *Progress on War Crimes Accountability, the Rule of Law, and Minority Rights in Serbia and Montenegro* – HRW Statement to the U.S. Commission on Security and Cooperation in Europe, 4. June 2003, p. 5, www.hr w.org/bacgrounder/eca/serbiatestimony060403.htm.

339 It was done on 13 March 2003, see http://untreaty.un.org/english/bible/englishinternetbib le/partI/chapterIV/treaty6.asp.

340 See communiqué: *Sednica Narodne skupštine održana za vreme vanrednog stanja* , www.parlament.sr.gov.yu/content/cir/aktivnosti/skupstinske_detalji.asp?Id=40&t=A

(1)). Proportionality will be discussed in more detail later, following analyses of each of the individual derogation measures adopted during the state of emergency in Serbia.

Derogation measures may also not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin (ICCPR, Art. 4 (1)). This condition was fulfilled in the case of the derogation measures adopted during the state of emergency in Serbia.

Finally, the derogation measures adopted during the state of emergency in Serbia did not formally contravene Art. 4 (2) of the ICCPR, which prescribes absolute rights, i.e., rights which may not be derogated. However, our analysis will show that certain derogation measures did not comply with the ICCPR standards on absolute rights, as defined by the UN Human Rights Committee, or with the ECHR standards, as interpreted by the European Court of Human Rights.

Measures derogating human rights may remain in force only for the duration of the situation which threatens the life of the nation to the extent strictly required by the exigencies of the situation (Art. 4 (1), ICCPR). The six-week-long state of emergency and duration of the measures derogating certain human rights cannot be regarded as excessively long, and we can say that this condition has been met.

1.2.3. Derogation from Individual Rights

1.2.3.1. Liberty and security of person; treatment of prisoners – Item 2 of the Instruction states that:

> Persons who threaten the security of other citizens or the security of the republic may be forcibly taken into custody by the Ministry of Internal Affairs and kept in official premises for no longer than 30 days.
>
> The application of the measure of taking into custody and detention shall be subject to the issue of a written decision, appeals against which may be submitted to the Minister of Internal Affairs.
>
> The persons defined in para. 1 of this Item are not entitled to a defender as provided by the Law on the Criminal Procedure.
>
> Whenever possible, the Ministry of Internal Affairs shall inform the families of the persons defined in para. 1 of this Item about the application of the measure of taking into custody and detention.

The above measure represents derogation from the right to the liberty and security of person guaranteed by Article 9 of the ICCPR. The first derogated right is that enshrined in Article 9 (1), according to which no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. The second and perhaps more important derogated right is that contained in Article 9 (3) of the ICCPR, according to which any arrested or detained

shall be brought promptly before a judge. There is also a derogation from Article 9 (4) of the ICCPR, according to which all persons deprived of liberty shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful.

Item 2 of the Instruction effectively introduces police internment of up to 30 days. Viewed in the light of international standards, the measure would not be problematic if two conditions were met: firstly, that the lawfulness of the arrest and detention can be promptly tested by a court at the request of the person taken into custody; and secondly, that a defence attorney, family members or other persons close to the persons in detention are informed that they had been taken into custody. These are not just demands proceeding from the letter of the ICCPR and ECHR, but also from the HR Charter.

Article 6 (9) of that HR Charter explicitly prohibits derogation from its Article 16 (6) – the right to have a court investigate the lawfulness of an arrest without delay. This is of course the famous *habeas corpus* constitutional institution and guarantee. The fact that the measure defined by the Instruction of taking persons into custody for up to 30 days was not subject to the approval of a court but an appeal to the Minister of Internal Affairs contravenes international standards established by the practice of the UN Human Rights Committee and the European Court of Human Rights.

In the opinion of the UN Committee, an important purpose of a judicial assessment of an arrest or detention is the protection of those rights which are absolutely protected (rights not subject to any derogation, not even in any possible exigency). It follows that although Article 9 of the ICCPR taken together with Article 4 of the ICCPR does not explicitly prohibit a derogation from the right to a judicial evaluation of an arrest or detention, the UN Human Rights Committee holds the following view:

> in order to protect rights not subject to derogation, the right to initiate proceedings before a court so that court can decide without delay on the lawfulness of detention may not be reduced by a decision of a state party to effect a derogation from the Covenant (General Comments No. 29 of the UN Human Rights Committee, 31 August 2001, para. 16).

The European Court of Human Rights expressed a similar view in its decision in the case of *Aksoy v. Turkey* (App. No. 21987/93 (1996), paras. 83–84).

It follows quite clearly that the measure providing for keeping a person in detention without access to a court and with his only possibility being an appeal to the Minister of Internal Affairs is contrary to the obligations of Serbia and Montenegro under international law and to the HR Charter. This breach seems all the more

serious, given the length of the detention period of up to 30 days. It should be noted that the European Court of Human Rights has assumed the position that during states of emergency detention without access to a court lasting 14 or more days represents a breach of the ECHR (see *Aksoy v. Turkey*).

The disputed measure also does not contain an explicit obligation of the police to inform anyone about taking a person into custody, or the right of such a person to inform his relatives or to take on a legal defender. This also goes against the HR Charter, whose Article 6 (9) prohibits derogation from its Article 14 (5), under which persons deprived of liberty are entitled to inform anyone they see fit about their detention. Although the HR Charter does not guarantee in all cases, including this one, that persons in detention are entitled to a lawyer, it guarantees quite clearly that there may be no derogation from the right of a person in detention to inform his kin that he is in custody. Item 2 § 4 of the Instruction therefore represents a violation of the HR Charter. The measure is also a violation of the ICCPR as interpreted by the UN Human Rights Committee, whose explicit position (General Comments No. 29, para. 13 (b)) is that a state may not impose "unreported detention", even in states of emergencies. The European Court of Human Rights holds the same view (see *Aksoy v. Turkey*).

The purpose of the prohibition of unannounced detention and obligation for all detentions to be subject to the evaluation of a court is to prevent violations of rights not subject to derogation. This refers in particular to the prohibition of torture or inhuman or degrading treatment, the right which proved to be the most problematic during the state of emergency in Serbia.[341] It also appears that during the forthcoming trials of persons detained during the state of emergency the value of statements made during the police detention will be challenged by claiming that they had been made under duress (News *B92*, www.b92.net, 24 December).

The said lack of compliance of the police detention measure with international and national human guarantees of rights not subject to derogation under any conditions opened the door to violations of absolutely guaranteed rights, in particular the prohibition of torture and inhuman and degrading treatment, of which there exist clear indications.[342]

It also appears that during the coming trials of persons detained during the state of emergency the value of statements made during the police detention will be challenged by claims that they had been made under duress. This could have been prevented with a provision under which persons in detention should be granted access to a judge, whose purpose is to establish not just the lawfulness of detention, but also the existence of any violations of the prohibition of torture and inhuman and degrading treatment.

341 See more in 1.2.4.2.
342 *Id.*

One of the rights the UN Human Rights Committee maintains is not subject to derogation is the ban on arbitrary arrests, which is in the view of the Committee prohibited by the mandatory rules of international law (General Comments No. 29, § 11). Some non-governmental organisations have claimed that arbitrary arrests did take place during the state of emergency in Serbia. Citing information obtained from the families of persons during the state of emergency, the HLC said that the police had "arrested and detained persons solely on the basis of the fact that they had criminal records or were registered drug addicts " (HLC, Press Release, 9 April).

Under Article 10 of the ICCPR, all persons deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Although the Covenant does not explicitly prohibit derogation from this right in states of emergency, The UN Human Rights Committee assumed the view that the right is guaranteed by the general norms of international law and that derogation is therefore not possible (General Comments, para. 13 (a)).

It appears that during the state of emergency in Serbia, especially taking into consideration the large number of people arrested (about 10,000), there were breaches of this right. According to a report published by a delegation made up of representatives of international organisations (hereinafter: "Report of International Organisations")[343] persons deprived of liberty were kept in police facilities in conditions suitable only for short-term detentions. It also said that the status of detainees kept in isolation in the Central prison in Belgrade was unacceptable to such an extent that it was in contravention of the prohibition of torture and inhuman and degrading treatment defined by Article 7 of the ICCPR and Article 3 of the UN Convention against Torture. The report says that "the cumulative and combined effects of the controversial extended detention in combination with the conditions in which detention is effected, which are sub-standard, represent for many detainees degrading punishment or treatment..." (Report of International Organisations, p. 10). The Report also notes that a number of detainees had complained of inadequate medical treatment, "including difficulties in obtaining necessary medicaments, personal hygiene articles and clean clothing" (Report of International Organisations, p. 11). There exists therefore some doubt that rules Nos. 15, 25 and 62 of the Minimal Rules of Treating prisoners were in fact observed.

1.2.3.2. Freedom of movement – Under Item 3 of the Instruction:

> The Minister of Internal Affairs may temporarily restrict or prohibit the freedom of movement in public places or in certain areas, as well as order certain persons to remain in the town of their temporary or permanent residence and report to the authorities.

343 UNOHCHR, OSCE and ODIHR: *Memorandum to the Ministries of Justice and the Interior of the Republic of Serbia – Initial Findings and Recommendations Arising from the Visit to De tainees in Belgrade 14–15 April 2003*, 24 April 2003.

> The Minister of Internal Affairs may order the closure of all approaches to a certain location or facility and prevent unauthorised egress from that location or facility.

Although this measure represents a permissible derogation from the right to the freedom of movement, what it lacks are the criteria for its application and the right to a legal remedy for persons subjected to it.

The right to an efficient remedy when the ICCPR provisions are breached represents according to the UN Human Rights Committee a contractual obligation inherent to the Covenant. In its General Comments No. 29, the Committee assumed the position that regardless of derogation measures that may be implemented, in any case "a state party must observe this fundamental obligation, according to Article 2 (3) of the Covenant, to offer a remedy which is efficient." This was not the case in respect of the limitation of the freedom of movement prescribed by Item 3 of the Instruction.

1.2.3.3. The right to privacy – The Instruction on Special Measures Applicable During the State of Emergency also states the following:

> 4. The director of the Security and Information Agency may undertake towards certain physical and legal persons measures derogating from the principle of inviolability of correspondence and other communication even without a decision issued by a competent court.
>
> 5. Authorised public officials may enter private or other premises, even without a decision issued by a competent court, if it is necessary for the purpose of detecting and apprehending the perpetrators of criminal offences suspected of being linked with organised crime, and finding evidence of such criminal offences and objects of importance to the criminal procedure.

The above measures derogate from the right to privacy, especially the principle of the inviolability of correspondence and communication, and the right of inviolability of abode guaranteed by the HR Charter, as well as Article 17 of the ICCPR.

The measure authorising public officials to enter private flats and other premises even without a valid court decision (Item 5) specifies the conditions in which this is permissible, but this is not the case with the authority given to the director of the BIA, who may order correspondence and other communication to be monitored without a court decision (It. 4). The Instruction does not list the criteria the Agency director needs to follow for ordering measures specified in Item 4, leading to the conclusion that in this case the derogation from the right to privacy represents an unacceptably broad restriction which was not necessary in an exigency situation. The measure also offers room for arbitrary application, which also goes against the principles derogations need to follow.

Persons who are subject to the application of these two measures are also not entitled to an effective remedy, which will be discussed later.[344]

1.2.3.4. Freedom of association – Item 6 of the Instruction "abolished the right to go on strike". Although such a right is not explicitly guaranteed by the ICCPR, and is guaranteed by Article 8, (1.d) of the ICESCR, that right could be said to proceed from the right to the freedom of association, in particular trade union organisation, and the right to the freedom of assembly. The right to go on strike is explicitly guaranteed by the Charter of Human Rights and Minority Rights (Art. 41) and the Serbian Constitution (Art. 37). The right may be derogated both under international standards and national legislation; in that context, the essence of the measure listed in Item 6 is not controversial. But that is not the case with its wording, as it "abolishes" the right to go on strike. It is quite clear that the state cannot *abolish* any right guaranteed by international human rights documents and national constitutional guarantees, as the state itself had not granted that right. In that context, the wording is unfortunate, to say the least, and testifies to a lack of comprehension of the essence of human rights.

1.2.3.5. Freedom of peaceful assembly – Item 6 of the Instruction on Special Measures reads:

> The organisation and holding of rallies and other public gatherings, which are under the law subject to a prior application to the Ministry of Internal Affairs, is hereby prohibited.

This derogation measure complies with the ICCPR and the Charter of Human Rights and Minority Rights, as the freedom of assembly may be restricted in exigencies such as a state of emergency.

1.2.3.6. Freedom of expression – The Instruction on Special Measures also states:

> 8. Political, trade union and other activities whose aim is to hinder and prevent the enforcement of measures during the state of emergency are hereby prohibited.
>
> 9. Publication of information and dissemination of printed media and other information about the reasons for proclaiming the state of emergency and the enforcement of measures during the state of emergency is hereby prohibited, except for the conveyance of official announcements issued by the competent state authorities.
>
> The enforcement of the measure defined in paragraph 1 of this Item is within the purview of the Ministry of Culture and Public Information, in co-operation with the Ministry of Internal Affairs.

344 See *infra*.

The measure defined by Item 8 which bans political and trade union and other activity "whose aim is to hinder and prevent the enforcement of measures during the state of emergency" represents derogation from freedom of speech because political and trade union activity is based on that freedom. Derogation from freedom of expression and the right of political and trade union organisation is permitted by the HR Charter, the ICCPR and ECHR. However, in the case of the measure prescribed by Item 8, it remains unclear what criteria are applied to restrict these rights – it is not clear who can conclude that certain political and trade union and other activity is "aimed at hindering and preventing the enforcement of measures during the state of emergency" and exactly how that conclusion is reached. No sanction is defined in this case; one could well imagine such a sanction to be defined by Item 2 – deprivation of liberty.

It should be noted in the context of the freedom of political organisation that prominent figures of the ruling Democratic Opposition of Serbia (DOS) accused opposition parties of inspiring the Đinđić murder and called for the extreme right-wing Serbian Radical Party (SRS) and Party of Serbian Unity (SSJ) to be banned (*Danas*, 19 March, p. 5; *Blic*, 20 March, p. 2).

Demanding that the state of emergency be lifted, opposition politicians, in particular the former President of the FRY, Vojislav Koštunica, and his Democratic Party of Serbia (DSS), accused the Government of using the state of emergency for settling accounts with political adversaries, "stifling political life" and "imposing a communist-style one-party system" (*Vijesti*, 30 March, p. 2; *Danas*, 14 April, p. 1). During the state of emergency, on 3 April, the Independent Police Trade Union was struck off the register of organisations after being accused of links with organised crime (*Politika*, 4 April, p. 8).

Item 9 of the Instruction on Special Measures, which prohibits publication of information on the reasons for proclaiming the state of emergency and the enforcement of measures during it, except for official statements, in principle represents a permissible derogation from the freedom of expression. However, in actual practice its implementation proved quite problematic. On the one hand, the media did not abide by the ban completely; most reported and commented on the reasons for the state of emergency and on the measures implemented during it, relying on other sources besides official announcements. On the other hand, the authorities banned some media with no obvious criterion for the bans or any explanation being given.

The measure contained in Item 9 formed the basis for the Instruction on the Prevention of Public Information, Distribution of Printed Media and Other Information on the Reasons for the Proclamation of the State of Emergency and the Enforcement of Measures During the State of Emergency, issued on 13 March 2003 by the Acting President of Serbia (*Sl. glasnik RS*, No. 24/03 – hereinafter: Instruction on the Prevention of Public Information):

> Public information, the distribution of printed media and other information about the reasons for the proclamation of the state of emergency and the enforcement of measures during the state of emergency, except for the conveyance of official announcements by the competent state authorities, is prohibited on the basis of a written decision issued by the Ministry of Culture and Public Information.

It follows that the Ministry of Culture and Public Information implements the measure and bans media which report or comment on the state of emergency without relying on official announcements issued by the state authorities. In practice, the Ministry of Culture, acting on its own volition (or at the recommendation of someone else in the Government), banned some media, but at the same time did not ban others who conducted themselves in a virtually identical manner. It will be shown later that the decisions issued by the Ministry contained little if any explanation, so that it was difficult to establish what criteria should be applied to the coverage of the state of emergency. In any case, the decisions were not published but only forwarded to the media concerned, which were either fined or banned. It therefore appears that the criterion for applying the measure was defined in each individual case by the Ministry of Culture and Public Information, thereby abolishing any existing legal certainty in its enforcement. We could say that in this manner a measure derogating from the right to free speech, which is in principle allowed by both international instruments and national human rights guarantees, became arbitrary and in effect impermissible.

The decisions issued by the Ministry of Culture and Public Information were not subject to an administrative dispute, nor could a complaint be lodged with the Government of Serbia. This means that the persons subject to the measure were not provided with any remedy, which goes against Article 2 (3) of the ICCPR, under which an efficient remedy must be made available to anyone whose rights guaranteed by the Covenant are violated.

The Instruction on the Prevention of Public Information formed the basis for bans issued to several media. On 17 March 2003, temporary bans were issued to the daily *Dan*, weekly *Identitet* and Valjevo-based *TV Marš*.[345] *Dan* could not be banned because it is published in Montenegro, but its distribution in Serbia was banned temporarily. The following day, the daily *Nacional*[346] was banned outright. Finally, on 22 March, the weekly Prst was also banned. The owners of all of these media and their editors were also fined. The decisions were signed by the Serbian Minister of Culture, Branislav Lečić. On 18 March, the Ministry fined but did not ban the daily *Večernje novosti,* for publishing a text mentioned in the decision. On this occasion as on the others, the Ministry gave no reason why the text contravened

345 BCHR Archive.
346 *Id*.

the Instruction on the Prevention of Public Information, but at least it identified the text, which was not the case when the more drastic sanctions were applied. The media reported that *TV Leskovac* and *TV Trstenik* were also fined (*Večernje novosti*, 3 April, p. 4; *Danas*, 17 April, p. 5).

All the decisions gave the same explanation, that the media concerned "published several texts on the reasons for the state of emergency and the application of measures during the state of emergency." But other media which also published without any official sanction texts on the reasons for the state of emergency and measures undertaken during it which were not based solely on state-approved information. It follows that it is not possible to establish any sort of (rational) criterion which guided the Ministry of Culture in its selection. The explanation that the censured media published "several texts" also tells nothing about their content, and does not even identify them. It follows that the enforcement of the Instruction on the Prevention of Public Information was arbitrary and that the state organ did not, as had been its duty, define any criterion on which to base its application of a measure as wide-ranging and drastic as banning the press.

The measures issued against media caused the Vienna-based International Press Institute to voice its concern (*Danas*, 21 March, p. 5). The Kragujevac daily *Nezavisna svetlost* protested early in April by publishing a blank page (*Danas*, 4 April, p. 5). Assessing the position of the media during the state of emergency, the UNOHCHR said that the restrictions imposed on the media were "broad, undefined and inconsistently applied," and that they exceeded what was necessary. Out of the eight media which were closed down, fined or cautioned, the UNOHCHR said that only two or three cases involved necessity warranted by an exigency (*NIN*, 25 May, p. 22).

Mile Perić, a resident of Valjevo, was fined 30,000 dinars on 24 April for mocking the Serbian Government and the late prime minister Đinđić on his internet sites. Perić was then released from custody, after spending 19 days in detention (Beta, 24 April).

Those arrested during the state of emergency included a number of journalists, one of them being the editor-in-chief of the weekly *Identitet*, Gradiša Katić (*Dan*, 14 March, p. 4), on suspicion of involvement in the Đinđić assassination. Two correspondents for *Dan* in Serbia, Dragiša Petrović from Kragujevac and Belgrader Milovan Brkić, were also arrested early in April (*Danas*, 9 April, p. 5; *Dan*, 5 April, p. 7).

1.2.3.7. The right to an efficient remedy for violations of rights – Just one of all the measures derogating from human rights during the state of emergency provided for any remedy for those who believed their rights had been violated by their application: only the 30-day police custody measure (Item 2 of the Instruction) contained the right of appeal to the Minister of Internal Affairs. However, our

analysis[347] shows that the said remedy – a complaint to the minister of internal affairs – is insufficient from the point of view of international human rights guarantees and the guarantees enshrined in the HR Charter. What this particular case should have featured was the protection of the court through the traditional institution of *habeas corpus*. The fact that this measure provided no effective remedy – not even to mention the others imposed during the state of emergency – represents a clear violation of international human rights standards – the ICCPR as interpreted by the UN Human Rights Committee:

> Even when a state party, during a state of emergency and to an extent to which those measures are warranted by the nature of the situation, may introduce changes in the application of procedures relating to judicial and other legal remedies, the state party must abide by the fundamental obligation, based on Article 2 (3) of the Covenant, to provide an efficient remedy (General Comments Nos. 29, 31, August 2001, p. 14).

1.2.4. Observance of Other Rights During the State of Emergency

1.2.4.1. Right to life –The right to life encompasses not just the duty of the state to refrain from depriving anyone of his life in an arbitrary manner, but also its obligation to conduct an efficient investigation in all cases where there exist indications of a breach of the said right. On 27 March, during the state of emergency, the police shot dead Dušan "Šiptar" Spasojević and Mile "Kum" Luković, two of the leading members of the so-called "Zemun Clan," during an attempt to arrest them; the police claimed they had put up armed resistance to the arrest (*Večernje novosti*, 28 March, p. 5). However, the police never released a detailed report about the event, and it remains unknown if an investigation was ever conducted. The incident provoked speculation in the media that the two had been assassinated "to shut them up",[348] not because they had resisted arrest. It appears that in this case the police avoided their duty not just to implement an investigation but also to inform the public in full about its findings.

1.2.4.2. Prohibition of torture – The prohibition of torture, inhuman and degrading treatment is a right not subject to any derogation, even during exigencies – one of the rights protected at all times. The Belgrade Centre for Human Rights has consistently reported that torture, especially police brutality, is widespread in Serbia; it seems to have been even more serious than usual during the state of emergency. The absence of any judicial control during the 30-day police detention[349] ruled out any possibility of independent control of police treatment of people

347 See IV.1.2.3.

348 See, for example, *Nacional*, 12 January 2004, p. 7, *Ključni svedoci ubijeni posle torture* (Key Witnesses killed After Being Tortured) (interview with Gradimir Nalić).

349 See 1.2.3.1.

deprived of liberty. The Serbian authorities also appear to have constantly delayed and blocked efforts by international and non-governmental organisations to visit detention centres; the first such visit, by an international delegation made up of the OSCE Mission in SaM, the ODIHR and the OHCHR, the took place on the 14th and 15th of April, just days before the state of emergency ended. There are also indications that a visit by Red Cross representatives was also blocked for quite a long time. NGOs involved in human rights complained that the Serbian authorities had prevented them for a long time from visiting detainees (HRW communiqué, 14 May). Independent reports based on the accounts of detainees, their families or lawyers published after the conclusion of the state of emergency show clearly that there were breaches of the prohibition of torture, inhuman and degrading treatment during the state of emergency.

Pointing to inhuman and degrading treatment contrary to Article 7 of the ICCPR in connection with the living conditions of the detainees kept in isolation in the Central Prison in Belgrade, the international organisations[350] said in their report that their delegation had heard reports and seen evidence of torture or inhuman and degrading treatment during detention in connection with two detainees (Report of International Organisations, p. 5).

Media reports and statements made by foreign officials after the international delegation's visit were largely interpreted in the Serbian media as confirmation that during operation "Sablja" there had been no serious violations of human rights, especially the ban on torture. According to the Institute for War and Peace Reporting (IWPR), the head of the OSCE Mission in Serbia and Montenegro, Maurizio Massari, said on 17 April that the OSCE's experts had recorded no serious breaches of rights or exceptionally unfavourable facts in connection with the status of the detainees.[351] In its report on alleged cases of torture in Serbia during operation "Sablja," Amnesty International (AI) said that in spite of obvious incorrect conveyance of news reports, the OSCE had done nothing to publicly deny them.[352] The IWPR also said that it was also possible that the Report of the International Organisations was the result of a compromise reached by the organisations involved in its compilation, and that it was possible that it toned down the real situation which had been found.[353]

The IWPR said in its report that ill-treatment of detainees was widespread. It reported on cases of bad beatings and strangulation, and the use of electric shocks. The allegations were later confirmed during a visit by a delegation of AI to Serbia.

350 See *supra* note 342.
351 IWPR, Dragana Nikolić-Solomon and Gordana Igrić, *Serbia: Detainees Allege Torture*, 4 June 2003.
352 AI, *Serbia and Montenegro: Alleged torture during Operation Sabre* (AI Index: EUR 70/019/2003), p. 10.
353 IWPR, Dragana Nikolić-Solomon and Gordana Igrić, *ibid*.

The AI said in its report that that the police often resorted to torture, especially in the case of detainees regarded as low-grade criminals.[354] Besides citing a number of cases of bad beatings of detainees by police, the two reports also speak about electric shocks.[355]

Policemen were accused of using electric shocks on Igor Gajić, who was arrested in Kruševac on 14 March. The AI quoted the lawyer and wife of Milan Sarajlić, a former prosecutor, that Sarajlić had been subjected to electric shocks as well as to psychological torture: threats that his daughter would be murdered.[356]

According to the AI, the above-mentioned delegation of international organisations found during additional visits made on 23 May, 8 and 9 July 2003 that about 25% of the detainees interviewed had claimed to have been subjected to inhuman treatment or torture.[357] It added that all the cases had taken place in police stations, in particular the "29 November street" station in Belgrade, as well as during arrests.[358] The international delegation was not informed about cases of ill-treatment or torture in the Central Prison in Belgrade. It should also be noted that the reports of both the IWPR and the AI point in particular to the SAJ, a police anti-terrorist unit, as being involved in numerous brutal beatings during arrests.[359] Regrettably, the reaction of the Serbian authorities to the reports has been almost completely negative (News *B92,* www.b92.net, 4 September). Colonel Srbislav Ranđelović, the Inspector-General of the police Public Security Department, said that the AI report had been considered and that it had been established that "there was no torture of the said detainees" (*Večernje novosti*, 11 September, p. 17).

1.2.4.3. Autonomy of courts – The judiciary were the target of much criticism by the executive branch before the state of emergency, and even more during it. Boško Ristić, the President of the Administrative Committee of the Serbian Parliament, demanded on 19 March 2003 the resignation of the President of the Supreme Court, Leposava Karamarković. At the same time, the Parliament pensioned off 35 judges and prosecutors, including seven justices of the Supreme Court of Serbia; Justice Minister Vladan Batić said this was done because of the "tardiness of judges" (*Glas javnosti*, 20 March, p. 7).

Justice Karamarković resigned on 20 March, stressing that she was unable to do her job because of the massive political and media pressure on her. The BCHR said in connection with her resignation that "her efforts to rid the judiciary of unworthy judges were welcomed neither by the legislative nor by the executive branches, nor by many of her unsupportive colleagues" (BCHR, Press Release,

354 See AI Report, *supra* note 351, p. 4 etc.
355 See AI Report, *id*, pp. 4, 6, i IWPR, *supra* note 350.
356 See AI Report, *id*, pp. 4, 6.
357 *Id*, p. 11.
358 *Id*, p. 11.
359 *Id*, p. 7 and note 12.

21 March). On 21 March, the acting republican president, Nataša Mićić, used her powers and the authority vested in her by the state of emergency decision to appoint Sonja Brkić, the President of the District Court in Novi Sad, the Acting President of the Supreme Court of Serbia. Nataša Mićić also suspended Siniša Simić from the post of Republican Public Prosecutor and appointed Đorđe Ostojić to replace him temporarily. It is particularly significant that the Instruction also empowers Mićić and the Republican Public Prosecutor to suspend the presidents of immediately subordinate courts and corresponding prosecutors, and to appoint acting replacements (*Sl. glasnik RS*, No. 28/03). An acting president of the Belgrade District Court was appointed on 24 March; the District Prosecutor in Belgrade, Rade Terzić, resigned the very next day, and was replaced on the 27th by Acting prosecutor Nenad Ukropina.

1.3. Conclusion

Although the measures of derogation implemented during the state of emergency in Serbia were generally in compliance with international standards and legitimate in the context of the need to preserve a democratic order in a situation where organised crime had assassinated the Prime Minister of Serbia, some of their elements went against international standards. This is particularly so in the case of the 30-day police detention measure, which was not subject to judicial control, whereby the right of *habeas corpus* was breached. The omission created room for violating the prohibition of torture. The lack of efficient remedies of challenging the application of derogation measures in individual cases also represents a serious violation of international standards. In practice, the most serious breach of those standards took place in connection with the prohibition of torture: NGO reports point quite clearly to widespread violations of the ban on torture. The replacements of senior members of the judiciary during the state of emergency, although not serious breaches of human rights in themselves, certainly brought into question and weakened the principle of the rule of law, with far-reaching consequences.

It can be concluded that the chronic weaknesses of the system of protecting human rights in Serbia and Montenegro, described in this as well as all earlier reports of the Belgrade Centre for Human Rights, were even more pronounced during the state of emergency. Violation of the prohibition of torture represents a constant problem in practice which was even worse during the state of emergency, when the police were granted wider powers and judicial control of detention disappeared. The weaknesses of the judicial system, its insufficient autonomy and the pressures exerted on it by the executive branch were even greater during the state of emergency. Although no controversy exists in regard to the motivation of the state authorities for imposing a state of emergency and introducing measures

derogating from accepted human rights standards, and the measures were undoubtedly legitimate and necessary in the situation, more attention should be paid to the prevention of various abuses of power in a situation as sensitive as a state of emergency, in which the powers of the executive branch are extremely broad. But that did not happen; it seems that the consequences will remain visible, especially for the duration of the prosecutions proceedings from the state of emergency, in particular the trials of those accused of complicity in the assassination of Prime Minister Zoran Đinđić, but also other cases brought back into the public eye during the state of emergency, such as that of Ivan Stambolić. The main questions will be how testimony obtained during police detention during the state of emergency will be treated during the trials, and whether the weakened judiciary will be able to shoulder the load.

2. The International Criminal Tribunal for the Former Yugoslavia (ICTY)

2.1. Introduction

The International Criminal Tribunal for the Former Yugoslavia (ICTY)[360] in the Hague was established by UN Security Council Resolution 827 of 21 May 1993 to try persons responsible for serious violations of international humanitarian law committed on the territory of the former SFRY since 1991. The Tribunal's activities are defined by its Statute, an integral part of Resolution 827, and the judicial procedure is defined by the Rules of Court adopted by the ICTY's judges. The Tribunal has three organisationally independent bodies (chambers), a Prosecutor and a Secretariat (Art. 11 of the Statute). The ICTY's Appeals Chamber also hears appeals in cases of the International Criminal Tribunal for Rwanda. The ICTY's Prosecutor has also served as the Prosecutor of the Tribunal for Rwanda, but the posts were separated by Resolution 1503, which also called on the ICTY to complete its work by the year 2010. The ICTY and national courts have concurrent jurisdiction to prosecute war crimes, crimes against humanity and genocide, although the ICTY has primacy and may take cases over from national courts (Art. 9, Statute). Article 7 of the Statute provides for individual criminal responsibility and chain-of-command responsibility. Given that the ICTY has no coercive mechanism, all states are bound to co-operate with it, primarily by apprehending persons indicted by the Tribunal and collecting evidence (Art. 29, Statute). Co-operation with the

360 For basic data on the ICTY and chronology, see *Human Rights in Yugoslavia, 1998*, *1999*, *2000*, *2001* and *2002*.

ICTY and its procedures are regulated in Serbia and Montenegro by the Act on Co-operation of Serbia and Montenegro with the ICTY.[361]

The ICTY's President is Justice Theodor Meron, while Carla del Ponte was re-elected the Chief Prosecutor by Resolution 1504. Since September 2001, the Tribunal has a permanent staff of 1,248 from a total of 82 countries. Its budget for 2002 and 2003 was USD 223,169,800.[362] The prosecutor has so far indicted a total of 139 persons. Thirty-five proceedings have been concluded, 57 are under way, and final judgments have so far been passed to 20 persons. Prosecution of 31 indictees is in the pre-trial stage. By the conclusion of work on this Report, the Detention Unit in Scheweningen held 52 indictees, while another seven who had surrendered to the Tribunal have been released at their own recognisance. A total of 20 indictees are still at large. Seven persons have completed their sentences, and another 13 are serving theirs.[363]

Four persons surrendered voluntarily to the ICTY in 2003: Miroslav Radić, Milan Milutinović, Vojislav Šešelj and Željko Meakić. The former head of the Serbian State Security Service, Jovica Stanišić, and his deputy Franko Simatović were arrested in Operation "Sablja" after the assassination of the Serbian prime minister. Although Stanišić and Simatović were in prison when the indictments against them were made public, the authorities of Serbia and Montenegro held the view that the two had given themselves up and enjoyed on that basis the guarantees of the state for being set at liberty before the start of the trial, as the two had even before their arrest in the Serbian police operation expressed readiness to surrender to the ICTY if they were indicted and because by their very arrest they had been prevented on other grounds from surrendering to the Tribunal voluntarily. In 2003, the Serbian authorities arrested Veselin Šljivančanin and Vladimir Kovačević and handed them over to the Tribunal.

2.2. Indictments in 2003

Limaj and others[364] (IT 03–66)

On 24 January 2003, Fatmir "Ćeliku" Limaj, Haradin "Shala" Bala, Isak "Kergiz" Musliu and Agim Murtezi were indicted for crimes against humanity and violating the laws and customs of war, but the charges against Murtezi were dropped

361 The Act on Co-Operation of the State Union of Serbia and Montenegro with the Internatio nal Tribunal for Prosecution Criminal of Persons Responsible for Serious Vioalation s of International Humanitarian Act Committed in the Territory of the Former Yugoslavia Since 1991 (*Sl. list SRJ,* No. 18/02; *Sl. list SCG*, No. 16/03).

362 See *Human Rights in Yugoslavia 2002* , IV.2.1.

363 For all data on the ICTY and its cases, see www.un.org/icty.

364 See www.un.org/icty/bhs/cases/limaj/limaj_main.htm.

on 28 February. Limaj was one of the commanders of the so-called "Kosovo Liberation Army" ("KLA") and was responsible for the functioning of an "KLA" prison camp in Lapušnik, Kosovo. Balja and Musliu were also in the "KLA" and served as commanders and guards in the Lapušnik camp. Limaj and the others are accused of nine counts of crimes against humanity, violating the laws and customs of war and murder. According to the indictment, in the Kosovo municipalities of Štimlje, Glogovac and Lipljan between May and July 1998, Limaj himself and in collusion with "KLA" forces under his command and control planned, incited, ordered, committed and in others ways aided and abetted the planning, preparation or commitment of criminal offences of imprisonment and acts of brutality against Serb and ethnic Albanian civilians. All three were arrested in February 2003 and handed over to the ICTY.

Vojislav Šešelj[365] (IT 03–67)

Vojislav Šešelj, the President of the Serbian Radical Party (SRS), was indicted on 15 January 2003 and surrendered voluntarily to the Tribunal on 24 February. The indictment lists eight counts in connection with crimes against humanity and six in connection with violations of the laws and customs of war perpetrated during Šešelj's alleged participation in a joint criminal undertaking.

According to the indictment, the aim of the conspiracy was the permanent removal by force of a majority of Croats, Moslems and other non-Serbs from about one-third of the area of Croatia, a large part of Bosnia and Herzegovina (BiH) and parts of the Province of Vojvodina. The conspiracy is claimed to have been created before 1 August 1991 and to have lasted at least until December 1995, and Šešelj's participation in it is said to have lasted until September 1993, when the SRS turned against Slobodan Milošević.

Naser Orić[366] (IT 03–68)

On 28 March, the prosecutor filed an indictment against Naser Orić, the commander of the 28th Division of the BiH Army's 2nd Corps. Orić is charged with being in command of all units active in the municipalities of Srebrenica and Bratunac, in particular in the fighting in Rupovo Brdo on 10 June 1992, in Ratkovići on 21 and 27 June 1992, Ježestica on 8 August 1992, Fakovići on 5 October 1992, Bjelovac from 14 through 19 December 1992 and in Kravica on 7 and 8 January 1993, and all units, including those of the military police, which took part in arresting and detaining persons of Serb nationality in Srebrenica. The six-count indictment accuses Orić of violations of the laws and customs of war, murder and inhuman treatment, reckless destruction of towns, villages and settlements, and stealing public and private property. Orić was arrested on 10 April 2003.

365 See www.un.org/icty/bhs/cases/seselj/seselj_main.htm.
366 see www.un.org/icty/bhs/cases/oric/oric_main.htm.

Dragan Obrenović[367] (IT 02–60/2)

Dragan Obrenović, who was the chief-of-staff and deputy commander of the First Zvornik Infantry Brigade of the Bosnian Serb Army (VRS) between December 1992 and November 1996, was indicted on 20 May 2003 in connection with crimes committed against the population of Srebrenica. Obrenović concluded a pleas bargain deal with the Prosecutor, pleading guilty to count 5 of an altered indictment accusing him of persecution and crimes against humanity; he is therefore no longer charged with genocide. Obrenović "was aware of the widespread and systematic crimes described in the indictment", the agreement states. According to the indictment, over 7,000 Bosnian Moslems were killed in Srebrenica between 14 July and 1 November 1995. Obrenović was sentenced to 17 years in prison.

Momir Nikolić[368] (IT–02–60/1)

Momir Nikolić, Captain First Class in the Bratunac-based First Light Infantry Brigade of the VRS u Bratunac between 11 July 1995 and 1 November 1995, acted as assistant commander in charge of security and intelligence. Nikolić pleaded guilty to one count of the indictment, in which he is charged with persecution on political, racial or religious grounds as crimes against humanity. The Prosecution dropped charges of genocide, complicity in genocide and murder as a violation of the laws and customs of war.

The trial began in 2003 of a group of former VRS officers[369] charged in connection with crimes committed in Srebrenica in July 1995. The fourth co-defendant, Momir Nikolić, the former VRS Bratunac Brigade assistant commander in charge of security and intelligence, concluded a deal with the prosecution, admitting involvement in persecution as a crime against humanity; he was then sentenced by the Trial Chamber to 27 years' imprisonment.

Jovica Stanišić and Franko Simatović[370] (IT 03–69)

An indictment was filed on 1 May 2003 against Jovica Stanišić, the former head of the State Security Service (SDB) within the Serbian Ministry of the Interior (MUP), and Franko Simatović, the former commander of the MUP's Special Operations Unit ("Red Berets"). Stanišić and Simatović are charged with participation in a joint criminal undertaking between 1991 and 1995 during which crimes against humanity were perpetrated in Bosnia and Herzegovina and in Croatia (the persecution and murders of Bosnian Moslems and Croats) and violating the laws and customs of war.

367 See www.un.org/icty/bhs/cases/obrenovic/obrenovic_main.htm.
368 See www.un.org/icty/bhs/cases/momir_nikolic/mnikolic_main.htm.
369 *Blagojević and others*, IT–02–53.
370 See www.un.org/icty/bhs/cases/stanisic/stanisic_main.htm.

Nebojša Pavković and others[371] (IT–03–70)

Sealed indictments against Yugoslav Army (VJ) Generals Nebojša Pavković and Vladimir Lazarević and MUP Generals Sreten Lukić and Vlastimir Đorđević were opened on 20 October 2003

General Lukić currently holds the post of Assistant Minister of the Interior of Serbia and the head of the Public Security Department. Pavković, Lazarević and Lukić live in Belgrade, while retired police general Đorđević disappeared after the 5 October 2000 democratic change in Serbia, and he is believed to be in Russia.

During the war in Kosovo, General Pavković was the commander of the VJ's Third Army, General Lazarević was the commander of the VJ's Priština Corps, General Lukić wad the police Chief-of-Staff in Kosovo, and General Đorđević was an Assistant Minister of the Interior and the head of the Serbian MUP's Public Security Department.

Pavković, Lazarević, Lukić and Đorđević are charged with five counts of crimes against humanity committed against Kosovo Albanians and violations of the laws and customs of war during the clashes in Kosovo in the spring and summer of 1999. They are charged with direct and chain-of-command responsibility for "the forcible relocation and deportation of about 800,000 ethnic Albanian civilians", "the murders of hundreds of ethnic Albanian civilians committed by FRY and Serbian forces", "sexual assaults by members of the FRY and Serbian forces against Kosovo Albanians, especially women" and "arbitrary destruction of Albanian religious facilities".

Pavković, Lazarević, Lukić and Đorđević are charged in connection with the deportation of Kosovo Albanians as a crime against humanity; the second count of the indictment lists other inhuman acts: forcible relocation of populations, as a crime against humanity. In the third and fourth counts, they are charged with murder, again as a crime against humanity and violation of the laws and customs of war. The last count accuses them of the persecution of ethnic Albanians on political, racial and religious grounds, again as a crime against humanity.

Under the indictment, between 1 January and 20 June 1999, FRY and Serbian forces implemented an action in which almost 800,000 ethnic Albanians were deported by force, "acting under the instructions and with the encouragement and support of" Generals Pavković, Lazarević, Lukić and Đorđević, but also of Slobodan Milošević, Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić and Vlajko Stojiljković". "Throughout Kosovo, FRY and Serbian forces systematically shelled towns and villages, burnt houses and farms, destroyed cultural and religious institutions of the Kosovo Albanians, murdered Albanian civilians and sexually assaulted Albanian women", the indictment reads. It also states that federal and Serbian forces committed a number of mass murders of Kosovo Albanians, including those of 45 residents of the village of Račak on 15 January 1999, the deaths of about 80 civilians

371 See www.un.org/icty/bhs/cases/pavkovic/pavkovic_main.htm.

in Bela Crkva, the execution and burning of the bodies of 105 men and boys in Mala Kruža in March of that year and the murders of at least 44 civilians in a café in Suva Reka whose bodies were later found in a mass grave near the Belgrade suburb of Batajnica. The indictment lists the names of ethnic Albanian civilians murdered by Yugoslav and Serbian forces which were under the commands of Generals Pavković, Lazarević, Lukić and Đorđević.

Milan Babić[372] (IT–03–72)

The indictment filed against Milan Babić on 17 November 2003 covers a period in which he was the President of the Republic of Serb Krajina (RSK), 19 December 1991 to 15 February 1992, and the period after April 1994, when he served as Foreign Minister in the RSK Government. Babić was elected to head the RSK Government in July 1995 and retained the post until the beginning of August 1995, when Croatian forces launched the so-called Operation "Oluja" (Storm) and the entire RSK leadership fled from Krajina. Babić is charged with being a participant in a joint criminal undertaking which had begun by 1 August 1991 at the latest and lasted at least until June 1992 and whose aim was forcibly and permanently ejecting the majority of the Croat and other non-Serb populations from about one-third of the total area of the Republic of Croatia in order for that territory to become a part of a new Serb-dominated state, by way of perpetrating crimes violating the provisions of Articles 3 and 5 of the ICTY's Statute. Babić is individually charged with being responsible for crimes of which he is accused in accordance with Articles 3, 5 and 7(1) of the Statute. He is accused of crimes against humanity and violating the laws and customs of war. Milan Babić appeared before the Tribunal for the first time on 26 November 2003.

2.3. Sentences Passed in 2003[373]

Biljana Plavšić

The Trial Chamber of the ICTY sentenced Biljana Plavšić to 11 years' imprisonment for crimes against humanity committed during the war in Bosnia and Herzegovina. Plavšić is serving her sentence in Sweden.

The ICTY filed an indictment against Biljana Plavšić on 7 April 2000 under which she was charged with genocide, crimes against humanity, violating the laws and customs of war and serious breaches of the Geneva Conventions. Ms. Plavšić concluded a deal with the Prosecution, which withdrew the genocide charges. Early in October last year, she pleaded guilty to the remaining charges and expressed remorse over persecution on racial and religious grounds. The Trial Chamber expressed the opinion that her admission of guilt and responsibility "should contri-

372 See www.un.org/icty/bhs/cases/babic/babic_main.htm.
373 The ICTY judgments are available on http://www.un.org/icty/bhs/icty/glance/judgements.htm.

bute to reconciliation in Bosnia and Herzegovina and the entire region". In deciding on the sentence, the Chamber took into consideration both aggravating and mitigating circumstances. The former were the defendant's high-ranking position, the vulnerability of the victims and the perversity of the crimes committed against them. The Trial Chamber said that Plavšić was not "among the top leadership", that she had not been the "author of the plan" of crimes in whose perpetration she had played a role inferior to those of others. There were other mitigating circumstances: admission of guilt, voluntary surrender, her conduct after the conflict and her (advanced) age.

Kupreškić and others

In the case of *Kupreškić and others*, the Appeals Chamber acquitted of charges Zoran Kupreškić, Mirjan Kupreškić and Vlatko Kupreškić, reversed their convictions and ordered their release. Drago Josipović had his 15-year sentence reduced to 12 years' imprisonment, and that of Vladimir Šantić was reduced from 25 to 18 years. The case of one of several involving a massacre of the Bosnian Moslem population of the small central Bosnian village of Ahmići, which was attacked by Bosnian Croat forces in 1993.

Čelebići

Acting on appeals lodged by Zdravko Mucić, Hazim Delić and Esad Landžo, the Appeals Chamber upheld their original judgments and sentences: 9 years' imprisonment for Mucić, 18 years for Delić and 15 years for Landžo. The three were found guilty in 2001 of being responsible for murdering, torturing, sexually abusing, beating and subjecting to other forms of inhuman and degrading treatment prisoners in the Čelebići prison camp in central Bosnia and Herzegovina, the first in his capacity as the camp commander, the second as deputy commander and the third as a camp guard.

Milomir Stakić – "Prijedor"

Milomir Stakić was charged with genocide, complicity in genocide, murder as a crime against humanity, murders, extermination, persecutions, deportation and other inhuman acts in connection with the events in the municipality of Prijedor between 30 April and 30 September 1992. Stakić was found guilty of extermination, murder and persecution as crimes against humanity. Although Stakić was cleared of genocide charges, he is the first recipient of the longest sentence prescribed by the ICTY's Statute – life imprisonment. An appeal against the judgment has been lodged.

Mladen "Tuta" Naletilić and Vinko "Štela" Martinović

Mladen Naletilić was found guilty of eight counts of his indictment for crimes against humanity (persecution on political, racial and religious grounds; torture),

violations of the laws and customs of war and violations of the Geneva Conventions, and sentenced to 20 years' imprisonment. Vinko Martinović was found guilty of nine counts of his indictment for crimes against humanity (persecution on political, racial and religious grounds; inhuman acts; murder), violations of the laws and customs of war and violations of the Geneva Conventions, and sentenced to 18 years' imprisonment, all in connection with the criminal offences of persecution, murder, inhuman acts and robbing Bosnian Moslems in and around the city of Mostar.

Momir Nikolić

ICTY Indictee Momir Nikolić concluded a plea bargain deal with the Prosecution admitting responsibility for persecution as a crime against humanity committed in Srebrenica, Potočari, Bratunac and Zvornik in July 1995, when over 7,000 persons were killed. The Trial Chamber accepted the guilty plea but neither the defence's nor prosecutor's sentence recommendations, on 2 December 2003 sentencing Nikolić to 27 years' imprisonment. The court said it was guided in its decision on the sentence by the fact that Nikolić had been an integral part of the implementation of a plan to commit mass murders in Srebrenica, and that he had taken part in destroying key evidence by co-ordinating work on exhuming and re-burying victims' bodies. The Chamber did take into consideration Nikolić's admission of guilt and his co-operation with the Prosecution, but said that neither his co-operation nor his remorse had been genuine and complete.

Stanislav Galić

Stanislav Galić, the former commander of the Sarajevo-Romanija Corps of the VRS, was on 5 December 2003 sentenced to 20 years' imprisonment for the crimes of implementing terror and deliberate attacks against the civilian population of Sarajevo (violations of the laws and customs of war and crimes against humanity) during the siege of the city. The judgment was adopted by a majority vote, in which Justice Nieto-Navia issued a separate opinion expressing the view that the individual criminal responsibility of the defendant for issuing orders had not been proven beyond a reasonable doubt, and that he would have found Galić guilty of the charges and sentenced him to 10 years' imprisonment according to his chain-of-command responsibility, as Galić had known or must have known about the perpetration of crimes even if he had not ordered them himself.

Dragan Obrenović

Defendant Dragan Obrenović was on 10 December 2003 sentenced to 17 years' imprisonment on the basis of an admission of guilt following a plea bargain with the prosecutor for taking part in a crime against humanity committed after the fall of the Srebrenica enclave in July 1995. The Trial Chamber said Obrenović's

co-operation was full and unconditional and his remorse genuine. The sentence was in line with the prosecutor's recommendation (15–20 years). On the basis of his deal with the Prosecutor, Obrenović testified at the trials of Vidoje Blagojević and Dragan Jokić.

2.4. The Trial of Slobodan Milošević

As expected, the trial of the former Yugoslav President, Slobodan Milošević, remained the focus of attention in 2003. A number of hearings were postponed throughout the year on account of the defendant's poor health.

Witnesses for the prosecution included Petra Kristea, the former Minister of Defence of Croatia, Aleksandar Vasiljević, the former head of the Yugoslav People's Army's counter-intelligence service, Dragan Vasiljković, also known as "Captain Dragan", Helena Ranta, the former head of an EU forensic medicine team, Milan Kučan, the former President of Slovenia, Zoran Lilić, the former President of the FRY, Dražen Erdemović, Lord David Owen, a former EU peace negotiator, and Borisav Jović, a former President of the SFRY Presidency.

The Trial Camber said on 18 September that Milošević would have three months to prepare his defence after the Prosecution completed its case in the autumn of 2003. The *amici curiae* appealed against the decision to the Appeals Chamber and demanded a longer period; the Appeals Chamber had not ruled on the motion by the end of 2003. The Trial Chamber ordered the ICTY's Secretariat to provide for Milošević rooms in the detention centre for contacts with witnesses and studying documents which would not be monitored. On 23 October, the Chamber appointed Dr Branko Rakić, an Assistant Professor at the Faculty of Act at Belgrade University, a legal advisor to the defendant, complementing Zdenko Tomanović and Dragoslav Ognjanović. The Chamber also upgraded the role of the *amici curiae*, primarily because of the defendant's poor health. When the Prosecution concludes presenting its case, attorney-at-law Branislav Tapušković will no longer be *amicus curiae* and will be replaced by Gillian Higgins, who joins Steven Kay and Timothy McCormack.

2.5. The Co-operation of Serbia and Montenegro with the ICTY

Early in April 2002, the then Parliament of the Federal Republic of Yugoslavia adopted the Act on Co-operation of the FRY with the ICTY, which took effect on 12 April 2002 (*Sl. list SRJ*, No. 18/02). The legislators said that the purpose of the law was to regulate co-operation with the ICTY providing a basis on which competent authorities of the member republics would decide on the cession of criminal proceedings and handing over of the accused persons to the Tribunal

(Art. 1 (1)). The FRY shall observe and implement the judicial decisions of the ICTY and shall render legal aid to its investigative and judicial authorities (Art. 1 (2)).

The Act also provides for the establishment of a National Council for Co-operation with the ICTY, which was set up on the basis of as decision taken by the federal government (*Sl. list SRJ*, No. 20/02). The Council is tasked with certain forms of co-operation, particularly "with regard to the status of the accused persons, rendering aid to their families, the position of witnesses, access to files, and other issues of importance for carrying out co-operation" (Art. 7, Act).

Article 18 of the Act is particularly important, as it refers to the handover of accused persons. It states that the Article shall apply to all the persons accused before the ICTY who find themselves on the territory of the FRY, irrespective of the rights and privileges ensuing from their governmental, political, public or official duty (Art. 18). In the handing-over procedure, the accused must have a defence lawyer (Art. 20 (1)). The investigating judge shall order detention of the accused whose handing over has been requested or shall take other measures for ensuring the presence of the accused (Art. 21 (1)).

Especially controversial is Article 39 of the Act, under which its provisions "shall apply to the Yugoslav citizens against whom the ICTY brought charges by a confirmed indictment till the day on which this Act goes into effect"; all others would be tried by Yugoslav courts. Criticising the said article in an address to the UN Security Council, the ICTY's President said the FRY was not honouring its international obligations. Alterations of the Act erasing Article 39 became effective on 16 April 2003 (*Sl. list SCG,* No. 16/03), bringing the Act in harmony with the Constitutional Charter of the Union of Serbia and Montenegro. All persons indicted by the ICTY will now be handed over to it, regardless of when the moment the charges were finalised and made public, unless the ICTY cedes the cases to the national judiciary.

The 2003 changes also relate to Article 11, under which Council of Ministers of SaM or the member states shall decide on releasing indictees (as well as witnesses) from the obligation to keep state or military secrets. The Council also decides on the submission of documents referring to a state, military or official secret.

The Foreign Ministry is now in charge of activities formerly performed by the Ministry of Justice, such as the reception of requests issued by the Tribunal, their transfer to competent authorities for processing and the issue of decisions on ceding criminal proceedings to the ICTY. The Ministry of Human Rights and Minority Rights is now in charge of activities in connection with the surrender of indictees to the Tribunal following the competition of the requisite judicial proceedings.

Contrasting opinions were voiced during 2003 in connection with the co-operation of the authorities of Serbia and Montenegro with the ICTY. Chief Prosecutor Carla Del Ponte said during several visits to Belgrade that the co-operation was insufficient, while her hosts described it as being far better than before. The main problem remains the non-apprehension of several indictees, notably Ratko Mladić. A US envoy in charge of war crimes, Pierre – Richard Prosper, has said that Serbia and Montenegro risks being divested of economic assistance from Washington after 31 March this year if it fails to hand over to the ICTY war crimes indictees, including Mladić,[374] the former commander of the VRS.

"Serbia and Montenegro, the Republika Srpska and Croatia may expect after a UN Security Council debate on the work of the ICTY more pressure from the European Union", Prosecutor Carla Del Ponte has said. "The manner in which pressure will be exerted on the countries from which full cooperation is being sought is not my problem", she told the Zagreb daily *Jutarnji list* in mid–2003. The Serbian Prime Minister, Zoran Živković, said soon after to the Sarajevo daily *Dnevni avaz* that "Ratko Mladić will be arrested and handed over to the ICTY the minute he is found". Živković said that Mladić had not been arrested in the past two years for two reasons: the first was that he was not in Serbia and the second that he had concealed himself so well that it was impossible to find him.

On 10 October, ICTY Prosecutor Del Ponte told the UN Security Council that the authorities in Belgrade were not co-operating sufficiently with the Tribunal. "At the trial of Milošević, like those of others, I feel that there exists a desire of the authorities to protect key documents which could offer proof of the involvement of the former authorities in Belgrade in crimes committed in Bosnia and Herzegovina" Del Ponte said. Reporting to the Council on the performance of the ICTY's Prosecution, she added that she had reason to believe that "more than half of the 17 fugitives who are still at large, including Ratko Mladić, are in Serbia and Montenegro". The Government of SaM responded by saying that the former federal president, former head of the state security service and several senior army officers had been handed over to the ICTY, and that all legal obstructions to co-operation with the Tribunal had been lifted, which could certainly not be described as poor co-operation. Del Ponte also criticised the Republika Srpska, whose authorities, she said, "have neither located nor arrested any of the indicted fugitives."[375]

During the summer, the Serbian Minister of Justice, Vladan Batić, sent a letter to Del Ponte expressing his ministry's readiness to offer evidence about crimes committed against Serb civilians in Kosovo and in connection with kidnapped and missing children of non-Albanian nationalities according to records compiled by the Committee for Collecting Evidence on Crimes Against Humanity and International

374 See *Danas*, 3 January, p. 2.
375 See www.un.org/News/Press/docs/2003/sc7889.doc.htm.

Act with evidence for each of the said crimes, and asking why the ICTY had launched no investigations. "Evidence of terrorist activities by the "KLA" was forwarded to you in October 2001. Not a single "KLA" leader has yet been indicted. Why? If the responsibility of superiors – 'chain-of-command responsibility' – has already been established and very often applied to indictees of Serb nationality, how is it that you have still not charged according to those same principles Thaqi, Cheku, Haradinaj and others?" Batić wrote.[376] Several months later, the Minister met with Del Ponte and discussed Serbia's co-operation with the ICTY's Prosecutor. Batić had earlier said that he would hand over to Del Ponte fresh evidence of crimes committed by the "KLA" against Serbs and other non-Albanians during the clashes in Kosovo in 1998 and 1999. He also said that in return he expected to get from the Tribunal evidence about shady financial dealings of the regime of Slobodan Milošević during the sale of Telekom Srbija to the Italian state-owned telecommunications company. The failure to prosecute ethnic Albanians is a serious problem, but Minister Batić's insistence on it seems to be more in the service of political promotion than anything else.

According to the ICTY Prosecutor, one of the key problems in its co-operation with the authorities of Serbia and Montenegro is that Belgrade is reluctant to hand over to the prosecutor documents of importance for the criminal prosecution of persons indicted by the ICTY, particularly Slobodan Milošević. Del Ponte has asked the Trial Chamber to apply Rule 54 *bis* of the Rules of Procedure and Evidence and order the Government of SaM to hand over the requested documents. Given that the ICTY was established on the basis of Chapter VII of the UN Charter, it is uniquely empowered to issue compulsory orders to sovereign states. Rule 54 *bis* prescribes the conditions under which the ICTY's Trial Chamber may issue such an order: sufficient specificity of the document (requests for unrestricted access to files or for an undefined batch of documents are therefore not allowed), its relevance for the case being heard, and a prior reasonable attempt by the applicant to obtain the said document from the state in question. That state may lodge a complaint against a request which fulfils the formal conditions listed above if handing over documents to the Tribunal would harm its national security. It is up to the Chamber to make a fair assessment and choose between the interests of the state and the interests of justice in that particular case. In any case, presentation of evidence must take into consideration the security interests of the state: hearings must be closed to the public, the relevant document must be returned to the state immediately after it is presented etc.[377]

In the Milošević case and acting on Prosecution requests, the Trial Chamber has so far issued a total of seven decisions based on Rule 54 *bis* in connection

376 See www.pcnen.cg.yu/vijesti, 15 August.

377 National security interests as grounds for refusal by a state to release evidence were considered for the first time in the *Blaškić* case; see Appeals Chamber decision: www.un.org/icty/bhs/cases/blaskic/documents/decisions/appch/bla-dec971029b.htm

primarily with documents of the Supreme Defence Council of SaM (FRY). The Chamber has among other things asked the SaM Government to hand over to the Prosecutor transcripts of meetings of the Supreme Defence Council, the military doctrine and some other documents of the army general staff, and also ruled against a request by the prosecutor to be allowed unrestricted access to state archives.

2.6. Legal Problems in the Work of the ICTY

2.6.1. Detention

The minimal standards of detention established in the process of developing human rights laws concern the conditions of undergoing detention and the conditions of ordering it. While very little criticism can be directed at the ICTY in regard to the former – living conditions in the ICTY's Detention Unit are extremely civilised, especially when viewed against those prevailing in the countries of the former SFRY – the area of ordering detention and its duration features certain problems linked with the protection of the detainees' human rights.

Contemporary law does not regard detention as punishment, but as a preventive measure ensuring the presence of the accused at the trial. In continental law, detention may be ordered solely on the basis of reasonable suspicion that the accused committed the crime with which he has been charged, but also requires that certain other conditions be fulfilled: a risk of flight, a danger that the accused could conceal or destroy evidence, or particular circumstances leading to a conclusion that the accused could attempt to repeat an attempted criminal offence or carry it through to its conclusion. Reasonable suspicion that the accused committed the criminal offence does not represent sufficient grounds for mandatory detention simply because there is a presumption of innocence until the judgment becomes final. Under SaM law, mandatory detention is ordered by the court to persons suspected beyond a reasonable doubt of having committed a criminal offence punishable by 40 years' imprisonment, except in cases where the law prescribes a possibility of passing a more lenient sentence. This provision does not comply with the standards of the Council of Europe established through the practice of the ECtHR.[378] It is up to the judge to assess in the concrete case whether such circumstances exist and to order or not order detention.

The presumption of innocence means that detention must be a subsidiary measure which must be withdrawn in the presence of another measure offering sufficient guarantees for the course of the criminal proceedings (for example bail), which is necessary for conducting prosecution, which is of limited duration – under SaM laws, detention may not exceed six months in the investigatory procedure, two years in the first-instance proceedings and one year in the appeals procedure. In its

378 See I.4.5.

practice in connection with Article 5 of the European Convention of Human Rights, the ECtHR has assumed a more flexible stance (especially due to the diversity of the relevant regulations in the European countries), which calls for reducing detention to the shortest possible term, depending on the circumstances and complexity of each individual case, on the behaviour of the defendant and on the conduct of the competent authorities, but detention may never be automatic and compulsory and must always be ordered by a judge.

In contrast to this, the ICTY regulates detention in a completely different manner. The Rules of Procedure and Evidence state that upon arrival in the seat of the ICTY, indictees shall be detained in a facility provided by the host-country (Rule 64), and that indictees may temporarily be released until the beginning of their trials if the indictees and the states to which they ask to be released provide sufficient guarantees (Rule 65). Detention is therefore mandatory – prescribed by the Rules. Although a pre-trial judge will order detention as soon as the indictee appears before the court for the first time, the judge is not able not to issue such a decision – the judge does not assess whether there exists a flight risk or other grounds for ordering detention, the judge is simply bound by Rule 64 to issue such a decision automatically, irrespective of the circumstances of the case, regardless of whether the indictee had been arrested or surrendered voluntarily, and irrespective of how much time passed from the publication of the indictment and the handover or surrender of the accused. The indictee is the one who has to convince the judge that there exists no flight risk, instead of the prosecutor having to prove the presence of that risk. The rules prescribe no limit on the duration of detention. Even those indictees who were temporarily released pending trial must remain in detention for the duration of their trials.

If such a detention regime were a feature of any national legal system, that system could hardly be said to respect the human rights of detainees. But this conclusion is altered to some extent by the fact that the ICTY is an international court. National legislatures may allow themselves the luxury of granting indictees extensive protection of their rights in regard to detention because they possess other instruments with which they can ensure their presence in court – in particular the police and other coercive mechanisms. The ICTY has no such mechanisms and is wholly dependent on states in the apprehension of indictees. A large number of them were only arrested after searches lasting years; many indictees enjoy enormous support among the local population and find it easy to conceal themselves; many states show little resolve to track indictees and arrest them, for reasons of national policy. The very nature of the ICTY, the crimes it prosecutes, the profiles, importance and personal influence of many indictees and the instruments available to it necessitates for the ICTY a detention regime more restrictive than those of national laws. But this does not justify some serious shortcomings, such as the unrestricted duration of detention. A statistical assessment points to an excessively strict detention regime – there are now 54 persons in detention, including no fewer than 22

who gave themselves up voluntarily. Only five indictees were released at their own recognisance.[379] Under national laws freedom is the rule and detention the exception, but in the ICTY's practice the opposite is the case, not just in statistical terms, but also regarding its regulations.

The extensive length of detention remains the biggest problem in the sphere of the human rights of the detainees, perhaps the best illustration being that of Momčilo Krajišnik. Krajišnik was arrested and placed in detention on 3 April 2000, and his trial has still not begun until the completion of this Report – his detention has therefore lasted almost four years yet this in no way influences his prosecution. Detention is not necessary for investigation purposes, as the acts Krajišnik has been accused of were committed more than eight years ago, a period sufficient to inquire fully into the most complex cases. Excessively long detentions of this kind represent violations of human rights, because no human being may be deprived of liberty for such a long time simply owing to the poor efficiency of the ICTY or its limited resources. Besides the Tribunal itself, no remedy is available that Krajišnik could use to challenge the legality and justifiedness of his detention – he cannot complain to Dutch courts, to the UN Human Rights Committee, not even to the ECtHR, because although he is on Dutch territory, he is under the jurisdiction of the UN.

Another major problem is the absence of a compensatory mechanism for persons who were unjustly detained. Almost all democratic legal systems recognise the possibility that courts can also make errors and offer to wrongfully convicted persons the right to rehabilitation and compensation from the state. In Serbia and Montenegro, the procedure has two stages – an administrative one, in which the person concerned negotiates with the Ministry of Justice, and a litigant one, in which persons not satisfied with the outcome of negotiations with the Ministry may seek satisfaction before a competent court. Article 3 of Protocol No 7 to the ECHR on the Protection of Human Rights also provides for compensation for wrongful convictions.[380] The ICTY's law provides no such mechanism.

2.6.2. Appointments of Defenders

So far two indictees, Slobodan Milošević and Vojislav Šešelj, have requested to act in their own defence, without the help of lawyers. The Chamber of judge Richard May allowed Milošević to defend himself with the help of three legal assistants of his own choice, although it also appointed three experts in various fidds of law as *amici curiae* (friends of the court), whose task is to monitor the impartiality and fairness of the court, as officers of the court itself and to a certain extent also to defend the interests of the accused.[381] In contrast, judge Wolfgang Schom-

379 See www.un.org/icty/bhs/icty/glance/stat_frame.htm.
380 See I.4.6.
381 See *Order inviting Designation of Amicus Curiae*, 30 August 2001, and the ICTY Secretariat's decision appointing *amici curiae* dated 6 September 2001.

burg appointed a stand-by defender for Vojislav Šešelj against his will.[382] This example show how the legal backgrounds of the judges affect their decisions in international legal proceedings. The Chamber of judge May, who together with a co-judge comes from the Anglo-Saxon accusatory (adversarial) system, chose to allow Milošević to conduct his own defence, even if it harms him more than it benefits him. Judge Schomburg, who comes from the continental inquisitorial system in which the truth is revealed by an inquiry into the facts conducted by the judge, decided to force a defence attorney on Šešelj. Naturally, the conduct of the accused could also have influenced the decisions. It should be noted that judge May (in his request to the accused to take a defender in his own best interest) and judge Schomburg (in his decision to appoint a stand-by defender) allowed the accused to participate in their own defence together with their layers (for example, cross-examining witnesses), which is characteristic of inquisitorial rather than accusatory systems. The claim of the accused that that a court appointment of a defender against their will represents a violation of their human rights is incorrect.[383] No relevant international instrument, for example Article 6 of the ECHR, defines an accused person's right to conduct his own defence as an absolute right, and all of them allow that right to be limited in the interest of justice. Most continental legal systems recognise the institution of obligatory defence,[384] which also exists in Serbia and Montenegro law. Under Article 71 of the Act on Criminal procedure, all persons accused of criminal offences punishable by terms of imprisonment of ten years or more (genocide, war crimes and crimes against humanity) must have a defence counsel, whether they want to or not.

2.6.3. Plea Bargain Deals

Plea bargains (deals) between the prosecutor and an indictee on guilty pleas as well as securing confessions or evidence are a customary mechanism in many legal systems, especially Anglo-Saxon law, which reduce the burden of the judiciary. They also exist in the legal system of the ICTY, albeit in a slightly modified form. The purpose of a plea bargain deal is that indictees admit their guilt before the court, describing in detail their crimes and their responsibility, in order for the entire trial to be skipped and a sentence passed at once. In exchange, the prosecutor will drop some counts of the indictment and/or demand a lighter sentence. While in Anglo-Saxon law the court is as a rule bound by the prosecutor's recommended

382 See *Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj in his Defence*, 9 May 2003. The trial of Vojislav Šešelj has not begun; the preparatory stage is under way.

383 *Id,* paras. 7–10.

384 E.g. the French *Code de Procédure Pénale*, Articles 274 and 317; Belgian *Code d'instruction criminelle* Article 294; German *Strafprozeßordnung*, Article 140, quoted according to the decision of judge Schomburg in the *Šešelj* case.

sentence (as the prosecutor has unlimited discretion in qualifying the offence and withdrawing counts of the indictment) and once convinced that the accused had really committed the act to which he had confessed and that the confession was full and frank has to pass the sentence demanded by the prosecutor, in the law of the ICTY a trial chamber is not bound by the deal struck by the parties, but as a rule respects it (although not always, as shown by the case of Momir Nikolić).

The advocates of plea bargain deals have their arguments – the average man trusts an accused member of his own people who confesses to his crime more than he trusts a distant, alienated and unknown foreign judge. How much the average man will believe a confession made by an indictee depends on many things, particularly the motives he believes provoked the confessions. If the confession was motivated by genuine remorse for one's crime, it may have a more healing effect than any conviction. In contrast, if the confession is the result of a desire to get a lighter sentence, it is viewed with contempt, extremely negatively, even when it is factually quite correct. The fundamental problem with deals is not that they are by their nature totally alien to continental legal practice, but that they are contrary to the purpose of the ICTY. While national legal systems, which process thousands of cases every year, may employ such procedural instruments, the ICTY, which will process only about 150 cases (albeit very complex) cannot allow itself that luxury. The ICTY was established by the UN Security Council on the basis of Chapter VII of the UN Charter with the aim of contributing to the establishment and preservation of peace on the territory of the former SFRY by prosecuting persons responsible for serious violations of international humanitarian law in order to prevent such crimes from being repeated in the future.[385] In order to for this task to be fulfilled, it is not enough that the ICTY should simply punish those responsible for these acts; justice must also be seen to be done. The penalties handed down by the ICTY must not only be retributive, but also generally preventive; they must affect other people in such a way as to convince them that any similar crime in the future will be punished. There is no cathartic effect of the trial, except maybe for the accused – evidence is not presented, victims are not cross-examined, the crimes themselves are not visible in all their perverseness.

Not only does the ICTY by accepting a system of plea bargain deals not realise its main role, as an impression is created in the public of some sort of commercial justice at play,[386] but it also creates injustices on the individual plane. It is possible by resorting to deals in national legal systems, with a large number of cases both with and without deals, to establish a relatively uniform penal policy.

385 See UN/S/RES/ 827, paras. 6 and 7.

386 See www.politika.co.yu/2003/1114/01_12.htm, also see Justice Hunt's opinion on http://www.people.virginia.edu/čhc3z/VAIL-arch/ICTY-plea_bargains_etc.html.

Using such deals in a specific legal system which will cover just over 100 cases results in the establishment of an inconsistent penal policy in which persons condemned of criminal offences of roughly similar gravity receive dramatically different sentences. Predrag Banović, once a guard in the infamous Keraterm prison camp, was recently sentenced to eight years' imprisonment for the murders of five persons whom he had beaten to death and for brutally beating another 27 persons, simply because he had concluded a deal with the prosecution, while two other prison camp guards, Duško Tadić and Hazim Delić, got 20 years each.[387]

One indictee, Momir Nikolić, concocted evidence and sexed up testimony in his negotiations with the Prosecutor because he believed he might gain from this.[388] Co-operation with the Prosecution could be a factor in determining penalties, but its influence must not be such as to halve a penalty for similar crimes.

A related question is the legal effect in other cases of judgments issued on the basis of confessions without the presentation of any evidence. Legal security warrants that once they become final convictions should have an effect which is not limited to that particular case, because a guilty judgment and the facts which represent elements of the crime committed should be regarded as correct and true in all other cases in which the perpetration of that crime is set as a prior issue (*res iudicata pro veritate accipitur*). This effect of convictions may be of considerable help to prosecutors in cases where the institution of joint criminal undertaking is used, i.e., in all those cases where the facts established by a prior final judgment are relevant to those cases – the same facts do not need to be proven again and the possibility is reduced of two different trial chambers weighing the same evidence and facts differently and issuing divergent judgments. Judgments based on admissions of guilt are specific by the absence of the presentation of evidence, which is exactly what creates an irrefutable presumption of the veracity of the judgment. An indictee's confession is enough to create the effect of a *res iudicata* in his concrete case, but not enough for that effect to be extended to another case. Simply put, although a person can irrevocably condemn himself by his confession, it cannot serve to condemn anyone else; in no other case can the prosecutor cite a judgment based on a person's confession, but needs to bring that person before the court to present evidence, which must carruy the same weight as any other evidence, in accordance with the principle of judicial evaluation of evidence, and its veracity should not been presumed, as it is in any other adjudicated case. The ICTY has so far taken no decisions on the question of the legal and factual effect of judgments issued on the basis of confessions, but the question will inevitably have to be tackled at some point.

387 See www.iwpr.net/index.pl?archive/tri/tri_332_4_eng.txt.
388 See 2.3, as well as www.iwpr.net/index.pl?archive/tri/tri_334_1_eng.txt.

3. The Human Rights Situation in Kosovo and Metohija in 2003

3.1. Introduction

The international civilian and military administration in the Province of Kosovo and Metohija was set up in 1999 according to UN Security Council Resolution 1244.[389] The civilian administration rests on four pillars: UN Mission in Kosovo (UNMIK), which controls the entire civilian administration, the Mission of the OSCE, which is in charge of organising elections and building up the democratic institutions, the Mission of the European Union, which is in charge of reconstruction and economic development, and UNMIK Police and the Department of Judicial Affairs. The heads of those pillars are also deputies to the Special Representative of the UN Secretary-General (SRSG), who heads UNMIK and is the supreme legislative and executive authority. The post was held in 2003 by Harri Holkeri, the OSCE Mission was headed by French diplomat Pascal Fieschi, and the EU Mission by British diplomat Andy Bearpark until August, when Nikdaus Limbsdorff came on that post.

3.2. Legislative Framework[390]

A total of 29 laws were adopted by the Kosovo Parliament in 2003, including two of particular significance for the area of human rights.[391] They are the Provisional Criminal Code of Kosovo and the Provisional Law on the Criminal procedure of Kosovo. UNMIK has declared these laws by Regulations 2003/25 and 2003/26 dated 6 July 2003; both will become effective on 6 April 2004.

Local and international legal experts worked on the two statutes for four years. The Criminal Code is based on the corresponding statute of the Federal Republic of Yugoslavia, albeit amended with international standards. The Code of Criminal Procedure upgrades the role of the public prosecutor, streamlines the judicial procedure and guarantees more protection for those who are subject to criminal prosecution.

389 UN/S/RES/1244, 10 June 1999.

390 For more on the Constitutional Framework for Provisional Self-Government in Kosovo and human rights in UNMIK regulations, see the Human Rights in Yugoslavia 2002. See also IV.1.2.

391 The number of based on information given on the web-site of the UNMIK *Official Gazette of Regulations and Administrative Decrees on* 2 December 2003.

3.3. Human Rights in Practice in 2003

The Ombudsman in Kosovo has levelled much criticism at UNMIK, accusing it of responsibility for "constant violations of human rights, abuse of its powers and indifference towards the principles of the rule of law." According to a report published on 10 July 2003,[392] the Ombudsman was approached by a total of 3,500 people seeking advice or assistance or help in filing complaints.[393]

UNMIK and KFOR were particularly criticised for insufficient transparency of compensatory procedures for persons suffering physical or property damage in connection with actions by those two institutions in Kosovo; each of them has set up its own office for receiving complaints, but the indemnification procedures differ widely.[394] It should also be noted that both UNMIK and KFOR enjoy immunity from prosecution.

The UNMIK Administration has also been criticised for failing to implement all necessary measures to determine applicable law in Kosovo and to publish the laws adopted in all three official languages – English, Albanian and Serbian.[395]

The Ombudsman's report also focuses on the problem of the recognition of civilian documents issued by UNMIK. To wit, the provisional self-government institutions (PIS) accept only documents issued by UNMIK, even in cases where the said documents apply to rights and facts dating from times before the Provisional Administration was founded.[396] In addition, some European countries[397] are refusing to recognise documents issued by UNMIK, thereby forcing the persons concerned to approach the authorities of the Republic. The consequence is that the exercise of numerous rights is impossible.

The position of the minorities in Kosovo continued to be very serious in 2003. The most vulnerable groups are the Serbs[398] and the Roma – their personal security cannot be said to be guaranteed, and their social and economic status is very bad.[399]

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392 Ombudsman in Kosovo, *Third Annual Report 2002–2003,* submitted to the SRSG.

393 *Id*, p. 8. A total of 399 cases have been registered so far by the institution, 69 have been declared inadmissible, in 60 cases the procedure was suspended during the investigation, *ex officio* investigations were launched in 13 cases, and in 10 cases the final reports were issued. In 239 cases UNMIK was the responsible party, in 19 it was KFOR, in 63 the Provisional Institutions of Self-Government (PISG), in 69 the Housing Property Commission and in 44 others; 306 applicants were ethnic Albanians, 81 Serbs and 44 members of other ethnic groups. *Id*, p. 3.

394 *Id*.

395 *Id.*

396 The report points to the problem of the recognition by the PIS of marriage certificates issued before the establishment of UNMIK. *Id*, p. 5.

397 The Government of Germany. *Id*, p. 5.

398 See 3.3.3.

399 CoE, Report of the Committee on Migration, Refugees and Population, 31 October 2003.

3.3.1. Investigations and prosecutions in connection with violations of international humanitarian law – The year 2003 was marked by two war crimes prosecutions. On 24 January, four former "KLA" officers were indicted by the ICTY. The four are awaiting trial in the ICTY's detention unit (the *Limaj and others* case).[400] Four former "KLA" servicemen (the co-called Lap Group)[401] were sentenced to lengthy prison terms for war crimes after a trial lasting five months in the Kosovo capital Priština.[402]

On 27 October, UNMIK Police arrested in Kačanik five Kosovo Albanians on suspicion of crimes committed against civilians during the conflict in Kosovo.[403] Their names have still not been made public.

The Lap Group's trial drew a lot of attention. The charges were based not only on the Yugoslav Criminal Code[404] but also on international humanitarian law standards.[405] The Prosecutor said the four had "individually, together or in collusion with other unidentified "KLA" members in a period between August 1998 and mid-June 1999, in the region of Lap (the villages of Bajgora, Lapušnica, Majac, Potok and Kolić), formed detention centres for keeping in custody ethnic Albanian civilians they suspected of co-operating with Serbian forces and betraying the "KLA". The detainees were kept in inhuman conditions, they were threatened, maltreated, exposed by constant mental and physical suffering, often deprived of water and food and essential medical treatment. One detainee was killed during the detention and five others after being freed."[406]

After a total of 40 hearings during which 60 witnesses were questioned, on 16 July the trial chamber found the four guilty of all charges and sent them to prison for a total of 45 years.

The trial was the first for war crimes in Kosovo in which former members of the "KLA", including a popular commander, were tried and convicted of crimes against the civilian population committed during the 1998–1999 clashes in Kosovo. This fact provoked much controversy in Kosovo[407] – many prominent local figures

400 See IV.2.2.

401 Rustem "Remi" Mustafa, former commander of the so-called Lap Military District, Nazi f "Drini" Mehmeti, former "KLA" Military Police commander in the District, Latif "Lata" Gashi, f ormer commander of the "KLA's" lap Intelligence Sector and Naim "Lumi" Kadriu, MP in the Lap r egion.

402 The International Criminal Court was made up of judges Timothy Clayson (president), Da niel Mabley and Leonard Assira (panel members). International Public Prosecutor Phill ip Alcock appeared for the prosecution. HLC, *Suđenja pred internacionalizovanim sudovima na Kosovu, slučaj Latif Gaši i drugi*, 9 September 2003.

403 UNMIK, Press Release, 28 October.

404 Article 142 taken together with Articles 22, 24, 26 and 30 of the Yugoslav Criminal Co de.

405 The Hague Conventions of 1899 and 1907, Article 3 of the 1949 Geneva Convention and Add itional Protocols I and II of 8 June 1977.

406 *Id.*

407 On 17 July, a hand grenade blew up outside the police station in Podujevo. During the ni ght between 19 and 20 July, several UNMIK Police cars were destroyed by unknown assailants in Peć a nd Priština. On 20 July, a rocket fired at the District Court in Priština caused substantia l damage. IWPR, *Kosovo: After the Trials – a Wave of Violence* , 31 July.

expressed disbelief and anger at the charges, calling them politically-motivated.[408] Representatives of the international community, for their part,[409] tried to highlight the primary aim of war crimes prosecution – individualisation of responsibility – but also the need to come to terms with the past through a serious debate about it and the war.

Although the trial of the Lap Group is a step in the right direction, it should be noted that it has been the only war crimes trial held in Kosovo so far and that it involved Albanians mistreating Albanians, pointing to the absence of the necessary will in Kosovo to look into serious violations of human rights and prosecute those responsible. This is particularly the case in connection with crimes committed against Serbs after 10 June 1999.

3.3.2. The question of missing persons in 2003 – According to data released by the UNMIK Office of Missing Persons and Forensics dated 12 November,[410] a total of 3,638 persons are still listed as missing in Kosovo. A total of 816 bodies have been exhumed, 406 identified and 373 returned to their families.

The International Missing Persons Day, 29 August, was marked in Kosovo by a gathering of family members of missing persons. Halit Berisha, the President of the Association of the Families of Missing Persons, said on the occasion that "in the past four years, not enough has been done to uncover the fates of those who are missing, and little has also been achieved in returning the bodies of Albanians found in mass graves in Serbia."[411] The frustrations of the Serbian side are just as tangible. At a meeting held in Kosovska Mitrovica on 1 December, members of the Association of Families of Missing and Kidnapped Persons expressed to UNMIK officials their dismay over the disappearance of over 1,000 Kosovo Serbs and what they said was almost non-existent progress in casting light on their disappearances and prosecuting those responsible.[412]

On 9 January, in an effort to establish a harmonious and efficient approach to the resolution of the problem of missing persons, the PISG formed a state Commission for Missing Persons, whose task is to "collect facts and record relevant

408 IWPR, Adrijatik Keljmendi, *Trials of* "KLA" *Members Harmful to Re-conciliation* , 18 July.

409 IWPR, Michael E. Hartmann, *Commentary: The Kosovo Judiciary is Impartial and not Politically Motivated*, 8 August.

410 UNMIK, Department of Justice, Office of Missing Persons and Forensics, OMPF Statistic s.

411 See II.2.2. for more data on exhumed and identified persons from mass graves in Serbia, as well as on the return of bodies to families in Kosovo, News *B92*, www.b92.net, 29 August. Fears about the outcome of direct dialogue between the Serbian Government, UNMIK and the Kosovo a uthorities which began in Vienna on 14 October, as well as dismay over the manner in which Alb anian political figures are treating the problem of missing persons, have motivated the fam ilies of 114 missing persons from the village of Mala Kruša, in the municipality of Orahovac, to subm it to the Prosecutor attached to the District Court in Priština a criminal complaint – the first of its kind in Kosovo – against 54 Serbs and two Roma they hold responsible for their abduction and dis appearance. IWPR, *Kosovo: Families of Missing Kosovo Albanians Seek Justice* , 13 November.

412 More on this was broadcast by *Radio B92*, *Po pitanju kidnapovanih i nestalih nije ništa urađeno* , 25 November.

data in connection with persons believed to have gone missing during the war in Kosovo. The Commission will also step up pressure through local and international institutions on the Serbian judiciary and security organs with the aim of obtaining data and shedding light on the fates of persons in Kosovo believed to be missing."[413] Fllora Brovina was appointed to head the Commission.

The International Commission for Missing Persons (ICMP) and UNMIK signed on 26 November a memorandum whose aim is rapid and accurate identification of victims in Kosovo.[414] The ICMP has thus far collected a total of 8,816 blood samples from members of families of persons who are listed as missing; this is the first and most important step in the identification of victims.[415]

3.3.3. Ethnically-motivated violence in 2003 – Ethnically-motivated violence continued to be part of everyday life in Kosovo and Metohija in 2003, representing a reason for much concern – not even after four years of international presence in Kosovo have the necessary conditions been created for the secure existence of the Serbs and other non-Albanians and freedom from fear.

As regards concrete forms of ethnically-motivated violence, 2003 was marked by a number of physical assaults[416] against Serbs, several of them involving firearms.

On 8 February, unidentified assailants bombed with a hand grenade a shop owned by Živorad Dinić in the village of Mogila, the municipality of Gnjilane. Dinić was seriously wounded and three other Serbs in the shop sustained lighter injuries. There was substantial damage (News *B92*, www.b92.net, 8 February).

413 News *B92*, www.b92.net, 9 January.

414 News *B92*, www.b92.net, 26 November.

415 *Id.*

416 On 24 June, a group of young men attacked Živka Delić, a resident of the village of Rab ovce, near Lipljan, slightly injuring her (News *B92*, www.b92.net, 24 June). On 17 August, unidentified assailants attacked Vukosava Ivković, 80, in her home in Gnjilane (News *B92*, www.b92.net, 19 August). On 8 September, unknown attackers tried to kidnap Dušica Popović, 23, from Dobr otin, near Lipljan. About ten days earlier, unknown attackers had tried in the same village to kidnap Marina Damjanović, 10 (News *B92*, www.b92.net, 9 September). On 25 September, two unidentified men attacked Prizren resident Janko Janković, 71, who was on his way home with his w ife. Janković was slightly hurt in the attack. His wife said that none of the bystanders had come to their aid and that many had watched with interest (ERPKIM Info-service, 26 September). On 9 Novem ber, a group of unidentified assailants brutally beat Aleksandar Stojković, 75, whil e he was guarding his cattle on his field in Novo Brdo, in the Gnjilane municipality. After he had fainte d, the attackers wrapped Stojiljković in a plastic sack and pushed him into a nearby river. Stojiljković came to after a while and sought help from neighbours, who took him to the local infirmary (News *B92*, www.b92.net, 9 November). On 21 November, two unidentified attackers brutally beat Traj ko Jovanović, 63, from Rabovac in the Kosovska Kamenica municipality, inflicting seri ous injuries (News *B92*, www.b92.net, 21 November). On 10 December, a group of men attacked 26 Serbs trying to return to their homes in Klina. The Serbs, who are temporarily living in the vil lage of Biča, were determined to return to Klina, in spite being warned by UNMIK that it could no t guarantee their safety (Info-Bilten ERPKIM, 10–12–03c).

On 14 October, a powerful explosion caused major damage in Ciganska mahala, an ethnically-mixed district in Lipljan. On the same date, unidentified assailants set on fire a barn belonging to local Serb Velibor Veličković in Bresje, in the municipality of Kosovo Polje.[417] Several attacks resulted in serious injuries, but also some deaths[418]. Serb religious facilities were also attacked in 2003.[419]

Two serious incidents provoked the strongest reactions in 2003. The first involved the murders of three members of a Serb family in Obilić and subsequent burning of their house,[420] and the second the 13 August killing of two and wounding of four other children who had gone out swimming in the river Bistrica in Goraždevac, in the municipality of Peć.[421] Pantelija Dakić, 12, and Ivan Jovović, 19, died of their wounds, while Marko Bogičević, 12, Dragana Srbljak, 14, Bogdan Bukumurić, 15, and Djordje Ugrenović, 20, all residents of Peć, were all seriously wounded.

The anger of the Serb community was compounded by a report that Djordje Ugrenović had not received adequate medical treatment in the hospital in Peć and that the consequences, had they not been spotted in time, might have killed him. Rajko Jandžiković and Milivoje Pavlović were attacked in Peć as they were driving the wounded children to the local hospital in a car with Serbian plates. On the way

417 ERKIM, *Masakr nad srpskom decom*, 27 August; News *B92*, www.b92.net, 13 August.

418 On 16 May, Zoran Mirković, 42, a resident of Vrbovac, the municipality of Vitina, was murdered "under circumstances provoking strong suspicion that he was a victim of ethnically-motivated violence", Kosovo Ombudsman Marek A. Novicki said in a press release, expressing concern about the fact that the incident had provoked no reaction by the media or key political figures in Kosovo (News *B92*, www.b92.net, 23 May). On 11 August, Dragan Tonić, a resident of Skulanovo, Lipljan municipality, was wounded by unidentified attackers while fishing in the Bistrica river. Tonić died on 18 August of injuries to his head inflicted in the attack (News *B92*, www.b92.net, 11 August). On 26 August, Zoran Dončić, a resident of Biča, Klina municipality, was seriously injured when he and two other Serbs looking for a runaway cow were attacked (News *B92*, www.b92.net, 26 August). Four Serbs were injured on 1 September when unknown attackers hurled a hand grenade at a shop owned by a Serb in Cernica, the municipality of Gnjilane. Milomir Savić, one of the four, subsequently died of his injuries (News *B92*, www.b92.net, 1 September).

419 Numerous incidents include the following: On 3 and 4 July, the Church of St. Nikola in Priština was attacked with stones for the second time. The local clergyman said verbal assaults were almost daily (News *B92*, www.b92.net, 5 July). On 15 August, arsonists set fire to an Orthodox cemetery in Bresje, Kosovo Polje municipality, after the cemetery had been desecrated several days earlier (News *B92*, www.b92.net, 15 August). On 29 August, unidentified locals damaged for the third time the fence and gate of the Church of St. Dimitrije in Sušica, Priština municipality (News *B92*, www.b92.net, 29 August). On 12 December, unknown assailants threw a hand grenade at the Church of St. Uroš in Uroševac. The blast broke a church window and damaged a KFOR vehicle parked outside (Info-Bilten ERPKIM, 13 December).

420 The three are Radmila Stolić, 80, Slobodan Stolić, 80, and Ljubinko Stolić, 50. Forensic examiners concluded that the "injuries were most probably inflicted with a metal bar or other metal object. There are no traces of knife wounds or of firearms, but there were traces of serious brutality, the attackers had jumped on the bodies and kicked them, there were also internal injuries. (News *B92*, www.b92.net, 6 June).

421 ERPKIM, *Massacre of Serb Children*, 27 August; News *B92*, www.b92.net, 13 August.

the two had to stop after running out of petrol, whereupon they were attacked by a group of unidentified people.[422]

Kosovo political figures and representatives of the international community strongly condemned the incidents in Obilić[423] and Goraždevac[424] and the general violence against minorities in Kosovo.[425] However, no information had been released by the end of the compilation of this Report about any investigation or prosecution in connection with the said incidents, leading to the conclusion that the most serious ethnically-motivated violence in Kosovo remained unpunished in 2003.[426]

3.3.4. The Problem of protecting witnesses in criminal trials – Intimidation of witnesses remained in 2003 one of the key problems in the prosecution of criminal cases. There are signs of poor confidence in the general public of the ability of the international administration to guarantee witnesses in certain cases a reasonable level of personal protection.[427]

UNMIK's witness-protection unit, founded in June 2001, has made no significant contribution to the elimination of this problem.[428]

422 ERPKIM, *Massacre of Serb Children*, 27 August; News *B92*, www.b92.net, 13 August.

423 Michael Steiner offered a reward of 50,000 euros for information which would lead to the arrest of the perpetrators (News *B92*, www.b92.net, 6 June); The Kosovo President, Ibrahim Rugova, and the Government of Kosovo expressed their condolences to the victims' family and supported the initiative for a day of mourning to be declared (News *B92*, www.b92.net, 6 June); The UN Security Council strongly condemned the murders of the Stolić family (News *B92*, www.b92.net, 7 June). See BCHR, Press Release, www.bgcentar.org, 5 June.

424 Harri Holkeri appointed a Special International Prosecutor to head the inquiry into the crime (News *B92*, www.b92.net, 14 August). The UN Security Council held an emergency session in connection with the incident in Goraždevac, condemned the murders of the boys in the strongest possible terms (News *B92*, www.b92.net, 19 August). Ilber Husa, a member of the Executive Board of the Association of Non-Governmental Organisations in Priština, Bajram Rexhepi, the prime Minister of Kosovo, and Ramush Haradinaj, the leader of the Alliance for Kosovo's Future, publicly expressed their condolences to the families of the children killed and wounded in (News *B92*, www.b92.net, 23 August). See BCHR Press Release, www.bgcentar.org, 14 August.

425 NATO's Secretary-General, George Robertson, strongly condemned the violence in Kosovo and upheld all measures of the UN mission aimed at restoring security in Kosovo (News *B92*, www.b92.net, 9 September). Friedhelm Frischenschlager, the head of the Office for Democratisation of the OSCE Mission in Kosovo, pointed to the destabilising effect of the violence in Kosovo for the Serb side as well as the international community (News *B92*, www.b92.net, 24 September). The UN Secretary-General, Kofi Annan, said a lack of security for the Serbs in Kosovo was a serious problem and urged all factors in Kosovo to join efforts in improving the general situation there (News *B92*, www.b92.net, 25 October).

426 It should also be noted that in an effort to show readiness to prosecute ethnically-motivated crimes, UNMIK Police formed early in 2003 a "Unit for Cold-Blooded Crimes" whose mandate will include looking into still-unsolved murders. The Ombudsman in Kosovo, *Third Annual Report 2002–2003*, 10 July 2003, p. 6.

427 OSCE Mission in Kosovo, *Kosovo – Review of the System of Criminal Law (March 2002 – April 2003)*, p. 8.

428 On the basis of UNMIK Regulation 2001/20 dated 20 September 2001, amended by UNMIK Regulation 2002/1 dated 24 January 2002; Administrative Decree 2002/25 dated 13 November specifies the implementation of the said measures.

Tahiri Zamaj, a close aide to President Rugova and a former deputy commander of the "Armed Forces of the Republic of Kosovo" (FARK), was murdered on 4 January.[429] The London-based IWPR has linked the murder with testimony Zamaj had given in a criminal trial conducted in Kosovo in mid–2002.[430] The second key witness for the prosecution was murdered on 14 April.[431] A bomb blew up in Peć on 26 September in the car of a third witness for the prosecution.[432]

3.3.5. Repatriation of refugees and displaced persons – The return of refugees and displaced persons to their homes is still within the jurisdiction of the UN administration in Kosovo. On 3 March, UNMIK and UNHCR officials said the "return of refugees and displaced persons to Kosovo" was a priority in 2003 and that the return must be "voluntary and permanent."[433]

According to the UNHCR,[434] a total of 3,106 persons returned to Kosovo between 1 January and 31 October. This included 1,043 who returned to the Priština region[435], including 402 Serbs, 65 Roma and 576 Ashkali/Egyptians. A total of 582 persons returned during the year to the region of Peć[436] – 111 Serbs, 65 Roma, 265 Ashkali/Egyptians and 141 Bosniaks. A total of 176 returned to the region of Kosovska Mitrovica[437] – 70 Serbs, 10 Roma, 34 Ashkali/Egyptians, 10 Bosniaks, one member of the Gora minority and 51 Albanians. A total of 774 persons had returned to the region of Gnjilane[438] – 500 Serbs, 38 Roma, 42 Ashkali/Egyptians and 194 Albanians. Finally, a total of 531 persons had returned to the region of Prizren[439] – 208 Serbs, 25 Roma, 12 Ashkali/Egyptians, 173 Bosniaks and 113 members of the Gora minority.

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429 Zamaj, 53, was murdered by unknown persons with his son Enis and nephew Hasan near Dečani. IWPR, *Kosovo: Murders Divide the Local Community* , 24 January.

430 Zemaj was a witness for the prosecution in the trials of Idriz Balaj, Daut Haradinaj, B ekim Zekaj, Ahmet Elsani and Ramush Ahmeti, who are known as the "Dukađini Group". In June 2002, the five were indicted before the international court in Priština for the murders of Bashk im Balaj, Rexhep Osaj, Sinan Musaj and Rama Idrizaj, former FARK servicemen. On 19 December 2002, the court handed down to the five sentences totalling 31 years' imprisonment. IWPR, *Murder of a Controversial Albanian Leader* , 9 January.

431 The murder of Ilir Selimaj, a former member of the KLA, near Peć, at which time Selimaj's a unt Feride was also killed and her husband Deme and two children, Drita, 14 and Kushtrim, 4, w ounded. IWPR, *Kosovo: Witness Protection Problem Causes New Fears* , 29 April.

432 Former witness Ramiz Murichi, who escaped unhurt. France Presse, *Kosovo Trial Witness Narrowly Escapes Death*, 26 September.

433 News *B92*, www.b92.net, 3 March. A Handook for a Sustainable Return had been issued shortly before UNMIK, Press Release, 17 February.

434 UNHCR OCM Priština, *Minority Voluntary Returns to Kosovo* , 31 October.

435 The Priština region encompasses the following municipalities: Obilić/Obiliq, Lipl jen/Lipjan, Podujevo/Podujeve, Priština/Prishtinë, Štimlje/Shtime and Kosovo Polje/Fuçe Kosove.

436 The Peć region contains the following municipalities: Dečani/Deqan, Djakovica/Gjak ova, Peć/Pejë, Istok/Istog and Kline/Kline.

437 The region of [Kosovska] Mitrovica is made up of the municipalities of Leposavić/Leposaviq, Vučitrn/Vushtrri, Kosovska Mitrovica/Mitrovice and Srbica/Skenderaj.

438 The Gnjilane region consists of the municipalities of Gnjilane/Gjilan, Novo Brdo/No voberdë, Vitina/Viti, Kamenica/Kamenice, Strpce/Shterpce and Uroševac/Ferizaj.

439 The Prizren region is made up of Dragaš/Dragash, Mališevo/Malisheva, Prizren/Prizren, Orahovac/Rahovec and Suha Reka/Suhareke.

On 14 July, 24 Serb men returned to the village of Bijelo Polje, in the municipality of Peć.[440] Their wives and children had to remain in Serbia as the village had been razed to the ground.[441]

As far as collective returns in 2003 are concerned, on 18 March, 40 displaced Serbs returned to the village of Novaci, in the Prizren municipality, initially being housed in the reconstructed local primary school building.[442] A group of 50 displaced Serbs from Suvi Lukavac, in the Istok municipality, returned on 25 September with the help of UNMIK and the UNHCR to the village of Osojane, near Istok, where they are awaiting the reconstruction of their homes in Suvi Lukavac.[443]

A negligibly small number of displaced persons returned to their former homes in 2003; this is a result of the poor security situation, but also the fact that few houses to which they could return are still standing. It cannot be said that all necessary measures to ensure the return of a large number of people to their homes have been implemented.

3.4. The Position of Minorities Seen on the Example of the Peć Region[444]

Serbs, Roma, Ashkali, Egyptians and Bosniaks are minorities which live in the Peć region and their status depends on a number of factors, like that of minorities throughout Kosovo. During the conflict in 1999, the Albanian population of the region suffered enormously, losing many lives and much property. The low or almost non-existent economic growth rate and high unemployment make up the economic aspect of the Albanian population's dissatisfaction, which also affects its readiness for a peaceful communal life, especially with the Serbs. Finally, [the poor] security and stability of Kosovo are also very dependent on existing crime.

3.4.1. Freedom of movement – Save for a few exceptions, freedom of movement is one of the key problems of the Serb population, in the Peć region perhaps

440 According to the ICG, the return is in fact a response to the said appeal, ICG, *Two to Tango: The Agenda of the New SRSG*, Pristina/Brussels, 3 September, p. 3.

441 With the help of Italian KFOR troops and the UNHCR, a large accommodation tent was set up in the centre of the village and a few huts erected, also for accommodation and sanitary purposes. Security reasons meant that food for the returnees was provided by KFOR, and other necessities together with UNMIK Police. A German company which is in charge of reconstruction began early in September together with the returnees to clear the ground, removing debris and rubble, and then started to erect prefabricated houses. Safety for the returnees was provided by KFOR soldiers, which stood guard next to the construction workers. Freedom of movement was restricted on security grounds to a radius of 20–30 metres.

442 News *B92*, www.b92.net, 18 March.

443 News *B92*, www.b92.net, 25 September.

444 The data are based on empirical research conducted as part of the Position of Minorities in Kosovo, a project of the Humanitarian Law Centre. The opinions set out here do not comply fully with the findings of that study.

their biggest problem. The Serbs live in ethnically-pure communities[445] and their movement is limited to their own village or neighbouring villages also populated by Serbs, which means that they live in total isolation. The communities are guarded by KFOR, whose troops patrol them regularly together with UNMIK Police and man control points on access roads. KFOR also provides regular escort for travelling to and from Kosovska Mitrovica or central Serbia. Most people we interviewed rated very positively co-operation between the local Serbs and KFOR and UNMIK Police in urgent cases, such as medical emergencies or legal or administrative business in Serbia or Kosovska Mitrovica. Many also said police presence had been stepped up since the tragic incident in Goraždevac on 13 August.

3.4.2. Access to the legal system – On the subject of accessing the legal system and the other state systems (health care, social security, education), it is important to point to the existence of parallel structures in the Serb-populated enclaves which are at the disposal of the Serbs and function with comprehensive assistance from the Serbian Government.[446] The Serbs therefore conduct administrative and legal business – obtaining birth, marriage and other certificates – through those structures and have no reason to have any contact with the Kosovo institutions.

The exception is the issue of personal identity cards by the UNMIK administration, submission of applications for old-age pensions and social security and the issue of various certificates in land-registry offices which are attached to every municipality. People we interviewed say that UNMIK's international staff usually visit villages after being notified by the locals and conduct all administrative business – collecting applications and other documents, and taking photographs for IDs – needed for the realisation of the said rights. Since the UN administration was established, not one of the people we interviewed has ever set foot in a local municipality building or any other state institution in the Peć region.

As far as the non-Serb minorities in the Peć region are concerned, they have unobstructed physical access to all state institutions – municipalities, courts, the police – and can exercise their rights fully and without obstacles. Members of the Bosniak community may use their mother-tongue[447] in verbal and written communication, and official documents are also written in their language. Members of the

445 For example: Osojane, Biča, Grabac, Cerkulez, Suvo Grlo etc.

446 For more on the parallel structures in Kosovo, see report by the OSCE Mission in Kosovo, *Parallel Structures in Kosovo*, October 2003. The parallel structures exist in the fields of security, law, administrative affairs, education and health care, and are defined as "bodies which have operated or are still operating in Kosovo since 10 June 1999, and do not have a mandate in accordance with UNSC Resolution 1244. In most cases, the said bodies function under *de facto* powers of the Serbian Government and transfer jurisdiction over Kosovo on Serbia itself, or operate within Kosovo territory. These parallel institutions operate simultaneously or under the same roof as those recognised by UNMIK."

447 The Egyptian and Ashkali populations use the Albanian language, the Bosniaks use the Bosnian language and the Roma speak Romany.

Roma community we interviewed said that they cannot use their language in the state institutions and that no official documents are written in their language.

3.4.3. Employment opportunities – The undeveloped economy and high unemployment rate in the entire Peć region mean that for the majority Albanian population a job in the public sector is the only hope for a steady income. This situation very much influences the access of minorities to employment in the public sector.

Bosniaks and Egyptians interviewed said that they knew of one or at most two members of their ethnic communities who were employed in state institutions in the Peć region – local governments, courts, the police, the local prison and a handful of state-owned firms. Even those persons were employed only because the job notice had specified a member of the Bosniak or Egyptian community. For the Roma, they said very few were employed in the state sector.

All those we interviewed said that their communities were underrepresented in the state institutions, their employment being symbolic and obtained following political pressures. They said that the majority of job notices were published in Albanian only and that they had only learned about them by accident.

The study showed that apart from a handful employed in the Kosovo police force, not a single Serb worked in the local administration, the court, prison or a public firm. Persons we interviewed said they would be happy to work in public institutions, especially because some had worked in them before, but that the lack of security and freedom of movement were the main reasons why they could not get such employment.

3.4.4. Access to health care and social security – All non-Serb minority members we talked to said there was no discrimination against them in health-care institutions in the Peć region. They said there were no problems in using their own languages in communicating with health-care workers or obtaining those free medicaments which were generally available. However, most said that those of them who spoke Albanian preferred to use it contacts with medical personnel, both for reasons of safety and hopes of getting better treatment.

The Serb community uses only those health-care institutions which are controlled by the Serbian Government, which provides all medicaments and equipment and pays their staff; local Serbs say they distrust Kosovo health-care institutions.

All people we interviewed, including the Serbs, said that all those who fulfilled the legal requirements for old-age pensions or social security had had no problems in exercising those rights.

3.4.5. Access to education – All children of Serbian nationality attend schools funded by the Serbian Government, which pays their staff and supplies all books and other materials free of charge. The curriculum is that used in Serbia.

Bosniaks we interviewed told us that in the Peć region there were a number of primary schools which used their language exclusively, the books and other materials coming from Bosnia and Herzegovina. They said a major problem was that schools were very far from their pupils' homes and there was no adequate transport, leading to constant difficulties for the children and their parents. There are also in Peć several secondary schools and one high school using Bosnian.

The Roma we interviewed said that there were no schools using their language in the entire region. They said that the reason was a shortage of qualified staff, but also inadequate political pressure by the Roma community and international representatives on the ministry of education.

3.4.6. Access to property and resolution of ownership questions – Only Serbs have problems in the Peć region in connection with physical access to their property – agricultural and grazing land and forests. Given that their freedom of movement is strictly limited to their villages, since the UN administration was established few have been able to conduct any agricultural activity on their land, while most have never even been close to more distant holdings, usually forest-land. Serbs we interviewed said that appeals to KFOR to escort people visiting their land were turned down.

Most of those asked about reconstruction of destroyed houses in partnership with UNMIK complained about bureaucracy and tardiness. Some said that even after their renewed homes were handed over they were not completely finished.

3.5. Standards for Kosovo

The Standards for Kosovo, which were made public on 10 December 2003, encompass a wide range of human rights, defining some as particularly important for Kosovo. The first, which determines the functioning of democratic institutions, defines the composition of manner of operation of the PIS. The Standards also define an electoral framework and the roles of the media and NGOs in the Kosovo society.

The second standard – the rule of law – besides its introductory definition for the Kosovo society guarantees in particular equal access to courts and the principle that no one should be above the law.

The third standard prescribed by the document – freedom of movement – encompasses both physical freedom and the freedom of expression in different languages.

The fourth – Sustainable Return and the Rights of Communities and their Representatives – guarantees comprehensive rights to all communities in Kosovo, with a special emphasis on the right to return to their former homes.

The economic standard defines an institutional framework for reviving Kosovo's economy and its development in the long term.

The property rights standard prescribes the existence of efficient laws and mechanisms for resolving ownership disputes, all with the aim of establishing a secure and transparent property situation in Kosovo. The standard also calls for respecting, protecting and preserving the cultural heritage of all communities in Kosovo.

The seventh standard – dialogue – calls for direct contacts between Belgrade and Priština: regular meetings of multi-ethnic working groups in charge of missing persons, repatriation, energy and transport and communications, all with the aim of enhancing progress in the resolution of those questions, as well as regional dialogue whose objective would be upgrading co-operation in the fields of free movement, commerce, police and law, public administration and regional parliamentary exchanges.

The eighth standard deals with the "Kosovo Protection Corps" and emphasises its mandate in accordance with the Constitutional Framework. Other principles defined are funding, proportional representation of all ethnic communities in Kosovo and the enforcement of the Disciplinary Regulations and Job Performance Assessment System.

Both Kosovo Serbs and the Serbian Prime Minister, Zoran Živković, have called the standards unacceptable. Serbian Deputy Prime Minister and head of the Co-ordination Bureau for Kosovo, Nebojša Čović, has said that the standards are not based on Resolution 1244[448] and that they were defined without the participation of the Kosovo Serbs and the Serbian Government (News *B92*, www.b92.net, 10 and 17 December).

Government of Serbia adopted Information on Final Draft of Standards for Kosovo, where was concluded the Draft did not create the basis for resolving Kosovo crisis and implementation of Resolution 1244. It was emphasised that not a single comments the Serbian Government has was adopted.[449]

SaM representatvie in the UN, Dejan Šahović, at the Security Council meeting stated that these Standards did not lead to the creation of multiethnic society in Kosovo.[450]

3.6. Conclusion

The human rights situation in Kosovo and Metohija remains unfavourable. Although quite a lot was done to stabilise the province and to set up a more efficient administration, the police and judiciary – without whom rule of law cannot exist –

448 After SaM protest, the preamble was changed to include the reference to the Resolution 1244. See www.srbija.sr.gov.yu, 25 September.
449 See www.srbija.sr.gov.yu, 8 December.
450 *Id.*, 18 December.

have not been developed sufficiently to guarantee a safe and secure life for all people in Kosovo.

Numerous crimes still go unpunished in Kosovo. Legal processes are slow: there is a shortage both of international judges and prosecutors and qualified local personnel. The general atmosphere of fear that still pervades Kosovo means that many witnesses often change testimony during trials or even withdraw it completely.

The continuing shortage of experienced police personnel in 2003 led to problems in investigating crimes and collecting evidence; many trials had to be based solely on eyewitness accounts.

The absence of firm security guarantees continues to particularly affect minorities, especially the Serbs, who suffer restricted freedom of movement and access to health-care, educational and other public institutions.

The local authorities, political parties and the media cannot be said to have contributed greatly in 2003 to the restoration of confidence and consolidation of institutions in Kosovo.

4. Refugees and Displaced Persons

4.1. Introduction

In 2003 there was a significant improvement in normalising the relations among neighbouring states, creating conditions for regional stability and return of refugees. The bilateral agreement on the return of refugees signed in October between SaM and Bosnia and Herzegovina binds the states parties to ensure conditions for voluntary, organised and coordinated return. The signing of a trilateral agreement among SaM, Croatia and Bosnia and Herzegovina has also been planned.

SaM currently hosts 276.680 refugees and is still the first country in Europe in this respect. Most refugees are from Croatia (189.472) and Bosnia and Herzegovina (99.761). Many of them have had refugee status for over ten years. In addition, four years after the conflict in Kosovo, SaM are still hosting about 224.833 internally displaced persons (IDP), of which 206.789 are in Serbia and 18.044 in Montenegro.[451]

According to the UNHCR data, a total of 65.000 refugees from SaM have returned to Bosnia and Herzegovina and 50.000 to Croatia. In comparison with last year, when there were 337.000 registered refugees, their number has been reduced, but many are still in need of assistance in their efforts to return to their country of origin or integrate in the local community.

451 UNHCR, Total Number of Refugees and IDPs in SaM, September 2003.

In May 2002, with support of UN High Commissioner for Refugees (UNHCR), UN Development Programme (UNDP) and Office for the Coordination of Humanitarian Affairs (OCHA), the Government of Serbia adopted the National Strategy for the Solution of Problems of Refugees and IDPs. The Strategy is focussed on return or integration of refugees from Croatia and Bosnia and Herzegovina, depending on their choice of durable solution. With the view of promoting local integration of refugees, the National Strategy has identified problems of housing, employment and legislation as key areas that need to be supported by funding and expertise. The implementation of the Strategy, however, entails very high costs and is based on foreign donations, which so far have not met the expectations.[452] Moreover, the implementation programme was designed only for refugees and not for IDPs.

With regard to IDPs, return to places of origin is the primary solution advocated by the official state policy. However, in the situation where this is not possible because the IDPs cannot or do not wish to return to Kosovo due to security reasons, high level of devastation of houses or unresolved property issues, insisting on the return option limits their right to integrate in the communities of their displacement. In April 2002, the Coordination Centre for Kosovo and Metohija[453] adopted the Strategy of Return of IDP, while UNHCR and UNMIK established in June 2003 the Rapid Response Returns Facility, managed by UNDP. However, the number of returnees is still very low; according to the UNHCR data, there were only 7.819 minority returns to Kosovo (Serbs, Roma and other non-Albanians), of which 2.025 in the first eights months of 2003.[454]

4.2. Legal Framework

Rights of refugees are guaranteed by the Convention Relating to the Status of Refugees of 1951 (*Sl. list FNRJ* (Dodatak), No. 7/60) and the Protocol on the Status of Refugees of 1967 (*Sl. list SFRJ* (Dodatak) No. 15/67). Articles 37 and 38 of the HR Charter guarantee the rights of refugees in SaM. Pursuant to Article 38:

> Any alien who reasonably fears that he/she might be persecuted because of his/her race, colour, sex, language, religion, ethnic affiliation, membership of a group or political conviction, shall have the right of asylum in SaM.

Under Article 37:

> Any alien may be expelled from the territory of SaM only on the basis of decision of competent authorities and by the procedure provided by law. No

452 The implementation of the Strategy requires 620 million dollars, of which 460 million should have been secured through foreign donations.

453 The Coordination Centre for Kosovo and Metohija (CCK) was established in 2001 with the aim of coordinating IDP related activities. The CCK has several units, including the Return and Humanitarian Issues Unit.

454 UNHCR, Minority Return to Kosovo, September 2003.

expelled person may be sent to a place where he/she might be persecuted because of his/her race, religion, affiliation to a certain social group or political opinion, or where his/her rights guaranteed under this Charter might be violated seriously.

SaM, however, still have laws applicable only to refugees from the countries of former SFRY, but not to asylum seekers, refugees from third countries.[455]

In 1992, Serbia adopted the Refugees Act, defining refugees as Serbs and other nationals who "under threat by Croatian government or governments in other republics, threat of genocide, as well as due to persecution and discrimination on the grounds of religion, nationality or political affiliation, were forced to leave their places of residence in these republics and flee to the territory of Serbia". Under the Refugees Relief Decree of March 1993, the status of refugees could not be obtained by persons from territories in Bosnia and Croatia under Serb control at that time. After the exodus of Serbs from Croatia in 1995, the Expelled Persons Relief Decree adopted in September the same year introduced a terminology difference between refugees and expelled persons. According to this Decree "expelled persons", unlike "refugees" could not have permanent employment and some documents (e.g. travel documents), on the other hand "refugees" could not get humanitarian aid, which was granted for "expelled persons".[456]

In 1992, Montenegrin Government adopted the Decree on Relief to Displaced Persons, which in fact pertained to refugees from Croatia and Bosnia and Herzegovina. Article 2 of the Decree defined the displaced persons as citizens of former Yugoslav republics and other persons who were forced to leave their places of residence and flee to Montenegro due to persecution on national, religious or political grounds. The reason they were called displaced persons was that the then Montenegrin Government did not recognise the dissolution of SFRY and the establishing of new international borders. Based on this decree containing some very

455 Within the EU Stabilisation and Association Process, through the initiative of Table III of the Stability Pact on Southeast Europe, in 2001 national teams were formed to develop national action plans for Balkan countries with the view of establishing legal frameworks and infrastructure capacities to resolve the issues of migration and exile in accordance with international standards. In cooperation with France, Switzerland and Hungary, the then FRY was at the beginning of 2003 close to adopting its national plan, but this was postponed due to problems in constituting the new state union and unresolved relations between member states. Bosnia and Herzegovina still has not adopted its national plan, which should have been done by end of 2003. In cooperation with Germany, Austria and Slovenia, Croatia adopted its National action plan on migration and refugee issues on 16th March 2002 and the implementation of projects related to border control and building shelter centres for asylum seekers is under way. This action plan, however, is not accessible to the public and is known only to states and organisations that participated in its development. (Stability Pact for South Eastern Europe, MARRI – Programme of Action, June 2003)

456 The difference in terminology could be explained by the political necessity of the then Serbian government to stress that between 1992 and 1995, Serbs from Croatia fled due to incidents of threats, discrimination, destruction of property and other forms of intimidation, whereas the mass exodus of Serbs from territories where they had been in majority was the result of military operations "Flash" in May 1995 and "Storm" in August 1995.

restrictive provisions on refugees,[457] the Montenegrin Commissariat for Displaced Persons also established its competency for internally displaced persons from Kosovo and Metohija.

In Montenegro, IDPs are treated as citizens of Serbia and do not have the same rights as the citizens of Montenegro, which is in contravention of Art. 7 of the Constitutional Charter, stipulating that "a citizen of a member state shall also be citizen of SaM" as well as that "a citizen of a member state shall have equal rights and duties in the other member state as its own citizen, except for the right to vote and be elected".

The relation of government towards IDPs in Montenegro has often been criticised. In the Report by the Commission on Migration, Refugees and Demography of June 2002, the CoE has expressed its concern that Montenegro does not have a long-term strategy for refugee and IDP issues and that Montenegro authorities are not considering durable solution possibilities for these vulnerable groups. Stating that Montenegro authorities are passive and reluctant to face problems of refugees and IDPs, the CoE raised special concerns regarding the adoption of the Citizenship Act in October 1999, which prescribes that a person must have ten years of permanent residence in Montenegro to obtain its citizenship.[458] Given that refugees and IDPs usually have temporary residence, by this Act Montenegro has factually denied them the right to acquire citizenship, which in turn leads to discrimination in employment, housing, obtaining of documents, etc.

4.3. The Situation of Refugees and IDPs in Practice

4.3.1. Legal protection against violence and discrimination – In Serbia and Montenegro there are no effective legislative or practical measures to ensure adequate compensation for refugees and IDPs. For many years now civil proceedings have been going on involving refugees, victims of forcible mobilisation in 1995, who are seeking redress from the state for unlawful deprivation of liberty and return to the frontlines in Croatia and Bosnia. The compensations awarded by the courts in some cases are minimal (some only 20.000 dinars – approximately 300 euros) and cannot provide refugees with either moral or material satisfaction for the hardship they had endured.[459] With regard to legal protection, in comparison with earlier years the most important is that by new interpretation of the Act on Obligations the courts have extended the statute of limitation for filing claims for compensation in these cases, by characterising the act of the state, i.e. deprivation of liberty, as a criminal offence.

457 Art. 17 provides that a displaced person may lose his/her status "if he/she should refuse the offered accommodation or refuse to temporarily settle in a place where his/her subsistence is provided" or "if he/she refuses to return to the place of origin once objective conditions have been ensured".

458 CoE, *Situation of Refugees and Internally Displaced Persons in FRY* , June 2002.

459 HLC, www.hlc.org.yu/srpski/Suocavanje_sa_prosloscu/Reparacije/index.php.

In the case of Dušan Milobratović, a refugee from Croatia, the First Municipal Court in Belgrade has accepted the position of Humanitarian Law Centre attorneys representing forcibly mobilised refugees, that the Republic of Serbia has unlawfully deprived Milobratović of freedom for a period exceeding 30 days, which pursuant to Criminal Code is a criminal offence carrying a prison sentence from 1 to 8 years, while the prosecution period for such offence expires ten years after the offence was committed.[460] If compensation is being sought for damages ensuing from a criminal offence, the statute of limitations is the same as the prosecution period for such offence – hence victims have the right to appeal to court within ten years from the date of the criminal offence, i.e. sustained damages. So far, the courts have only recognised the general three-year statute of limitation.

4.3.2. Endangering of lives and security of refugees, IDPs and returnees – Many refugees have already become well integrated in their new environment in SaM, with positive attitude and acceptance by the local population. Occasionally, however, refugees and IDPs face violence and discrimination on the grounds of their ethnicity or current status, both from state agencies and local population. Displaced Roma from Kosovo are particularly exposed to open discrimination and violence, since they are of darker complexion, often have Muslim names and do not speak Serbian language. Perpetrators of violent acts against them are often members of rightist movements. In many cases the police and judiciary do not provide adequate protection for refugees and IDPs, often taking a passive stand and not instigating criminal prosecution even when the evidence on the committed offences is undisputed. In cases when criminal proceedings were instigated against the perpetrators, their criminal offences would not be qualified as acts of discrimination or ethnically motivated violence, resulting in their prosecution only for ethnically/racially neutral offences.

In the case of three young men who were a part of a larger group of assailants that had beaten up a group of five displaces Roma from Kosovo in the Novi Sad "Najlon" marketplace on 31 August, the police only filed a misdemeanour charge for disturbing public peace and order.[461] One of the Roma, Selatim Kolovati, regained consciousness in the ambulance, after the youngsters with shaved heads had beaten him up with baseball bats and shovels while cursing his "Albanian mother". Miladin Kostrešević, Chief of the Novi Sad MUP department stated that this was "just an ordinary fight and not the expression of intolerance and hatred."[462]

Although exposed to assault and discrimination, refugees and IDPs are reluctant to denounce the perpetrators, fearing that this would only aggravate the difficult

460 HLC, Press Release, 25 July.

461 Municipal Misdemeanour magistrate in Novi Sad, registry number of misdemeanour charge against the minor B.K. 30–6–381/03; registry number of misdemeanour charge against Jovan Dabić and Slobodan Pantelić 30–6–381.

462 "Kostrešević: Ordinary fight", *Građanski*, 5 September 2003.

position they find themselves in. Cruel treatment of Danijel Škorić, a sixth-grade pupil in the "Radoje Domanović" elementary school in Niš, who had been harassed for a year by a group of pupils only because he is a refugee, culminated on 12 March 2003, when he ended up in the intensive care unit of the Children's Surgery Clinic, after a group of his peers had physically injured him in the school toilet.[463] The boy's parents are afraid of this case being discussed in public, fearing for their safety and the safety of their child.[464]

Authorities in Croatia and Bosnia and Herzegovina keep issuing statements encouraging refugees to return, although in some areas this is hardly feasible due to security concerns. Refugees returning to Croatia or Bosnia and Herzegovina into entities where they are a minority are exposed to attacks aimed at intimidation of returnees and obstruction of future returns. In Bosnia, in the settlement of Ribnica under Mount Ozren, on 8 March Mrs. Anđa Simić was badly injured when a bus was stoned carrying Serbian refugees who came to visit their destroyed properties in villages under Ozren Mountain. Of 6.000 Serbs who used to live in the area of Vozuća and seven other neighbouring villages before the war, only 67 families have returned.[465] In Croatia, in Plaško, Croatian settlers from Bosnia who live in Serb houses violently broke up a public debate organised by the Independent Serbian Democratic Party on the topic of minority return.[466]

In Kosovo and Metohija basic security conditions do not exist for the return of IDPs. There are frequent cases of endangering the lives and destruction of property of Serbs, Roma and other non-Albanians. The most drastic example of ethnic violence was the armed attack on a group of youngsters and children on 13 August in Goraždevac, when Pantelija Dakić (11) and Ivan Jovović (20) were killed and four other children were wounded.[467] With intent to demoralise the displaced people and prevent their return, in the night of 20 August in the Prizren town district of "Podkaljaja", two houses were burned down that belonged to Todorka Jovanović and Dragan Lelić.[468]

4.3.3. Access to labour market and social services – Subtle, hidden and difficult to prove indirect forms of discrimination against refugees and IDPs occur in the labour market. Due to their exile or displacement, these people find it hard to get work and are forced to accept worst jobs despite their qualifications or work in the black market without the right to social, pension and health insurance in case of accident at work. According to the Vulnerability Assessment of IDPs in SaM done by the International Committee of the Red Cross (ICRC), the priority problem

463 "Ustasha, go back to Croatia", *Danas*, 3 April 2003.
464 News *B92*, www.b92.net, 18 April.
465 *Glas javnosti*, "Stones against Serbs", 19 March 2003.
466 "Pressures against Serbs in Croatia increasing", *Politika*, 4 March 2003.
467 News *B92*, www.b92.net, 13 August 2003.
468 Beta, 20 July.

of IDPs is the impossibility to find employment, All other problems concerning registration, access to documents and property rights are of secondary importance.[469]

In October the Serbian Government adopted the Poverty Reduction Strategy[470] into which refugees and IDPs were included as particularly vulnerable groups due to their social status. Estimates show that the number of destitute people among refugees and IDPs is between 120.00 and 140.000 as well as that the proportion of destitute people in this population is twice as high as in the overall population.[471] According to ICRC data, up to 88,8% of IDPs are under the poverty line, compared to 10% of the local population under this line. Level of unemployment among refugees is 45%, which is almost twice as high as the unemployment rate of the local population.[472] Between 35% and 45% of IDPs in Serbia and between 80% and 85% in Montenegro relies exclusively on black market economy.[473]

The number of displaced persons under Minimal social security level (MSSL) is 23.100, of which 14.600 Roma.[474] According to the information by the Ministry for Social Welfare in 2002, in Serbia less then 10% of IDPs receive social assistance benefits, but this number relates primarily to those who were receiving these benefits prior to displacement. The Ministry database still does not have precise information on how many IDPs there are among the recipients of social assistance. According to ICRC, between 25% and 35% of these people have access to some social benefits, but the number of IDPs below the MSSL is still very high. The discontinuation of ICRC food parcels distribution will result in additional 7–8% of IDPs falling below the MSSL. Thereby the number of extremely vulnerable IDPs will increase to 36.600.[475] The Ministry for Social Welfare, together with ICRC, is developing a plan for financial assistance for the most vulnerable IDP families from Kosovo, which should mitigate the effect of the discontinuation of food assistance. The

469 ICRC, *The Vulnerability Assessment of Internally Displaced persons in Serbia and Montenegro*, July 2003.

470 In September 1999, the International Monetary Fund and the World Bank initiated the Poverty Reduction Strategy programme, as we new form of assistance to heavily indebted countries in the world. About 80 countries took part in this programme, including SaM, and each state had undertaken to articulate a comprehensive national development plan including macroeconomic and structural changes as well as define achievable aims that would influence the reduction of poverty. After the Poverty Reduction Strategy plans have been finalised, the developing countries should receive long-term international loans under favourable conditions.

471 Poverty Reduction Strategy Paper, October 2003.

472 UNHCR/Serbian Commissariat for Refugees, *Registration of Refugees in Serbia*, March-April 2001.

473 ICRC, *The Vulnerability Assessment of Internally Displaced Persons in Serbia and Montenegro*, July 2003.

474 ICRC, *The Vulnerability Assessment of Internally Displaced persons in Serbia and Montenegro*, July 2003.

475 ICRC was supposed to stop its food assistance in September 2003, but nevertheless continued with this aid until the end of the year.

ownership of land or property in Kosovo will not be taken as a criterion for social assistance, since it is only fictive for many IDPs, or at least in most cases they do not benefit from their properties in any way.

In mid July, the Serbian Government has recognised the right to compensation for about 65.000 work able Serbs from Kosovo, who have been unemployed for the past four years and received no salaries. Based on the 1 September 2003 decision, 35.000 people from Kosovo and 28.000 IDPs in central Serbia receive financial remuneration. Pursuant to this decision, employees from public administration and companies who remained in the enclaves in Kosovo receive the remuneration in the amount of two minimal salaries in the republic, while Kosovo displaced in Serbia receive financial remunerations in the amount of minimal salary. Although the right to inheritance in cases of missing and kidnapped persons can be acquired only once their actual fate has been established, Serbian Government issued a decision allowing the families of the missing to obtain the right to remuneration in the amount of one minimal salary increased by 50%.[476]

In Montenegro, the right to work and pay is denied to refugees and IDPs by Art. 4 of the Employment Act, which prevents displaced persons to register as unemployed.[477] Since most IDPs are citizens of Serbia, they need to obtain a permanent residence permit and work permit in order to become employed. In May, the Montenegrin Government adopted a Decree on Employment of Non-resident Natural Persons[478] pursuant to which the employer must set aside a contribution of 2,5 euros per day if he wishes to employ a refugee or an IDP, since they are also non-resident persons. Such discriminatory provision, supposedly aimed at ensuring legal employment, prescribes that employment of refugees and IDPs is more expensive than employment of Montenegrin citizens. In addition, the Decree does not discriminate between people who have come to work in Montenegro for economic reasons and the refugees and IDPs who had fled their homes due to persecution.

Refugees are not encompassed by the Act on Social Security and Provision of Social Welfare and therefore have no right to social welfare assistance. The issue of social security for refugees should be resolved by the Agreement between Croatia and SaM, which came into force on 1 May 2003, allowing refugees to receive their pensions in the places of current residence from this day forward. The problem lies in the inefficiency of pension fund administrations in SaM and Croatia, which have not yet processed relevant data, delaying payment of pensions for many people for six months or more. On the other hand, 6.330 pensioners are already receiving their

476 *Danas*, "For about 70.000 Serbs employed in public administration and state companies from Kosovo, begins on 1 September", 18 July 2003.

477 Article 4 defines the unemployed person as the individual of 15–65 years of age regis tered with the Montenegrin Employment Bureau and actively seeking employment, as well as an alien or stateless person who is legally permanently settled and has a work permit in Montenegr o (*Sl. list RCG*, No. 28/03).

478 *Id*.

Croatian pensions, of which 85% via the Commercial Bank.[479] Particular problem is that the Agreement on social security does not envisage the compensation for unpaid pensions during past 12 years. Pensioners can file individual complaints against the Croatian pension fund, but the question remains what their chances are for success in such a long lasting court procedure.

In Montenegro, IDPs cannot receive their pensions, because they cannot register their current residence in this republic and because there is no system of payment operations between SaM. They receive their pensions by registering residence somewhere in Serbia and opening an account with Postal Savings using the "green card".[480]

4.3.4. Housing and accommodation – Resolving the housing issue is considered the key prerequisite for local integration. About 18% of refugees have already secured their housing and the percentage of IDPs is even lower – less then 8% of IDPs own the apartments or houses in which they currently live. Especially vulnerable are refugees and IDPs (about 6% of the overall population) who live in collective centres, official or unofficial, in precarious living and hygiene conditions. In 2002, the Serbian Commissariat for Refugees adopted a plan on closure of all official collective centres by the end of 2005, with support from the UNHCR and international donors. At the beginning of 2003 there were 446 official collective centres in SaM (of which 44 in Montenegro) accommodating 21.704 refugees and 10.868 IDPs. In September, this number was reduced to 206 collective centres with 9.782 refugees and 9.033 IDPs.[481]

Refugees who are to be moved have been offered several possible solutions: placement in the institutions of social care, one-off financial assistance, return to the country of origin, transfer to another collective centre or provision of building material sufficient for 35 m^2 dwellings for refugees who own land. On the other hand, IDPs from collective centres scheduled for closure are only offered transfer to other collective centres as an alternative accommodation.

One of the key principles in refugee and IDP assistance that the state should adhere to is not to cause further displacement of people if possible. The only solution to this problem in the process of closure of collective centres is to offer the same possibilities to IDPs and refugees, in order to avoid moving these people from one collective centre to another, which causes additional problems in adaptation to the new environment.[482]

According to the reports by international organisations dealing with refugee and IDP issues, it is very difficult to ensure durable solutions for old, ailing and

479 Information from the Commercial Bank.
480 Nenad Stanković, *Internally displaced persons*, Legal analysis, April 2003.
481 UNHCR, *Official Collective Centres for Refugees and IDPs in FRY*, October 2003.
482 Group 484 comment to the Second Draft version of the Poverty Reduction Strategy Paper, September 2003.

persons with special needs, since on the local level there are no adequate bodies that could take over the responsibility for care and establishing and maintaining old people's homes. Financial and managerial resources in almost all municipalities are insufficient to carry this burden. Additional problem is that there is still a high need for collective centre accommodation, since people do not have the money to pay for private accommodation. Therefore it happens that refugees and IDPs in this situation move into a collective centre that had been partly vacated.

Unofficial collective centres also pose a serious problem, since they are almost never covered by the authorities in SaM. In about 70 unofficial collective centres there are about 5.000 IDPs, of which 3.000 in Montenegro.[483] Disproportionately high number of IDPs in unofficial collective centres are Roma. The problem of IDP accommodation arose during their exodus from Kosovo. Since they came after the refugees, IDPs could only find accommodation in collective centres where there were enough places and where the living conditions were usually worse. Those who have not obtained permits to settle in official collective centres by the Commissariat for Refugees have moved into other abandoned facilities without permission. These are mainly abandoned workers' barracks and empty warehouses without basic living conditions. IDPs in unofficial collective centres cannot register their residence, which often leads to the impossibility of exercising other civil, political, social and economic rights, such as health care, social welfare, change of residence, etc. Unlike the "recognised" collective centres, where the state pays for electricity and other utilities, unrecognised collective centres do not have such benefits. In many of them there is no running water and their inhabitants have constant problems with unpaid electricity or heating bills. In both republics the commissariats have not recognised these collective centres and in Serbia the only assistance provided to them by the Commissariat for Refugees is one meal per day in some of these centres in and around Belgrade but not in the rest of the country.

IDPs in unrecognised collective centres live in constant uncertainty whether they would be thrown out in the street, since the owners of these facilities resort to requesting their eviction in court. There is no programme that could provide people from unrecognised collective centres in Serbia with adequate alternative accommodation, although in some cases the Commissariat has offered refugees and IDPs accommodation in other locations. The problem is that these are often unacceptable solutions for refugees and IDPs, since they are usually transferred to collective centres in remote areas, which would make difficult for adults to find employment and the children to attend school.[484]

483 OCHA, *Internally displaced persons in Serbia and Montenegro* , April 2002.

484 Only two of 60 displaced Roma families from the illegal settlement "Stari aerodrom" in Zemun have accepted the transfer to another collective centres in the town of Zaječar. Others have been left to their own devices and their fate is uncertain, since they are under pressure of the landowner to move out.

4.3.5. Choice of the place of residence and freedom of movement – Until the first half of 2003, Group 484 has received reports by IDPs on cases where the competent bodies of the Ministry of Interior (MUP) have refused to issue them documents on de-registration of permanent address in Kosovo in order to settle in Serbia. IDPs could register with the police in the current place of residence, but only for temporary residence that must be extended every three months. The practice in police stations in most cases was to not issue certificates to IDPs on de-registration of addresses in Kosovo, without any legal justification for such decision.

In the second half of 2003, MUP discontinued this practice and since then IDPs can register their permanent residence in any Serbian municipality without problems. However, there are no accurate data on how many IDPs has de-registered or wish to de-register their residence in Kosovo. Another issue is how many IDPs are aware of this possibility, since the media never reported that IDPs can now obtain permanent residence in the community of displacement. Legal and political implications of de-registering permanent addresses in Kosovo are still not fully clear and the question is how this affects the status of IDPs, their right to vote, right to return, etc.

IDPs in unrecognised collective centres cannot get the proof on legal ground of using this address and hence cannot register their residence. Since they cannot get their registration of residence at the address where they live, IDPs in unrecognised collective centres usually obtain one by fictively registering with relatives, friends, etc.

If and IDPs wishes to change the place of residence and move to a different town, the trustee of the Commissariat for Refugees from the place where the IDP is currently located should request the consent of the trustee in the place where the IDP wishes to move to. Only once such consent has been obtained, the IDP can move away. This procedure serves to prevent IDPs from receiving humanitarian assistance in two places at the same time and should not in any other way restrict the right of IDPs to choose their place of residence.

4.3.6. Lack of personal documents – Many IDPs do not have one or more important personal documents, and the practice of Group 484 shows that some IDPs have been unable to obtain some of their documents for over four years. One of the problems is that IDPs can obtain personal documents, such as birth certificates, marriage certificates or citizenship certificates, only from municipal public services from Kosovo, which have been relocated to various towns in Serbia, due to which IDPs often have to travel long distances. This particularly applies to IDPs in Montenegro, who have to travel to Serbia in order to get their documents.

Travel costs that often include overnight accommodation are too high for many IDPs. The Danish Refugee Council has said that elderly IDPs experience most problems in obtaining documents, because of low income and travel strain that could

present a serious difficulty for their advanced age.[485] In addition, some registry books have been destroyed or remained in Kosovo, in which case IDPs need to wait for their reconstruction. The procedure of subsequent inscription and its duration depend on what documents the IDP possesses (old birth certificate, valid IDP card or passport, etc.). Other documentation, such as work booklets, diplomas, driver's test certificates and the like, has remained in Kosovo and IDPs are unable to access it; the procedure for obtaining these documents is complicated and long and requires the IDP to address both the UNMIK administration and administration offices in Serbia.

The fact that almost the entire archives were taken out from Kosovo and brought to Serbia represents a great problem for Kosovar citizens as well as IDPs if they wish to obtain documents issued by UNMIK. In such case the IDP needs to go through the procedure of subsequent inscription in Kosovo. On the other hand, Serbian authorities do not recognise the validity of UNMIK documents. The Norwegian Refugee Council has registered a case of non-recognition of marriages concluded in Kosovo after June 1999 and the non-recognition of UNMIK marriage certificates. Consequently, the child who was born in Belgrade to one of such families could not be registered in the Birth Registry as child born in wedlock.

With regard to ID cards, IDPs should be able to obtain them in current places of residence. However, in order to obtain a new ID card, they need various documents, including the certificate on de-registration of residence, birth certificate and citizenship certificate, for which IDPs need to travel. Similarly, in order to get the internally displaced person ID (green card), entitling the IDP to humanitarian assistance (food, health care, etc.), the personal ID card is needed as proof of current residence. Roma are particularly affected by the impossibility to obtain personal documents.[486] According to the Norwegian Refugee Council assessment, 30–35% of displaced Roma have never been registered. In Serbia many displaced Roma do not have the certificate of residence, nor can they obtain it, since they live in unofficial collective centres or illegal settlements. They don't have "green cards" because these require registration of residence, so they cannot exercise their right to humanitarian assistance.

485 According to the Act on Amendments to the Act on Registry Books of 7 June 2003, handling of registry books from Kosovo is done by administrative bodies in several Serbian towns. IDPs can avoid travelling to Registry Services by issuing a power of attorney to someone who can claim the necessary excerpt from the registry on their behalf, but in that case IDPs have to pay the cost of verification of the power of attorney since they are not exempt from this tax (the Act, however does provide such possibility, so that refugees do not have to pay the costs of power of attorney for obtaining their birth or citizenship certificate).

486 OXFAM Report, December 2001: 55% of Roma do not have a citizenship document, 39,5% does not have a valid ID card, 53,4% does not have a birth certificate and 56,5% does not have the IDP ID card.

Refugees usually do not have problems with obtaining personal documents in Serbia and all are entitled to refugee cards enabling them to exercise their other rights. Problems can arise because the refugee card does not contain the general register number of citizens, which is necessary for resolving many status related and administrative issues. If this number is not contained in some other document he/she possesses, the refugee must submit an application to the competent police station in Croatia in order to obtain his/her general register number, since from 1 January 2003 this became one of the protected data and is not visible on personal documents. Parents of children born between 1991 and 1996 in the territories of the then Republic of Serb Krajina have to request subsequent inscription into registry in order for their children to obtain the registry number, because Croatia does not recognise registry books from this period.

In August, the Serbian Government adopted a decision to return Croatian registry books to Croatia; since 1995, there have been 514 such registry books in Serbia.[487] These are registry books and data on residence from the municipalities of Plaški, Dvor, Drniš and Glina, which were under Serb control during the war in Croatia. These books were returned in November 2003 and will facilitate the provision of personal documents for refugees and others registered in these books, since they would no longer have to go through the procedure of subsequent inscription.

4.3.7. Property rights – Exercising property rights is crucial for finding durable solutions for refugees and IDPs, irrespective of whether they wish to return or integrate in the local community. The key reason for significant reduction of the number of refugees from Bosnia and Herzegovina is that the return of property, restitution of tenancy rights and reconstruction of houses in this country is progressing well through the Property Legislation Implementation Plan of the Office of the High Representative (OHR). According to OHR data, by end of September the level of implementation of property laws in Bosnia and Herzegovina was 90 percent. Offices for housing issues in Bosnia and Herzegovina have resolved 198.197 of 220.225 the submitted real property claims and this process should be completed during 2004.[488]

Tens of thousands of refugees from Croatia are still facing enormous problems in their efforts to restore their property, primarily due to the discriminatory attitude of Croatian authorities.[489] Amendments to the Act on Areas of Special State

487 News *B92*, www.b92.net, 14 August 2003.

488 OHR, *Level of property laws implementation reaches 90 percent* , 12 November 2003.

489 According to Human Rights Watch findings, the majority of those who have returned to Croatia permanently are elderly rural people whose properties have not been destroyed or occupied. This international NGO has established that refugees rarely return to urban areas, since they are unable to exercise their tenancy rights or obtain alternative accommodation, while younger or middle aged

Interest from July 2002, prescribe the conditions under which the owner can repossess his/her temporarily occupied property. The repossession of property is conditional upon prior provision of adequate accommodation for the person who has occupied it. This could prolong the return of property indefinitely, since the illegal occupant is allowed to judge which accommodation would be adequate for him/her. Cases have been registered in which Croats who have illegally occupied the property had requested the refugees to pay them to move out. Pursuant to new amendments to the Act on Special State Interest, after 1 January 2003, the legal owner has the right to compensation for the period prior to final re-possession of his/her property.

Until recently the international community was almost alone in funding the reconstruction of Serb properties. Slow pace of house reconstruction was greatly caused by the Reconstruction Act of 1996, in which the provision of assistance for compensation of damages was limited only to damages caused during the war. This Act was used by many district commissions as an "argument" that burning or mining of Serb houses are terrorist acts and that the owners do not have the right to reconstruction assistance.[490] Some Serbs received negative responses from district commissions to their requests for house reconstruction, justifying the refusal by the lack of their ownership documents or by alleging that their houses are not their permanent residence addresses.[491]

In January 1996, the Croatian Parliament amended the Code of Obligations and dismissed all proceedings for compensation of damages in which the state was sued as being responsible for terrorist acts, thereby leaving all owners of houses destroyed in terrorist attacks without the right to indemnity by the state. In the case of *Kutić v. Croatia* on 1 March 2002, the European Court of Human Rights ruled that Croatia has violated the ECHR with respect to the right of the plaintiff to access the court by dismissing the case for compensation of damages. The Court has ordered Croatia to pay to the plaintiffs the sum of 10.000 euros indemnities for non-material damages.[492]

The Act on responsibility for damages caused by terrorist act and public demonstrations, of July 2003, does not mention financial compensation fro properties destroyed by terrorist actions. The Act restricts the claims to cases of bodily harm or death and provides that the state should ensure indemnity for destroyed or

Serbs from Croatia do not wish to return due to impossibility to find employment; men often fear arbitrary arrest for alleged war crimes (HRW, *Broken promises – Obstacles in return of refugees to Croatia*, September 2003).

490 HRW, *Broken promises – Obstacles in return of refugees to Croatia* , September 2003.

491 *Pravi odgovor magazine*, "Serb houses were not destroyed in war", 28 October 2003.

492 *Kutić v. Croatia* (ECtHR, App. No. 48778/99 (2002)). House of the Kutić family in the village of Martinec was destroyed by explosion in December 1991, and their garage and neighbouring warehouse in Bjelovar were destroyed in September 1994, also in an explosion).

damaged property only through reconstruction of such property according to the Reconstruction Act. This restriction pertains to cases for compensation initiated before January 1996, when Croatia dismisses these proceedings. The Act on responsibility for damages caused by terrorist acts thereby eliminates claims for damages filed before January 1996. The Act also does not provide for indemnity for cases such as the one in the ruling on Kutić case, i.e. for denying access to court between 1996 and 2003.[493]

According to the OSCE, in the period between 1991 and 1995, refugees from Croatia have lost tenancy rights on about 50.000 apartments. The SFRY Act on Housing Relations of 1985 had stipulated that a tenancy right could be forfeited due to failure to use the apartment for the period exceeding 6 months. By applying this Act selectively, Croatian authorities have been depriving Serb refugees of their tenancy rights during the war and giving their apartments to new tenants who subsequently acquired ownership by purchasing these apartments.

On 12 June, the Croatian Prime Minister Ivica Račan invited refugees to return to Croatia. This invitation came after the Croatian Government adopted a variety of housing measures by which tenancy right of refugees was not restored, since this category no longer exists in Croatian legislation, but has made provisions for refugees to settle in their pre war communities. The state should provide them with an apartment either through the so-called socially support housing or through purchase of apartments in areas where the previous measure is not applied.[494] Representatives of the International Community have saluted this long awaited initiative by Croatian authorities in the field of tenancy rights, but in meetings with Croatian officials have expressed their concern about the lack of clarity and certain insufficiencies of these measures. One of the key issues is the tenancy right of persons who do not wish to return and whether these measures have deprived them of the right to dispose with their property. The question was also raised about what influence these measures could have on the potential right to compensation of former tenancy right holders, especially in the context of the decision by the European Court of Human Rights on the admissibility of the claim by Kristina Blečić for the loss of tenancy right in Croatia. The Court in Strasbourg has ruled that the violation occurred of the right to home as well as the failure to protect this right in the national court of law.[495] The Serbian Commissariat for Refugees is of the opinion that the decision by Croatian Government on the housing of returnees

493 HRW, *Broken promises – Obstacles in return of refugees to Croatia* , September 2003.

494 Beta, Račan invites refugees to return to Croatia, 12 June.

495 *Blečić v. Croatia*, ECtHR, App. No. 59532/00 (2003). Kristina Blečić was a tenancy right owner of an apartment in Zadar. In July 2001 she went to visit her daughter in Rome. Due to war and her own health problems, she prolonged her stay in Rome. She returned to Zadar in July 1992 , but in the meantime, in November 2001a Croatian family had moved into her apartment. The Mun icipal Court in Zadar ruled that Krisitna Blečić had forfeited her tenancy right because she wa s absent from her apartment without proper justification. This decision was confirmed by the D istrict Court in Zadar, the Supreme Court and the Constitutional Court of Croatia.

and refugees has placed refugees in a position of inequality compared to other Croatian citizens, because their return to their home they had temporarily abandoned is not guaranteed.[496] The Annex 7 of the Dayton Agreement guarantees to all refugees and displaced persons the right to freely return to their homes, as well as the right to return of property or compensation for all property that cannot be returned.[497]

IDPs and returnees to Kosovo are also facing problems in exercising property rights lost due to armed conflict. Housing and Property Directorate (HPD) and the Commission for Housing and Property Claims were established by an UNMIK regulation in 1999 in order to resolve property disputes. Four years later their work cannot be considered effective, although the opening of HPD offices in SaM has improved the access of IDPs to thus institution and increased the number of claims submitted to HPD. The deadline for filing claims was 1 July 2003, and according to data from HPD out of 28.000 claims for repossession of property (93% of the claims pertain to properties owned by Serbs, Roma and other minorities that fled Kosovo) until October 2003, only 8.000 were resolved and 630 evictions were implemented of illegal occupants. One of the problems is that the HPD does not have the mandate to resolve property issues pertaining only to land or commercial property. Also, in reaction to reports that members of national minorities are being coerced into selling their property in order to move away, the UN Special Representative for Kosovo passed a regulation in 2001 that should prohibit forced sale of property to members of Albanian majority in certain parts of the province.[498] Given that many IDPs are planning to sell their properties, either because they are in need of money or do not intend to return to Kosovo, the Regulation on registering contracts of real property sale in specific areas has produced many negative effects. The Norwegian Refugee Council (NRC) issued an opinion that the regulation violates the rights of minorities and the majority to freely conclude contracts on purchase of property, as well as that the regulation represents an obstacle for minorities to exercise their right to leave Kosovo and choose another place of residence. Also, the NRC stated that this regulation is arbitrarily and inadequately applied on the level of municipal administration and court decisions.[499]

4.4. Roma and the readmission treaties

Among IDPs, Roma are certainly in the worst position. Many displaced Roma live together with the local Roma communities in complete destitution in

496 Statement by the Serbian Commissariat for Refugees, 13 June 2003.
497 Dayton Agreement, Annex 7, Art.1, para. 1, Dayton, Ohio, 21 November 1995.
498 UNMIK, Regulation No. 2001/17 on registering contracts of sale of real property in specific geographic areas in Kosovo.
499 NRC, Global IDP Database, Profile of Internal Displacement: Yugoslavia (Federal Republic of); Property Issues, December 2002.

irregular settlements without minimal health and hygiene conditions. Many of them do not speak Serbian language, do not have personal documents and do not know how and where to turn for assistance. According to the IDP vulnerability assessment in SaM by ICRC, 14.600 displaced Roma rely significantly on the distribution of basic food commodities and would therefore be seriously at risk once ICRC discontinues its food parcel assistance.[500] UNHCR has registered about 26.000 displaced Roma, but it is estimated that the more realistic number is over 50.000, since many have not been registered anywhere.

Several thousand Roma, including a great number of Roma from Kosovo, has applied for asylum in the countries of Western Europe. In most cases their applications have been denied and in the next several years their return to the country of origin is expected. Until July 2003, SaM has signed readmission treaties with 11 countries, bilaterally stipulating conditions for returning SaM citizens whose asylum applications have been denied. State agencies participate directly in the admission and processing of data only for persons deported with official escort and not those who are returning voluntarily, so therefore the state does not have complete data on the overall number of returnees. Although there are no precise data on the number and characteristics of these people, according to the data in former Federal Ministry of the Interior since 10 January 2003 approval was given for the return of 140.000 citizens from Germany alone, of which there are between 40.000 and 50.000 Roma. Until July 2003, with official escort 12.000 Roma have been returned from Germany to Serbia, but no data are available on how many of them were IDPs from Kosovo.

The government of SaM is under the pressure from Western countries to respect the readmission treaties, but lacks basic means and possibilities fro the safe acceptance of the returned people, with all respect for their human rights. In October, the CoE stated that the Kosovo Roma who have applied for asylum in European countries should not be forced to return to Kosovo or other parts of SaM until the security situation allows.[501]

The European Roma Rights Centre (ERRC) is of the opinion that without adequate arrangements on readmission there is a realistic risk that returnees would come back to a situation where their basic rights could not be fulfilled, as well as that the Serbian Government does not have a strategy on how to ensure their housing, education and meet their other existential needs. “Many Roma from former Yugoslavia who are awaiting deportation, have been living in Western Europe for years or decades, have children who were born and raised in Western European countries who go to school in these countries, etc. In many cases, the ties with their country of exile have become permanent, while the ties with SaM have at least

500 ICRC, *The Vulnerability Assessment of Internally Displaced persons in Serbia and Montenegr o*, July 2003.

501 CoE, *Don't force Roma to return to Ko* sovo, 22 October 2003.

weakened". ERRC also stated that they are aware that several European countries have returned Roma directly to Kosovo.[502]

4.5. Asylum Seekers – "Refugees from third countries"

In SaM there are neither capacities for reception of asylum seekers and illegal immigrants nor effective mechanisms that would separate the issue of asylum seekers from illegal migrants and thereby protect refugees from third countries against deprivation of liberty or deportation. In the absence of laws that would regulate the issue of refugees from "third countries", UNHCR in SaM has the mandate to introduce foreign nationals caught in transit to Western countries into the asylum procedure. During 2003 a total of 127 persons requested protection from the UNHCR (most of them Iranians – 74 and Afghans – 26) and refugee status was granted to 10 persons (one woman from Moldova and nine Russian citizens – a Chechen family). There are indications that several thousand people did not get the permission to enter SaM and that they were returned from the border.

Aliens who were admitted into UNHCR procedure for obtaining asylum, were allowed to reside in SaM, but without any economic and social rights. These people have the right of temporary residence while UNHCR in SaM takes care of them.

Persons caught while attempting an illegal entry or stay in SaM are usually sentenced by a magistrate to three weeks imprisonment for illegal crossing of border. The exceptions are parents with children and unaccompanied children who are immediately escorted to the UNHCR by the police. In court and during the serving of sentence, asylum seekers do not have access to legal counsel or an attorney. After having served their sentence, if they are not deported from the country, these people are either transferred to the Padinska Skela penitentiary, where they remain with other persons convicted for criminal offences, or to an open type asylum seeker centre in the motel Hiljadu ruža near mountain Avala outside Belgrade. This facility accommodates mainly persons with children awaiting the resolution of their status by the UNHCR. The asylum procedure can take from several months to two years. If they are granted refugee status, UNHCR looks for a country, most often in the West, which would take them. Asylum seekers who have been granted refugee status are still awaiting their final solution from several months to over one year in the motel Hiljadu ruža.[503]

502 ERRC and UNOHCHR, *Memoradum on Protection of Roma Rights in Serbia and Montenegro* , April 2003.
503 Information by the Group 484.

Appendix 1

The Most Important Human Rights Treaties Binding the Serbia and Montenegro

- Convention against Discrimination in Education (UNESCO), *Sl. list SFRJ (Dodatak)*, No. 4/64.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Sl. list SFRJ (Međunarodni ugovori)*, No. 9/91.
- Convention against Transnational Organized Crime, *Sl. list SRJ (Međunarodni ugovori)*, No. 6/01.
- Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, *Sl. list FNRJ (Dodatak)*, No. 8/58.
- Convention No. 98 Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, *Sl. list FNRJ (Dodatak)*, No. 11/58.
- Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation, *Sl. list FNRJ (Dodatak)*, No. 3/61.
- Convention No. 182 on the Worst Forms of Child Labour (*Sl. list SRJ* (*Međunarodni ugovori*), No. 2/03.
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, *Sl. list SFRJ (Dodatak)*, No. 13/64.
- Convention on the Elimination of All Forms of Discrimination against Women, *Sl. list SFRJ (Međunarodni ugovori)*, No. 11/81.
- Convention on the High Seas, *Sl. list SFRJ (Dodatak)*, No. 1/86.
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, *Sl. list SRJ (Međunarodni ugovori)*, No. 7/02.
- Convention on the Nationality of Married Women, *Sl. list FNRJ (Dodatak)*, No. 7/58.
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, *Sl. list SFRJ (Međunarodni ugovori)*, No. 50/70.
- Convention on the Political Rights of Women, *Sl. list FNRJ (Dodatak)*, No. 7/54.
- Convention on the Prevention and Punishment of the Crime of the Genocide, *Sl. vesnik Prezidijuma Narodne skupštine FNRJ*, No. 2/50.

- Convention on Relating to the Status of Refugees, *Sl. list FNRJ (Dodatak)*, No. 7/60.
- Convention on the Rights of the Child, *Sl. list SFRJ (Međunarodni ugovori)*, No. 15/90; *Sl. list SRJ (Međunarodni ugovori)*, Nos. 4/96, 2/97.
- Convention Relating to the Status of Stateless Persons and Final Act of the UN Conference Relating to the Status of Stateless Persons, *Sl. list FNRJ (Dodatak)*, Nos. 9/59, 7/60; *Sl. list SFRJ (Dodatak)*, No. 2/64.
- Convention for the Suppression on the Trafficking in Persons and of the Exploitation of the Prostitution of Others, *Sl. list FNRJ*, No. 2/51.
- European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, *Sl. list SRJ (Međunarodni ugovori)*, No. 1/02.
- International Convention on the Elimination of All Forms of Racial Discrimination, *Sl. list SFRJ (Međunarodni ugovori)*, No. 6/67.
- International Convention on the Suppression and Punishment of the Crime of Apartheid, *Sl. list SRFJ,* No. 14/75.
- International Covenant on Civil and Political Rights, *Sl. list SFRJ*, No. 7/71.
- International Covenant on Economic, Social and Cultural Rights, *Sl. list SFRJ*, No. 7/71.
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *Sl. list SRJ (Međunarodni ugovori)*, No. 7/02.
- Optional Protocol to the International Covenant on Civil and Political Rights, *Sl. list SRJ (Međunarodni ugovori)*, No. 4/01.
- Second Optional Protocol to the International Covenant on Civil and Political Rights, *Sl. list SRJ (Međunarodni ugovori)*, No. 4/01.
- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, *Sl. list SRJ (Međunarodni ugovori)*, No. 6/01.
- Protocol Amending the Convention on the Suppression of Trade in Adult Women, *Sl. list FNRJ*, No. 41/50.
- Protocol Amending the Slavery Convention Signed at Geneva 25 September 1926, *Sl. list FNRJ (Dodatak)*, No. 6/55.
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, *Sl. list SRJ (Međunarodni ugovori)*, No. 6/01.

- Protocol on Relating to the Status of Refugees, *Sl. list SFRJ (Dodatak)*, No. 15/67.
- Slavery Convention, *Sl. novine Kraljevine Jugoslavije,* XI–1929, No. 234.
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *Sl. list FNRJ (Dodatak),* No. 7/58.

Appendix 2

Legislation Concerning Human Rights in the Serbia and Montenegro

Constitutional Acts

- The Constitutional Charter of the State Union of Serbia and Montenegro, *Sl. list SCG*, No. 1/03.
- The Charter on Human and Minority Rights *Sl. list SCG*, No. 6/03.
- The Act for Implementation of the Constitutional Charter, *Sl. list SCG*, No. 1/03.
- The Constitution of the Republic of Serbia, *Sl. glasnik RS*, No. 1/90.
- The Constitution of the Republic of Montenegro, *Sl. list RCG,* No. 48/92.

SaM Legislation

- The Act on the Association of Citizens in Societies, Social Organisations and Political Organisations, *Sl. list SFRJ*, No. 42/90; *Sl. list SRJ*, Nos. 16/93, 31/93, 41/93, 50/93, 24/94, 28/96, 73/00.
- The Act on Bases of Labour Relations, *Sl. list SRJ*, Nos. 29/96, 51/99.
- The Act on Bases of the Pension and Disability Insurance, *Sl. list SRJ*, Nos. 30/96, 58/98, 70/01, 3/02, 39/02.
- Court of Serbia and Montenegro Act, *Sl. list SCG*, No. 26/03.
- The Act on Defence, *Sl. list SRJ*, Nos. 43/94, 11/95, 28/96, 44/99, 3/02.
- The Act on Election of Federal Deputies in the Chamber of Republics of the Federal Assembly, *Sl. list SRJ*, Nos. 32/00, 73/00.
- The Act on Election and Term of the President of the Republic, *Sl. list SRJ*, No. 32/00.
- The Act on Election of Deputies to the Chamber of Citizens of the Federal Assembly, *Sl. list SRJ*, Nos. 57/93, 32/00, 36/00, 73/00.
- The Act on Enterprises, *Sl. list SRJ*, Nos. 29/96, 33/96, 29/97, 58/98, 74/99, 9/01, 36/02.
- The Act on Finansing of Political Parties, *Sl. list SRJ*, No. 73/00.
- The Act on Foreign Investments, *Sl. list SRJ*, No. 3/02.
- The Act on Movement and Residents Aliens, *Sl. list SFRJ*, Nos. 56/80, 53/85, 30/89, 26/90, 53/91; *Sl. list SRJ*, Nos. 16/93, 31/93, 41/93, 53/93, 24/94, 28/96.

- The Act on the Principles of Property Relations, *Sl. list SFRJ*, Nos. 6/80, 36/90; *Sl. list SRJ*, No. 29/96.
- The Act on Protection of Rights and Freedoms of National Minorities, *Sl. list SRJ*, No. 11/02.
- The Act on Repealing the Decree passed by the Presidium of the FPRY National Assembly by which the Karađorđević Royal Family were Denied of Their Yugoslav Citizenship and Their Property Confiscated, *Sl. list SRJ*, No. 9/01.
- The Act on Security Services of the FRY, *Sl. list SRJ*, No. 37/02.
- The Act on Yugoslav Citizens' Travel Documents, *Sl. list SRJ*, Nos. 33/96, 46/96, 12/98, 44/99, 15/00, 7/01, 71/01, 23/02, 68/02.
- The Amnesty Act, *Sl. list SRJ*, No. 28/96.
- The Amnesty Act, *Sl. list SRJ*, No. 9/01.
- The Amnesty Act, *Sl. list SRJ*, No. 37/02.
- The Bonds Act, *Sl. list SFRJ*, Nos. 29/78, 39/85, 45/89, 59/89; *Sl. list SRJ* No. 31/93.
- The Communication System Act, *Sl. list SFRJ*, Nos. 41/88, 80/89, 29/90; *Sl. list SRJ*, Nos. 34/92, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96.
- The Criminal Procedure Code, *Sl. list SRJ*, Nos. 70/01, 68/02.
- The Decree on the Borba Federal Public Company, *Sl. list SRJ*, Nos. 15/97, 56/98, 10/00, 17/00, 34/00,7/01, 12/01.
- Decree on Military Service, *Sl. list SRJ*, No. 36/94 i 7/98; *Sl. list SCG*, No. 37/03.
- The Federal Criminal Code, *Sl. list SFRJ*, Nos. 44/76, 36/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90, *Sl. list SRJ*, Nos. 35/92, 37/93, 24/94, 61/01.
- The General Administrative Procedure Act, *Sl. list SRJ.* Nos. 33/97, 31/01.
- The Introduction of the Register Numbers of the Citizens Act, *Sl. list SFRJ*, No. 58/76.
- The Pardons Act, *Sl. list SRJ*, No. 90/94.
- The Personal Data Protection Act, *Sl. list SRJ*, Nos. 24/98, 26/98.
- The Procedure for the Registration in the Court Register Act, *Sl. list SRJ*, No. 80/94.
- The Rules on the Manner of Operation of Assemblies of Electors for the Election of National Councils of National Minorities, *Sl. list SRJ*, No. 41/02.

- The Strikes Act, *Sl. list SRJ*, No. 29/96.
- The Yugoslav Army Act, *Sl. list SRJ*, Nos. 43/94, 28/96, 44/99, 74/99, 3/02, 37/02.
- The Yugoslav Citizenship Act, *Sl. list SRJ*, Nos. 33/96, 9/01.
- The Yugoslav Enviroment Protection Act, *Sl. list SRJ*, No. 24/98.

Serbia

- The Act on Abortion in Medical Facilities, *Sl. glasnik RS*, No. 16/95.
- The Act on Assembly of Citizens, *Sl. glasnik RS*, Nos. 51/92, 53/93, 67/93, 48/94, 29/01.
- The Act on Assets Owned by Republic of Serbia, *Sl. glasnik RS*, Nos. 53/95, 3/96, 54/96, 32/97.
- Act on the Bases of the System of Education, *Sl. glasnik RS,* No. 62/03, 64/03.
- The Act on Broadcasting, *Sl. glasnik RS*, No. 42/02.
- The Act on Child Welfare, *Sl. glasnik RS*, Nos. 49/92, 29/93, 53/93, 67/93, 28/94, 47/94, 48/94, 25/96, 29/01, 16/02.
- The Act on Elementary Schools, *Sl. glasnik RS*, Nos. 50/92, 53/93, 67/93, 48/94, 66/94, 22/02.
- The Act on Employment and on the Rights of Unemployed Persons, *Sl. glasnik RS*, Nos. 22/92, 73/92, 82/92, 56/93, 67/93, 34/94, 52/96, 46/98, 29/01, 80/02.
- The Act on Financial Support for Families with Children, *Sl. glasnik RS*, No. 16/02.
- The Act on Financing of Political Parties, *Sl. glasnik RS*, No. 32/97.
- The Act on Financing of Political Parties, *Sl. glasnik RS*, Nos. 72/03, 75/03.
- The Act on Indirect Election of State Union's Member of Parliament, *Sl. glasnik RS*, No. 10/03.
- The Act on Judges, *Sl. glasnik RS*, Nos. 63/01, 42/02, 17/03, 27/03.
- The Act on Labour Relations in Government Agencies, *Sl. glasnik RS*, Nos. 48/91, 66/91, 44/98, 49/99, 34/01.
- The Act on Local Self-government, *Sl. glasnik RS*, Nos. 4/91, 79/92, 82/92, 47/94, 48/99, 49/99, 27/01.
- The Act on Medical Insurance, *Sl. glasnik RS*, Nos. 18/92, 26/93, 53/93, 67/93, 48/94, 25/96, 46/98, 54/99, 29/01, 18/02, 80/02.

- The Act on the Official Use of Languages and Scripts, *Sl. glasnik RS*, Nos. 45/91, 53/93, 67/93, 48/94.
- The Act on Organisational Structure of Courts, *Sl. glasnik RS*, No. 63/01, 42/02.
- The Act on Organisation and Jurisdiction of State Bodies in Suppressing Organised Crime, *Sl. glasnik RS*, Nos. 42/02 27/03, 39/03, 67/03.
- The Act on Pensions and Disability Insurance, *Sl. glasnik RS*, No. 34/03.
- The Act on Political Organisations, *Sl. glasnik RS*, No. 37/90, 30/92, 53/93, 67/93, 48/94.
- The Act on Secondary Schools, *Sl. glasnik RS*, Nos. 50/92, 53/93, 67/93, 48/94, 24/96, 23/02, 25/02.
- The Act on the Security and Information Agency of the Republic of Serbia, *Sl. glasnik RS*, br. 42/02.
- The Act on Shares Fund, *Sl. glasnik RS*, No. 38/01.
- The Act on Social Organisations and Citizens Associations, *Sl. glasnik SRS*; Nos. 24/82, 39/83, 17/84, 50/84, 45/85, 12/89, *Sl. glasnik RS*, Nos. 53/93, 67/93, 48/94.
- The Act on Special Conditions for Real Property Transactions, *Sl. glasnik SRS*, Nos. 30/89, 42/89; *Sl. glasnik RS*, Nos. 55/90, 22/91, 53/93, 67/93, 48/94.
- The Act on Social Security and Provision of Social Welfare, *Sl. glasnik RS*, Nos. 36/91, 79/91, 33/93, 53/93, 67/93, 46/94, 48/94, 52/96, 29/01.
- The Act on the State Administration, *Sl. glasnik RS*, Nos. 20/92, 6/93, 48/93, 53/93, 67/93, 48/94, 49/99.
- The Act on Tax and Extra Profit and Extra Property, *Sl. glasnik RS*, No. 36/01.
- The Amnesty Act, *Sl. glasnik RS*, No. 10/01.
- The Basic Criminal Code, *Sl. list SFRJ,* Nos. 44/76, 36/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90; *Sl. list SRJ*, Nos. 35/92, 37/93, 24/94, 61/01, *Sl. glasnik RS,* No. 39/03.
- The Building Lots Act, *Sl. glasnik RS*, Nos. 44/95, 16/97, 23/01.
- The Courts Act, *Sl. glasnik RS*, No. 46/91, 60/91, 18/92, 71/92, 63/01 (this act ceased producing effect on 1 January 2002, except provisions of Art. 14 – 20, which would cease to produce effect on 1 March 2003).
- The Criminal Code, *Sl. glasnik SRS*, Nos. 26/77, 28/77, 43/87, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89, 21/90; *Sl. glasnik RS*, Nos. 16/90, 26/91, 75/91, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94 and 17/95, 44/98, 10/02, 11/02, 80/02, 39/03, 67/03.
- The Decision on Designation of Locations in Belgrade for Public Assembly, *Sl. list grada Beograda*, No. 13/97.

- The Decree Introducing Religious Instruction and an Alternative Subject in Elementary and Secondary Schools, *Sl. glasnik RS*, No. 46/01.
- The Decree on Opening State Security Service Secret Files, *Sl. glasnik RS*, Nos. 30/01, 31/01.
- The Decree on Publishing Supplemental Postal Stamp "Erecting Memorial Temple of St. Sava", *Sl. glasnik RS*, No. 112/03.
- The Directive on Police Ethics and Conduct, *Sl. glasnik RS,* No. 41/03.
- The Election Act, *Sl. glasnik RS*, No. 35/00.
- The Elections of the President of the Republic Act, *Sl. glasnik RS*, Nos. 1/90, 79/92, 73/02.
- The Enforcement of Criminal Sanctions Act, *Sl. glasnik RS*, Nos. 16/97, 34/01.
- The Enviroment Protection Act, *Sl. glasnik RS*, Nos. 66/91, 83/92, 53/93, 67/93, 48/94, 44/95, 53/95.
- The Expelled Persons Relief Decree, *Sl. glasnik RS*, No. 47/95.
- The Expropriation Act, *Sl. glasnik RS*, Nos. 53/95, 23/01.
- The Health Protection Act, *Sl. glasnik RS*, Nos. 17/92, 26/92, 50/92, 52/93, 53/93, 67/93, 48/94, 25/96, 18/02.
- The High Judicial Council Act, *Sl. glasnik RS*, Nos. 63/01, 42/02, 39/03, 41/03.
- The Inheritance Act, *Sl. glasnik RS*, No. 46/95.
- The Internal Affairs Act, *Sl. glasnik RS*, Nos. 44/91, 79/91, 54/96, 27/00, 30/00 (SUS), 8/01 (SUS).
- The Labour Act, *Sl. glasnik RS*, Nos. 70/01, 73/01.
- The Marriage and Family Relations Act, *Sl. glasnik SRS*, Nos. 22/80, 24/84, 11/88; *Sl. glasnik RS,* Nos. 22/93, 25/93, 35/94, 46/95, 29/01.
- The Pardons Act, *Sl. glasnik RS*, Nos. 49/95, 50/95.
- The Privatisation Act, *Sl. glasnik RS*, No. 38/01.
- The Privatisation Agency Act, *Sl. glasnik RS*, No. 38/01.
- The Public Information Act, *Sl. glasnik RS*, No. 43/03
- The Public Prosecutors Office Act, *Sl. glasnik RS*, Nos. 63/01, 42/02, 39/03.
- Regulation on the Use of Force, *Sl. glasnik RS*, Nos. 40/95, 48/95, 1/97.
- Rules on Entry of Trade Union Organisations in Register, *Sl. glasnik RS*, Nos. 6/97, 33/97, 49/00, 18/01.
- The Refugees Act, *Sl. glasnik RS*, Nos. 18/92, 45/02.

- The Responsibility for Human Rights Violations Act, *Sl. glasnik RS,* Nos. 58/03, 61/03.
- The Safety of Work Act, *Sl. glasnik RS*, Nos. 42/91, 53/93, 67/93, 48/94, 42/98.
- The State of Emergency Act, *Sl. glasnik RS*, No. 19/91.
- The Telecommunications Act, *Sl. glasnik RS,* No. 44/03.
- The Unique Registration Numbers of Citizens Act, *Sl. glasnik SRS*, Nos. 53/78, 5/83, 24/85, 6/89; *Sl. glasnik RS*, Nos. 53/93, 67/93, 48/94.
- The University Act, *Sl. glasnik RS*, No. 21/02.

Montenegro

- The Act on Abortion Procedure, *Sl. list SRCG*, Nos. 29/79, 31/79, 29/89, 39/89; *Sl. list RCG*, Nos. 28/91, 17/92, 27/94.
- The Act on Broadcasting, *Sl. list RCG*, Nos. 51/02, 62/02.
- Act on the Census of Population, Households and Apartments in 2003, *Sl. list RCG, Nos*. 59/00, 12/01, 38/02 and 21/03
- The Act on Consitutional Court of Montenegro, *Sl. list RCG,* No. 21/93.
- The Act on Election of Deputies and Councilors, *Sl. list RCG,* Nos. 16/00, 9/01, 41/02.
- The Act on Electoral Rolls, *Sl. list RCG*, Nos. 14/00, 30/01.
- The Act on the Enforcement of Criminal Sanctions, *Sl. list RCG,* Nos. 25/94, 29/94.
- The Act on Health Protection and Medical Insurance, *Sl. list SRCG*, Nos. 39/90, 21/91; *Sl. list RCG*, 48/91, 17/92, 30/92, 58/92, 6/94, 27/94, 30/94, 16/95, 20/95, 22/95, 23/96.
- The Act on Finansing of Political Parties, *Sl. list RCG*, No. 44/97.
- The Act on Montenegrin Citizenship, *Sl. list RCG*, br. 41/99.
- The Act on Non-governmental Organisations, *Sl. list RCG,* Nos. 27/99, 9/02, 30/02.
- The Act on Pensions and Disability Insurance, *Sl. list SRCG,* Nos. 14/83, 4/84, 12/85, 23/85, 3/86, 14/89, 29/89, 39/89, 42/90, 28/91; *Sl. list RCG*, Nos. 48/91, 17/92, 18/92, 14/93, 20/93, 27/94, 26/00 (SUS).
- The Act on the Protector of Human rights and Freedoms, *Sl. list RCG,* No. 41/03.
- The Act on Public Assembly, *Sl. list RCG,* Nos. 57/92, 27/94.
- The Act on Public Broadcasting Services, *Radio Montenegro* and *Television Montenegro*, *Sl. list RCG*, Nos. 51/02, 62/02.

- The Act on Social and Child Protection, *Sl. list RCG*, Nos. 45/93, 27/94, 16/95, 44/01.
- The Administrative Proceedings Act, *Sl. list RCG*, No. 60/03
- The Citizens Associations Act, *Sl. list SRCG,* Nos. 23/90, 26/90, 13/91; *Sl. list RCG*, Nos. 48/91, 17/92, 30/92, 21/93, 27/94, 27/99.
- The Criminal Code, *Sl. list RCG,* Nos. 42/93, 14/94, 27/94, 30/02.
- The Decision on Competencies and Composition of the Republic Council for Protection of the Rights of the Members of the National and Ethnic Groups, *Sl. list RCG,* No. 32/93.
- The Decree on Displaced Persons, *Sl. list RCG*, No. 37/92.
- The Decree on Registration of Trade Union Organisations, *Sl. list RCG,* No. 20/91.
- The Decree on Non-Resident Employees, *Sl. list RCG*, No. 28/03.
- The Election of the President of the Republic Act, *Sl. list RCG,* No. 11/03.
- The Elementary School Act, *Sl. list RCG,* Nos. 34/91, 48/91, 17/92, 56/92, 30/93, 32/93, 27/94, 2/95, 20/95, 64/02.
- The Employment Act, *Sl. list SRCG,* Nos. 29/90, 27/91, 28/91; *Sl. list RCG*, Nos. 48/91, 8/92, 17/92, 3/94, 27/94, 16/95, 22/95.
- The Enviroment Act, *Sl. list RCG*, Nos. 12/96, 55/00.
- The Family Law, *Sl. list SRCG,* No. 7/89.
- Act on Indirect Election of State Union's Member of Parliament, *Sl. list RCG*, No. 8/03.
- The Internal Affairs Act, *Sl. list RCG,* Nos. 24/94, 29/94.
- The Labour Relations Act, *Sl. list SRCG,* Nos. 29/90, 42/90, 28/91; *Sl. list RCG*, Nos. 48/91, 17/92, 27/94, 16/95, 21/96, 5/00.
- The Labour Act *Sl. list RCG*, br. 43/03.
- The Media Act, *Sl. list RCG*, Nos. 51/02, 62/02.
- The Pardons Act, *Sl. list RCG,* Nos. 16/95, 12/98, 21/99.
- The Personal Names Act, *Sl. list RCG,* Nos. 20/93, 27/94.
- The Referendum Act, *Sl. list RCG*, Nos. 9/01, 17/01 (SUS).
- The Rules on Register of Political Organisations, *Sl. list RCG,* Nos. 25/90, 46/90.
- The Secondary Schools Act, *Sl. list SRCG,* No. 28/91; *Sl. list RCG*, Nos. 35/91, 48/91, 17/92, 56/92, 27/94, 64/02.
- The Unique Registration Numbers of Citizens Act, *Sl. list RCG,* Nos. 45/93, 27/94.

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